CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 544

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED OCTOBER 25, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 544

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

	Original	Print
Record from Superior Court of Thurston County	1	1
Amended complaint	3	1
Answer	15	10
Order granting temporary injunction	21	14
Decree	23	15
Memorandum re notice of appeal	25	17
Statement of facts	26	17
Stipulation re statement of facts (omitted in printing)	27	
Caption	31	17
Testimony of R. D. Sheldon	31	18
R. W. Mastick	68	22
Otto B. Rupp	190	99
Order settling statement of facts	202	101

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 12, 1935.

—7223-C

	Original	Print
Record from Superior Court of Thurston County—Continued.		
Plaintiff's Exhibits:		
1—Statement of amount on books for plant, equipment, etc.	204	102
5—Decision on rate base in Case 5344, brought down to end of and average for each year, 1922 to 1933, inclusive	205	103
6—Actual performance appraisal as of December 31, 1914, brought down to end of each year, etc., 1915-1933	206	104
11—Statement of operations, 1932	207	105
12—Statement of operations, 1933	208	106
15—Drawing showing use of telephone plant	209	106
16—Statement of subscribers loops, etc., book cost	210	107
17—Summary of jointly used property	219	111
Defendant's Exhibits:		
19—Letter, Mastick to Tax Commission, July 19, 1934, with enclosed statements	220	111
20—Connecting agreement of August 2, 1933	224	117
21—Connecting agreement of March 26, 1930	230	122
Plaintiff's Exhibit 22—Returns and correspondence relative thereto	237	128
Proceedings in Supreme Court of Washington	259	151
Opinion, Main, J.	259	151
Dissenting opinion, Steinert, J.	260	152
Opinion, Main, J., Cause No. 25684	261	152
Dissenting opinion, Steinert, J.	272	161
Dissenting opinion, Holcomb, J.	276	164
Order, per curiam, correcting opinion	277	165
Judgment	278	166
Petition for appeal	279	167
Assignments of error and prayer for reversal	283	170
Order allowing appeal	286	171
Supersedeas bond on appeal (omitted in printing)	288	
Citation and service (omitted in printing)	291	
Præcipe for transcript of record	293	172
Clerk's certificate (omitted in printing)	295	
Statement of points to be relied upon and designation as to printing record	296	174

[fols. 1-3] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 15282

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and T. S. HEDGES and T. M. JENNER, as Members of the Tax Commission of the State of Washington, Defendants

AMENDED COMPLAINT—Filed May 28, 1934

Comes now the plaintiff, The Pacific Telephone and Telegraph Company, and files this, its amended complaint herein, and alleges:

I

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California; that it has complied with all the laws of the State of Washington relating to foreign corporations, has paid its annual license fee last due to the State of Washington, and is duly authorized to do business therein.

II

That at all times hereinafter mentioned the defendants T. S. Hedges and T. M. Jenner have been and now are members of the Tax Commission of the State of Washington, a continuing board, composed of three members, of which only said two have been appointed and qualified; that said defendants are residents and citizens of Thurston County, Washington.

[fol. 4]

III

That during all of the times herein mentioned plaintiff has owned and operated, and now owns and operates, a telephone and telegraph system, and has been and is now engaged in operating and conducting a public telephone and telegraph system in the State of Washington and in the

States of California, Oregon and a part of Idaho, furnishing to the public telephone exchange service and both intrastate and interstate telephone toll service and telegraph service; that it had, long prior to 1933, duly filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations required by the Act of Congress of July 24, 1866 (14 Stat. 221). That the said plaintiff is subject to the Acts of Congress regulating interstate commerce and to Chapter 117, Laws of Washington of 1911, known as the "Public Service Commission Law," and the amendments thereto.

IV

That the Interstate Commerce Commission, in pursuance of its statutory powers, has prescribed the form of accounts to be kept by telephone companies, subject to the Act to Regulate Commerce, as amended (41 Stat. L. 474), and in particular in accordance with Section 20 of said act as amended; that plaintiff is one of the telephone companies in the United States subject to said act and is required by law to keep its accounts in the form prescribed by the Interstate Commerce Commission; that the Department of Public Works of the State of Washington, by order No. 5251, dated October 31, 1921, has adopted and has prescribed for all telephone companies subject to its jurisdiction the same form of accounts as that adopted and prescribed at that time by the Interstate Commerce Commission.

[fol. 5]

V

That Chapter 191 of the Laws of Washington of 1933, being an act entitled

"An Act relating to taxation; imposing taxes upon the privilege of engaging in business activities and providing for the ascertainment, assessment, collection and distribution thereof; providing for the administration and enforcement of this act; providing penalties; making appropriations; and declaring that this act shall take effect immediately."

provides, in Section 2(2), page 871, that "from and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be col-

lected from every person (and corporation) an annual tax or excise for the privilege of engaging in business activities" in the State of Washington, measured by a percentage "gross income" of certain business activities described in said Section 2, and by said Section 2(2)(e), page 873, a tax of three per cent of said gross income is imposed on telephone and telegraph companies, including the plaintiff, for the privilege of engaging in such business activities in this state. By Section 5, page 879, of the said Laws of 1933, there is excepted from taxable gross income so much as is received from the United States, the State of Washington, "or from business which the State of Washington is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States." Defendants construe said act as not applying to the gross income from interstate business, but pretend that the same applies to the gross income from plaintiff's intrastate business, and that plaintiff owes and must pay said three per cent of said gross income for the privilege of doing intrastate business in this state.

[fol. 6] VI

That the definition of "gross income," as set forth in Section 1 of said Chapter 191 of the Laws of 1933, is as follows:

"(6) The term 'gross income' means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without any deduction on account of losses: Provided, The term 'gross income' shall not include any payments received on accounts or notes outstanding at the time this act goes into effect."

That said statute is so vague and indefinite in its definition of "gross income" as to render it impossible for plaintiff thereunder to compute, with reasonable certainty, the amount of the tax, if any, owing by it thereunder.

VII

That plaintiff's telephone and telegraph business in the State of Washington is conducted efficiently and economically; that plaintiff's net earnings derived from its intrastate telephone and telegraph business in thre State of Washington, stated in rate per cent annual return upon the fair value of plaintiff's property used and useful in furnishing said service, and exclusively devoted to the rendition thereof, was (during the first six months of 1933 and up to the effective date of said Chapter 191) not in excess of 1.75 per cent, and that the payment of any tax as required by said act is arbitrary, unreasonable, oppressive, and confiscatory of plaintiff's property, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 7]

VIII

That the plaintiff constructed and equipped its telephone and telegraph business in this state many years prior to the enactment of said Chapter 191 of the Laws of 1933, and has expended therefor more than $60,000,000 to provide adequate facilities for both interstate and intrastate telephone and telegraph service.

IX

That plaintiff is subject to Chapter 117 of the Laws of 1911 of the State of Washington, known as the "Public Service Commission Law," and thereby and by the Constitution of the State of Washington, Article XII, Sections 13, 14, 15 and 19, there is imposed on the plaintiff an obligation to devote its properties to the service of the people in this state in the furnishing of telephone and telegraph service, from which it cannot withdraw while continuing to carry on its interstate business.

X

That said tax of three per cent on the gross income, imposed by said Chapter 191 of the Laws of 1933, is not a property tax nor in lieu of a property tax, but is an excise tax imposed solely for the privilege of doing intrastate business, and plaintiff cannot escape said tax by abandon-

ing said business while continuing in its interstate business as aforesaid.

XI

That plaintiff has paid all taxes of any and every kind levied by or for the State of Washington, the County of King, a municipal corporation of the State of Washington, [fol. 8] or any other municipal subdivisions of the State of Washington, against all of its property of any and every kind to date; that on March 15, 1933, the plaintiff paid to the respective treasurers of the various counties in the State of Washington in which plaintiff owns property the sum of $115,681.34 on account of real property taxes owing to the State of Washington and all municipal subdivisions thereof; that likewise on March 15, 1933, the plaintiff paid to the respective treasurers of the various counties in the State of Washington in which plaintiff owns personal property the sum of $582,309.17, being the first half of the 1932 taxes levied against all of plaintiff's personal property located in the State of Washington; that the remaining one-half of said taxes for the year 1932 can be paid without penalty on or before November 30, 1933.

XII

That plaintiff's interstate and intrastate business is inseparable, commingled and mutually dependent; that both classes of business are done by plaintiff over the same telephone and telegraph lines, through the same exchanges, operated by the same employes and with the same facilities, and that it is not possible, practically or economically, or at all, to conduct separately intrastate and interstate business by different lines, through different exchanges or by means of different instrumentalities or employes; that plaintiff's gross operating revenue in this state for the year 1932 from the conduct of its entire business, both intrastate and interstate, was a large sum of money, aggregating $11,295,788.86; that of said sum a very large portion was derived from interstate telephone and telegraph business originating in or coming to the State of Washington.

[fol. 9]

XIII

That if plaintiff could and should abandon its intrastate telephone and telegraph business, the entire burden of

maintaining and operating its intrastate system of telephone and telegraph service, equipped to handle both classes of business, would fall entirely on interstate business and would necessitate an increase of rates greater than the same could bear as a practical matter or at all, and would result in the destruction of an essential instrument of interstate commerce and of the value of plaintiff's property in an amount of many millions of dollars. That the tax imposed by said Chapter 191, Laws of 1933, on the pretext of a tax or fee for the privilege of doing intrastate business in the State of Washington, is in reality a tax or burden upon interstate commerce and upon the gross revenues received by plaintiff therefrom and is a tax upon plaintiff's business done and upon income earned in other states and upon property located outside the State of Washington, and is in violation of the commerce clause of the Constitution of the United States, being Article I, Section 8, of said Constitution, and of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and of the Acts of Congress regulating interstate commerce.

XIV

Section 6 of said Chapter 191, Laws of 1933, provides that said annual tax of three per cent shall be payable in monthly instalments on or before the 15th day of the month next succeeding the month in which the tax accrued; that the taxpayer, on or before the 15th day of the month, shall make out and file, on forms prescribed by the Tax Commis-
[fol. 10] sion, a return showing his estimate of the amount of the tax for the preceding month and accompany the return with payment of the amount so estimated. Section 7 provides that on or before fifteen days after the end of the year each taxpayer shall make a return for the entire year, verified by oath, and pay any balance after crediting monthly payments theretofore made. Section 8 makes provision for correcting errors, and Section 9 requires that records of gross income be kept for five years, during which they shall be subject to examination by the said Tax Commission. Section 10 provides that if a taxpayer fails to make the required return, the Tax Commission shall obtain the facts on which to base the assessment and examine the taxpayer's books and take evidence, and thereupon assess

the tax with a penalty of ten per cent for failure to make return and a further penalty of one per cent per month of the tax for each month after the same was due, and shall notify the taxpayer of the amount of the tax and added penalties, which shall be paid within ten days after date of notice. Section 13 provides that no injunction shall be granted to enjoin the collection of any tax or penalty, except upon the ground that the same was in violation of the Constitution of the United States or of the State of Washington. Section 14 provides that after payment of the tax, the taxpayer may apply to the Tax Commission for a hearing and correction and refund of the amount and for appeal to the superior court, and thence to the supreme court. No provision is made by said sections or otherwise by the act for refund of taxes paid if said act should be held unconstitutional as to plaintiff or any taxpayer, or for any reason that no tax is payable by plaintiff under said act. Section 16 provides that if any tax or penalty be not paid within fifteen days after due, the Commission shall [fol. 11] issue a warrant directed to the sheriff, commanding him to levy upon and sell the real or personal property of the taxpayer found within his county, or so much as may be necessary for the payment of the amount due, together with a penalty of one per cent for each thirty days after date of the warrant, plus the cost of executing the same, and said warrant is returnable within sixty days after receipt by the sheriff. The sheriff, within three days, shall file with the clerk of the superior court of his county, and the clerk shall enter in the judgment docket, the amount of the tax and other details, and thereupon the amount so entered shall be a lien upon all real and personal property of the taxpayer in the same manner as a judgment, and the sheriff shall proceed to collect said amount by sale and execution, as provided by law. The proceeds of such sale shall be credited on the amount due under the warrant, and when the full amount, plus interest, penalties and costs, is received, the judgment docket shall be satisfied, and if not paid in full, the deficiency shall be and remain a judgment against the taxpayer and collected in the same manner. Section 17 provides that any person may be enjoined by suit in the superior court from engaging or continuing in any business for which a privilege tax is required until the same has been paid and until he has complied with the pro-

visions of the act. Section 23 provides that it shall be unlawful for any person to fail or refuse to obtain a license, or to fail or refuse to make any return provided for in the act, and any person or corporation violating any of the provisions of said section shall be guilty of a gross misdemeanor and punishable in the manner provided by law, to-wit, by fine and imprisonment. Section 28 appropriates [fol. 12] the sum of $10,000 for the purpose of making refund of taxes erroneously paid as provided by the act. The aforesaid provisions of said statute, and each of them, intended to administer the same and to enforce collection of said tax, are, as applied to the plaintiff, contrary to the commerce clause of the Constitution of the United States, to-wit, Article I, Section 8 thereof, and the due process clause of the Constitution of the United States, and are null and void.

XV

Plaintiff alleges that it has refused to make any return and that it refuses to pay any tax, and has in all particulars failed and refused to comply with any of the provisions of said Chapter 191, Laws of 1933.

XVI

That the defendants, and each of them, threaten to and will, unless restrained, invoke the penal provisions of Sections 10, 15, 17 and 23 of said act, and threaten to and will, unless restrained, issue a warrant directed to the sheriff, commanding him to levy upon and sell the real and personal property of the plaintiff within any county in the state, and thereby the title to plaintiff's property will be clouded by the lien of said pretended tax and its property will be sold for taxes, and plaintiff will be deprived of the use thereof and its business will be destroyed, to its great and irreparable injury, and plaintiff will be prosecuted as for a gross misdemeanor and fined and punished in the manner provided by law.

XVII

Plaintiff has no adequate remedy at law for said wrongs and injuries, for the reason that if it makes said monthly [fol. 13] payments, it will be necessary to bring repeated

actions at law to recover, in which the issues will be the same and the parties will be the same, and there is no provision made by said act or otherwise for the satisfaction of any judgment, interest and costs which plaintiff may obtain; and plaintiff further alleges that it will be put to great expense and inconvenience in making said monthly and annual returns for the reimbursement of which no provision is made, and the same will be a total loss to plaintiff, even if it should recover the amount of the tax so paid pursuant to said act.

Wherefore, plaintiff prays that defendants, and each of them, their agents and employes, be restrained and enjoined from taking any action against the plaintiff, or its employes, for failure to make a return under said act, from making any assessment against plaintiff for said tax or any part thereof, from issuing any warrant directed to the sheriff of any county in this state, commanding him to levy upon and sell any real or personal property of plaintiff within his county and directing him to file said warrant with the clerk of the superior court, or taking any action whatever against plaintiff for the collection of said pretended tax, and from in any manner proceeding against the plaintiff under Section 23 or otherwise for failure or refusal of plaintiff to obtain any license to do business in this state or for failing or refusing to make any return provided for in said act, or for failure or refusal to pay the tax or any part thereof claimed to be due or payable under said act; and that plaintiff have such other and further relief as may be just and equitable in the premises.

McMicken, Ramsey, Rupp & Schweppe, Attorneys for Plaintiff.

[fol. 14] *Duly sworn to by C. E. Mong. Jurat omitted in printing.*

Copy received this 28th day of May, 1934. G. W. Hamilton, R. G. Sharpe, Attys. for Defendants.

[fol. 15] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ANSWER—Filed July 20, 1934

Come now the defendants and for answer to plaintiff's amended complaint:

I

Admit the allegations of paragraph I thereof.

II

Admit the allegations of paragraph II thereof except that defendants allege that in addition to the two members therein named, Harold H. Henneford is now and for many months last past has been a member of said Tax Commission.

III

Answering paragraph III thereof, defendants deny any knowledge or information sufficient to form a belief as to whether plaintiff has filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations required by the Act of Congress of July 24, 1866 (14 Stat. 221), but otherwise admit the allegations of said paragraph III.

IV

Admit the allegations of paragraph IV and V thereof.

[fol. 16] V

Answering paragraph VI thereof, defendants admit that the definition of "gross income" contained in Section 1, Chapter 191, Laws of 1933, is in the words and figures set forth in said paragraph VI, but deny each and every other allegation, matter and thing contained in said paragraph VI.

VI

Answering paragraph VII thereof, defendants deny any knowledge or information sufficient to form a belief as to

whether or not plaintiff's telephone and telegraph business in the State of Washington is conducted efficiently and as to whether or not such business is conducted economically, or as to what plaintiff's net earnings derived from its intrastate telephone and telegraph business in the State of Washington were for the first six months of 1933 and up to the effective date of said Chapter 191, Laws of 1933, either in rate per cent annual return upon the fair value of plaintiff's property used and useful in furnishing said service, or otherwise, and denies each and every other allegation, matter and thing contained in said paragraph VII.

VII

Answering paragraph VIII thereof, defendants deny any knowledge or information sufficient to form a belief as to the amount which plaintiff has expended in the construction and equipment of its telephone and telegraph business in this state, or as to whether the facilities furnished by said plaintiff have been adequate either for interstate telephone and telegraph service or for intrastate telephone and telegraph service.

VIII

Answering paragraph IX thereof, defendants admit that plaintiff is subject to Chapter 117 of the Laws of Wash- [fol. 17] ington of 1911, but deny each and every other allegation, matter and thing therein contained.

IX

Answering paragraph X thereof, defendants admit that the said tax of three per cent on the gross income, imposed by said Chapter 191 Laws of 1933, is not a property tax nor in lieu of a property tax, but deny each and every allegation, matter and thing therein contained.

X

Answering paragraph XI thereof, defendants deny any knowledge or information sufficient to form a belief as to the allegations of said paragraph, and particularly deny any knowledge or information sufficient to form a belief as to the amount of taxes paid by plaintiff on either its real or personal property in the State of Washington for the

year 1932, or as to whether plaintiff has or has not paid all taxes levied against its said property, or as to how much, if any, of such taxes still remain unpaid.

XI

Answering paragraph XII thereof, defendants admit that plaintiff's operating revenue in this state for the year 1932 from the conduct of its entire business, both intrastate and interstate, was a large sum of money, to-wit, not less than $11,295,788.86, and that a portion of said sum was derived from interstate telephone and telegraph business originating in or coming to the State of Washington, but deny each and every other allegation, matter and thing therein contained.

XII

Answering paragraph XIII thereof, defendants deny each and every allegation, matter and thing therein contained.

[fol. 18]

XIII

Answering paragraph XIV thereof, defendants admit that the provisions of Chapter 191, Laws of Washington of 1933, therein referred to, are substantially as alleged in said paragraph, but deny each and every other allegation, matter and thing therein contained.

XIV

Admit the allegations of paragraph XV thereof.

XV

Answering paragraph XVI thereof, defendants admit that the defendants and each of them threaten to and, unless restrained, will, if plaintiff does not pay its tax, issue warrants directed to one or more of the county sheriffs of the counties in which plaintiff's property is located, or to the duly authorized agent of such tax commission, commanding them to levy upon and sell plaintiff's real and personal property within the state and that sufficient property of plaintiff will be sold under such warrants to pay such tax, but deny each and every other allegation, matter and thing contained in said paragraph XVI.

XVI

Answering paragraph XVII thereof, defendants deny the same and each and every allegation, matter and thing therein contained.

As and for a first affirmative defense to the matters set forth in plaintiff's amended complaint, defendants allege:

That the plaintiff has never applied either to the Department of Public Works of the state of Washington or to any other department of such state for permission to renounce its intrastate business in the state of Washington.

As and for a second affirmative defense to the matters set forth in plaintiff's amended complaint, defendants allege:

[fol. 19] That the plaintiff has never applied to the department of Public Works of the state of Washington for permission to increase any of its rates or tariffs on either its intrastate public telephone exchange service or its intrastate telephone toll service or its intrastate telegraph service in the state of Washington, or any of its other rates or tariffs, on the ground that its operating expenses would be or have been increased by reason of the occupation tax imposed on plaintiff by the provisions of chapter 191, Session Laws of the state of Washington for 1933.

Wherefore, defendants pray that plaintiff take nothing by reason of its amended complaint herein, and that said defendants be allowed to go hence with their costs.

G. W. Hamilton, Attorney General; R. G. Sharpe, Assistant Attorney General, Attorneys for Defendants.

Duly sworn to by T. M. Jenner. Jurat omitted in printing.

[fol. 20] STATE OF WASHINGTON,
County of Thurston, ss:

Margaret Page, being first duly sworn on oath deposes and says that at all the times herein mentioned she was and now is a citizen of the United States and of the State of Washington, over the age of twenty-one years and in nowise interested in the above entitled action and competent to be a witness herein.

That on the 20th day of July, 1934, affiant served the within answer upon the plaintiff therein named by deposit-

ing a true and correct copy of said answer in the U. S. post office at Olympia, Washington, securely wrapped and with first class postage thereon fully prepaid and plainly addressed to:

McMicken, Ramsey, Rupp & Schweppe, Attorneys at Law, 660 Coleman Building, Seattle, Washington,

which said addresses were then and there the attorneys for plaintiff in the above entitled action. That there is regular and daily communication between the City of Olympia, Washington, and the City of Seattle, Washington.

Further affiant saith naught.

Margaret Page.

Subscribed and sworn to before me this 20th day of July, 1934. Jennie M. Tattersall, Notary Public in and for the State of Washington, residing at Olympia.

[fol. 21] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ORDER GRANTING TEMPORARY INJUNCTION—Filed July 12, 1934

The above entitled matter having come on to be heard before the undersigned judge of the Superior Court of the State of Washington upon motion of the plaintiff for a temporary injunction during the pendency of this action and until the final determination thereof on the merits, enjoining the defendants, as members of the Tax Commission of the State of Washington, from enforcing against the plaintiff the provisions of Chapter 191 of the Laws of 1933 of the State of Washington; both parties appearing by their respective counsel, and this court having heretofore overruled defendants' demurrer to the amended complaint herein, and it appearing to the court that the defendants, as members of the Tax Commission of the State of Washington, threaten immediately to enforce the provisions of said act against the plaintiff during the pendency of this

action and prior to the final determination thereof on the merits, by causing to be seized the property of the plaintiff on account of the tax purporting to be imposed by said Chapter 191, and that an emergency exists, and the court [fol. 22] being fully advised in the premises,

Now, Therefore, it is hereby ordered that the defendants, as members of the Tax Commission of the State of Washington, and each of them, and the said Tax Commission of the State of Washington be and they hereby are enjoined and restrained, during the pendency of this action and until the final determination thereof upon the merits, from enforcing against the plaintiff any of the provisions of Chapter 191 of the Laws of 1933 of the State of Washington.

It is further ordered that this temporary injunction shall become effective upon plaintiff filing in this court and cause a bond, conditioned as provided by law, in the sum of $10,000.00.

Done in open court this 12 day of July, 1934.

(Signed) D. F. Wright, Judge.

[fol. 23] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 15282

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and T. S. Hedges and T. M. Jenner, as members of the Tax Commission of the State of Washington, Defendants

DECREE—Filed March 11, 1935

The above entitled matter came on duly and regularly for trial on January 9, 1935, before the undersigned, one of the judges of the above entitled court, the plaintiff appearing by its counsel, McMicken, Ramsey, Rupp & Schweppe, and the defendants appearing by their counsel, G. W. Hamilton, Attorney General of the State of Washington,

and R. G. Sharpe, Assistant Attorney General. The trail proceeded with the introduction of testimony on behalf of the plaintiff and on behalf of the defendants until the close thereof; and the court having heard the arguments of counsel, and being duly advised in the premises; and it appearing to the court that the tax imposed upon plaintiff above named by Chapter 191, Laws of 1933 of the Laws of the State of Washington, is in violation of the commerce clause, viz., Article I, Section 8, of the Constitution of the United States and of the Fourteenth Amendment to the Constitution of the United States;

Now, therefore, it is by the court ordered, adjudged and decreed that the defendants above named, and each of them, and their agents and employes, be and they hereby are permanently restrained and enjoined from enforcing against the plaintiff or its employes the provisions of Chapter 191 of the Laws of the State of Washington of 1933, being an act entitled:

[fol. 24] "An Act relating to taxation; imposing taxes upon the privilege of engaging in business activities and providing for the ascertainment, assessment, collection and distribution thereof; providing for the administration and enforcement of this act; providing penalties; making appropriations; and declaring that this act shall take effect immediately."

And said defendants, and each of them, their agents and employes, are hereby further permanently restrained and enjoined from making any assessment against the plaintiff for the pretended tax, or any part thereof, provided to be paid under said act hereinabove referred to, from issuing any warrant directed to the sheriff of any county in the State of Washington, commanding him to levy upon or sell any real or personal property of the plaintiff within his county, and directing him to file said warrant with the clerk of the superior court, and the said defendants, and each of them, their agents and employes, are further permanently restrained and enjoined from taking any action whatever against the plaintiff for the collection of the pretended tax in said act hereinabove referred to sought to be levied, and, further, from in any manner proceeding against the plaintiff under Section 23 of said act, or otherwise, for the failure or refusal of the plaintiff to obtain

any license to do business in this state, or for failing or refusing to make any return provided for in said act, or for failure or refusal to pay the pretended tax, or any part thereof, claimed to be due or payable under said act. To all of which each defendant excepts, which exceptions and each of them are hereby allowed.

Done in open court this 11th day of March, 1935.

D. F. Wright, Judge.

Presented by: McMicken, Ramsey, Rupp & Schweppe, by Alfred J. Schweppe.

[fol. 25] MEMORANDUM RE NOTICE OF APPEAL

Be it remembered that at the time the foregoing decree was made and entered, the defendants and each of them gave notice in open court that the defendants and each of them appealed from said decree and the whole thereof to the supreme court of the State of Washington.

Done in open court this 11th day of March, 1935.

D. F. Wright, Judge.

[fols. 26-30] [File endorsements omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

[fol. 31]

Statement of Facts—Filed March 28, 1935

Be it remembered, that the above entitled causes came on regularly for hearing before the Honorable D. F. Wright, one of the judges of the above entitled court, sitting in Department No. 2 thereof, at the Thurston County Court House at Olympia, Washington, at the hour of ten o'clock a. m. on Wednesday, the 9th day of January, A. D., 1935; the parties herein appearing by their respective attorneys as follows:

The plaintiff by Otto B. Rupp and Alfred J. Schweppe of McMicken, Ramsey, Rupp and Schweppe.

The defendants by R. G. Sharpe.

Whereupon, the following proceedings were had and testimony taken, to wit:

Mr. Rupp: If your Honor please, I take it you are sufficiently familiar with the issues involved in this particular litigation, so that no opening statement is necessary. I therefore call Mr. Sheldon.

MR. R. D. SHELDON, being a witness called on behalf of the plaintiffs, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rupp:

Q. Mr. Sheldon, you live in Seattle?
A. Yes, sir.
Q. How long have you lived there?
A. Between seven and eight years.
Q. You are the assistant to the general auditor of the Pacific Telephone and Telegraph Company, are you not?
A. I am.
[fol. 32] Q. How long have you been employed by the Pacific Company or by one of what is commonly called the Associated Companies or by the parent company, the American Telephone and Telegraph Company?
A. Approximately twenty-nine years.
Q. In what capacity?
A. First with the Southwestern Bell Telephone Company and its predecessor in the state of Oklahoma, starting in the capacity of manager of one of the small exchanges and transferred to the accounting department in 1907 and holding various positions in the accounting department, ranging from travelling auditor to the position of division auditor at the head of the accounting department in Oklahoma. Transferring from there to the American Telephone and Telegraph Company in 1928 and for three years occupying the position of travelling auditor of that company, followed by three years in the comptroller's department in New York in various capacities in their method section, culminating with the position of supervision and plant disbursement accounting methods. Ten years ago I was transferred to the Southern Telephone Company at Los Angeles as auditor of that company and some two

years later to the position of assistant to the general auditor at San Francisco. Six months later to Seattle where I have since been acting auditor of the companies in Oregon and part of Idaho.

Q. In that portion of the state of Idaho in which the Pacific Telephone Company operates?

A. Yes, sir.

[fol. 33] Q. Northern Idaho and largely adjacent to the territory of which Lewiston, Idaho is the center?

A. Yes, sir.

Q. Now, as assistant to the general auditor and as acting auditor for the Washington, Oregon, Idaho area of the company, you have charge of the books of the Pacific Company in that territory?

A. I do.

Q. As a part of your work, also, you have charge of the books of the Home Telephone and Telegraph Company of Spokane?

A. Yes, sir.

Q. Now, have you prepared from the books of the company a statement showing the amount on the books of the Pacific Telephone and Telegraph Company for plant, equipment and working assets at the end of each year from the year 1922 down to and including the year 1933 and the average for each of those years for plant, equipment and working assets?

A. I have.

Q. Is the document which I now hand you a transcript showing what is on the books of the company for the items which are denominated in the document itself?

A. Yes, sir.

Mr. Rupp: I offer that in evidence.

Mr. Sharpe: No objections.

(Statement of the Pacific Telephone Company of amount on books for plant equipment and working assets total for State of Washington, admitted in evidence and marked plaintiff's exhibit 1.)

[fol. 34] Mr. Rupp:

Q. The exhibit, of course, speaks for itself but it shows the average of the plant, equipment and working assets for the year 1932, which is what?

A. $58,013,344.

Q. And the average for the year 1933, which is how much?

A. $57,993,413.

Q. I noticed a star at — in the first column after the figure 1-1-1933 and that is marked down below as reclassification of accounts. Explain that.

A. From 1913 until the end of 1932 our accounting was performed in accordance with the provisions of the first issue of the uniform system of accounts for telephone companies promulgated by the Interstate Commerce Commission. Effective January 1, 1933, quite numerous revisions were made in the system of accounts and the titles changed to the first revised system of uniform accounts. The adoption of the first revised issue necessitated certain reclassification of issues between accounts and had the effect of bringing into what we term plant accounts certain items formerly carried in assets accounts of the other class to the amount of $84,029.

Mr. Sharpe: Your Honor please, when this document was offered a few minutes ago, I waived objection to it. [fols. 35-47] Upon reflecting, I believe the document is immaterial to the issues in this case, and I therefore wish to withdraw my statement, I didn't object to the statement, if it is possible to do so at this time and move that the document be stricken on the ground it is not material to the issues in this case. I am not objecting to the method of proof or demanding the production of the proof, but I don't believe that the question of what investments the company has in the state of Washington is material to the determination of the validity of the occupational tax as applied to this particular company. I ask that I be permitted at this time to preserve my objection, by motion to strike the document.

The Court: That is what I was going to suggest. It may be admitted with the understanding that you may argue the effect of it at the conclusion.

Mr. Sharpe: Of course, I also object to the testimony of this witness with respect to the matter contained in the exhibit, the question of the investments in the plant equipment and working assets on the same ground, that they are not material.

The Court: It may be understood it goes in over your objection.

[fol. 48] Q. Now, Mr. Sheldon, you are aware of the fact that in the year 1922, in cause number 5344, before the Department of Public Works of the State of Washington, a value was determined by the Department for the Pacific Company in the state of Washington?

A. Yes, sir.

[fol. 49] Q. Have you taken the decision of the Department of Public Works fixing the value of the Pacific Company's property in the state of Washington as of June 30, 1922, and brought that value down by years, by net additions and betterments to the end of the year 1933?

A. I have.

Q. Is the document which I now hand you the document which shows the net additions and betterments made each year from 1922 on?

A. Yes, sir.

Q. And the decision is brought to the end of each year and the average for each of those years?

A. Yes, sir.

Mr. Rupp: I offer those in evidence.

The Court: They may be admitted.

Mr. Sharpe: I object on the same ground, it is immaterial.

[fol. 50] (Decision on rate base in case 5344, brought down to end of and average for each year, 1922-December 31, 1933, inclusive, admitted in evidence and marked plaintiff's exhibit no. 5.)

[fols. 51-53] Q. You are aware, also, of the fact, are you not, that in the year 1915 there was introduced into a rate case then pending before the Public Service Commission of the state of Washington, No. 1810 and 1825, an actual performance appraisal of the property of the company in the state of Washington?

—. ——.

[fols. 54-65] Q. As I understand it, you answered you have brought down that actual performance appraisal by net additions to plant and equipment for each of the years 1915 on.

A. Yes, sir.

Q. The document I hand you shows that compilation, does it?

A. Yes, sir.

Mr. Sharpe: I object to it on the ground it is immaterial.

The Court: It may be admitted.

(Actual performance appraisal as of December 31, 1914, brought down to end of and average for each year 1915-December 31, 1933, inclusive, admitted in evidence and marked plaintiff's exhibit no. 6.)

[fols. 66 & 67] Cross-examination.

By Mr. Sharpe:

Q. Mr. Sheldon, you have testified only to matters relating to the cost of property as shown by the books and shown by the reports after hearing of the Department of Public Works of this state, haven't you? You haven't testified in any way with respect to either the net or gross earnings of the companies, either the Home or Pacific Companies?

A. I have not.

Q. You have not testified as to anything relating to the depreciation of these various properties, operating properties of the Pacific or Home Companies?

A. I have not.

[fol. 68] Mr. R. W. Mastick, being a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rupp:

Q. Your initials are R. W.?

A. R. W. Mastick.

Q. You live in Seattle?

A. Yes, sir.

Q. What is your occupation?

A. I am general staff engineer of the Pacific Telephone and Telegraph Company for the state of Washington.

Q. Do your duties also comprehend like matters for the Home Telephone and Telegraph Company of Spokane?

A. Yes, sir, I act in the same capacity for that company.

Q. Will you tell us what your education has been and what your employment has been?

A. I attended the University of California, Berkeley, California and studied there electrical engineering. After leaving college, I was employed by the Pacific Telephone and Telegraph Company in January, 1907.

Q. Well, what have you done for the Pacific Telephone and Telegraph Company since you entered its employ?

A. My first employment with the company was with the engineering department in San Francisco in making toll line location surveys in the state of California, after which I was involved in making plant inventories of the properties of the Pacific Company in California, Nevada and southern Oregon, and on miscellaneous drafting work. That was 1907 and '08. In 1908, I was employed in making [fol. 69] commercial surveys of the territory, to prepare the computations and surveys to serve as a basis of forecast for the plant and to make telephone development studies and, having had experience in that work, I was then put into fundamental plan work, which was a matter of taking the forecasts and actually designing what the Telephone plant should be in the future, to meet the development anticipated in the future. After that, I was engaged in outside plant and design, actual outside plant design. In 1910—that work lasted from 1908 to 1910. In 1910, I became engaged in transmission engineering, which comprehends the electrical design of the apparatus used in speech communication. I was in that from 1910 to 1912.

In 1912, there was instigated in California an investigation of the inductive effect between telephone and power lines. The inductive effect caused noises on the lines. The California Railroad Commission became interested in that and I was appointed by the California Commission as engineer in charge of field research for inductive interference. I was loaned by the company to the Commission for this work. At the same time I carried on work as transmission engineer for the company. I worker there for about three years, and conducted a highly technical survey of the effect of inductive disturbances in telephone lines. We promulgated in the joint committee a set of rules and regulations for lines in parallelism and they were issued as a gen-

eral order by the California Commission and are still in force [fol. 70] and effect. As a result of this work, the California Commission published a large volume on that subject which I edited and compiled for them.

In 1914 I was appointed transmission and protection engineer of the Pacific Company in San Francisco and in that capacity I had charge of the electrical design of all of the telephone plants and equipment of Nevada, California, Idaho, Oregon and Washington. I retained this position until 1923.

In 1923 I was appointed engineer of outside plant design and practice. This position involved not only carrying on the transmission and protection duties, but also gave me charge of the design of outside plant, structurally, including the maintenance for the entire territory of the Pacific Company in the same states. In 1926, I was appointed chief engineer for the Pacific Telephone and Telegraph Company for their operations in the states of Washington, Oregon and Idaho, with headquarters at Seattle. I was chief engineer of the Pacific Company from 1926 to '30, and I had entire charge of plant design of all of the properties in that area.

In 1930, I was appointed special representative of the Pacific Company in that area, reporting to the vice president and general manager. I was involved in studying the problems of management that we have to solve in connection with the operation of the company.

In 1933 I was appointed general staff engineer, which included along with the duties of special representative, the matter of handling all tax matters in the states of Wash- [fol. 71] ington and Idaho and the Home Telephone Company of Spokane.

Q. You are a member of a number of technical associations?

A. I am a member of the American Institute of Electrical Engineers, was a member of the American Railway Association for years and a member of the National Electric Light Association for years.

(Whereupon an adjournment was taken until one-thirty o'clock p. m.)

(Upon reconvening, the following proceedings were had and testimony taken, to wit:)

Mr. Mastick (on stand).

Mr. Rupp:

Q. Now, Mr. Mastick, will you turn to the annual report for the year 1932 and the annual report for the year 1933, of the Pacific Company to the Department of Public Works and tell the Court how much taxes were paid by the Pacific Company in the state of Washington for each of those years?

A. The taxes paid by the Pacific Telephone and Telegraph Company in the state of Washington for the year 1933, paid during the year 1933—1932, pardon me, were $1,510,541.39.

Q. Does the report to the Department show the segregation of those taxes?

A. Yes, sir.

Q. What does it show for taxes on real estate in the state of Washington?

A. A total of $116,997.98 on real property and $1,066,-[fol. 72] 663.48 on the personal property, plus a figure of $193.75 on personal property paid in the city of Waitsburg.

Q. There is a peculiar situation in the city of Waitsburg?

A. Yes, sir.

Q. What is it, briefly?

A. They retained the right, under charter, to levy and collect their own taxes.

Q. That is the only case of its kind in the state of Washington, so far as you know?

A. Yes, sir.

Q. Will you give the comparable figures for 1933 as shown by the reports?

A. 1933, the taxes paid during that year, $1,604,796.14. Of the real property taxes, $116,233.23; personal property taxes, $1,164,618.10, plus the same item reported in 1932 for the city of Waitsburg, $193.75. I say the same item, I mean the same amount is applicable to 1933.

Q. What accounts for the difference between the figures for real and personal property taxes paid in the year 1932 and the total paid by the company relative to Washington operations as shown by the annual reports for each of those years '32 and '33?

A. There are other taxes the company pays besides real

and personal property taxes. They include such taxes as Federal income and franchise and license payments.

Q. What was the amount of Federal income tax?.

A. 1932 was $277,978.60.

[fol. 73] Q. Do you know how that is determined?

A. That is a pro rate of the total amount of Federal income tax paid by the Pacific Company pro rated to the state of Washington on the proportion of the property in the state of Washington to the entire——

Mr. Sharpe: You say relation of property?

A. Plant and equipment.

Mr. Sharpe: You mean the total of the property?

A. The total on the books.

Mr. Sharpe: Its relative cost, then, as appearing on the books?

A. Right.

Mr. Rupp: For certain items of property, plant and equipment.

Mr. Sharpe: Operating equipment?

A. Yes, sir.

Mr. Rupp:

Q. What was the comparable amount for federal income tax for 1933?

A. 1933, the Federal income tax was $263,361.56. That is the Washington portion of the Pacific Company payment.

Q. In both years, there is an amount shown by the report for Federal capital stock tax?

A. Yes, sir.

Q. And that is determined, so far as the state of Washington is concerned, in the same manner that the amount of Federal income tax attributable to the state of Washington is determinable?

A. Yes, sir.

Q. That is equally true of another small item in the year [fol. 74] 1933 of Federal tax amounting to approximately $2500.00?

A. Yes, sir.

Q. Franchises and licenses for the year 1932 is how much?

A. I would have to add this column of figures to get that. It is segregated separately by towns.

Q. I see. Well, if you take the total amount of tax and deduct from it the Federal income tax in the year 1933, $210,336.50; Federal capital stock tax, $24,999.75—989.75; and other Federal taxes of $2,578.04; and the amount of real property taxes of $101,042.01; and personal property taxes of $887,112.10 plus $193.75, paid to the city of Waitsburg, you would have the amount of franchise and license taxes?

A. That is correct.

Q. On an accrual basis?

A. Yes, sir.

Q. Now, then, the actual amount of taxes paid during the year 1933 was $1,604,796.14, of which amount $263,361.56 was Federal income tax, $16,659.83 Federal capital stock tax, other Federal taxes, $2,578.04, real property taxes $116,233.23, personal property taxes $1,164,618.10 plus the Waitsburg tax, $193.75?

A. Yes, sir.

Q. You would have the amount of franchise and license taxes actually paid? It would be the difference between the $1,604,796.14 and the figures of the amounts shown for Federal income, Federal capital stock, other Federal, real property, personal property and Waitsburg?

[fol. 75] A. That is correct.

Q. The figures for 1932, both the amount accrued and the amount actually paid during that year, are in the annual report to the Department?

A. Yes, sir.

[fol. 76] Mr. Sharpe: I object to the offer of evidence of the taxes paid by the company, as not material to the issues [fols. 77 & 78] in this case, and not having a bearing on the validity of this particular tax, the subject of dispute here. So far as the production of the actual receipts in evidence is concerned, the defendants waive the production of the receipts if the Court finds the question of what taxes were paid for these years to be material. I merely object to the proof on the ground it is immaterial.

The Court: The objection may be overruled.

Mr. Rupp:

Q. In the year 1933, did the Pacific Company pay to the state of Washington any taxes under the act here under attack?

A. No.

[fol. 79] Q. Now, then, Mr. Mastick, have you prepared a document showing the gross operating revenues for the Pacific Company for the year 1932, segregated as between intrastate and interstate, the total operating revenues segregated between intra-state and interstate, the net revenues sgregated between intra-state and interstate, the amount of taxs actually paid during that year, also so segregated, and the ratio of the operating income, both intra-state and interstate, relating to the amount on the books for plant, equipment and working assets for the average of the year 1932, and a like relationship between the operating income and the average of the Commission decision brought down, and a like ratio, equally so segregated, as to the actual performance appraisal of the average for the year 1932?

A. Yes, sir, I have.

Q. Is the document which I now hand you the compilation to which you have just referred?

A. It is.

Mr. Rupp: I offer it in evidence.

Mr. Sharpe: I object to it on the ground it is immaterial.

[fol. 80] The Court: It *is* may be admitted.

Mr. Sharpe: Certain parts of it, I object to.

Mr. Rupp: Here is a copy.

(The Pacific Telephone and Telegraph Company, state of Washington, year 1932 operations admitted in evidence and marked plaintiff's exhibit no. 11.)

Mr. Sharpe: I object to the items in the plaintiff's exhibit 11.

The Court: Yes.

Mr. Rupp: We agree your objection can run to each item.

Mr. Sharpe: I don't want it to run to each item.

Mr. Rupp: You are objecting to it.

Mr. Sharpe: I object to the figures shown on line D of plaintiff's exhibit 11.

The Court: What line?

Mr. Sharpe: Line D and line F, and line G, line H, line I and each of the other lines following, J, K, L and M, each on the ground that the same is wholly immaterial to the issues in this case, and to the question raised by the pleadings in this case and I object to each of those lines independently, on the same ground.

The Court: The objection may be overruled with the understanding, of course, you may argue the effect at the close of the case.

[fol. 81] Mr. Rupp:

Q. Have you prepared a like compilation for the year 1933 of the Pacific Telephone and Telegraph Company?

A. Yes, sir.

Q. Does the document I now hand you show the result of your compilation?

A. No, sir. This is 1932.

Q. I gave you the wrong one.

A. Yes, sir, this is the statement I prepared.

Mr. Rupp: I offer that in evidence.

Mr. Sharpe: Which one, '33 this time?

Mr. Rupp: It is exactly like '32.

Mr. Sharpe: I object to this document, plaintiff's exhibit 11.

Mr. Rupp: 12.

Mr. Sharpe: 12, on the same grounds urged against plaintiff's exhibit 11.

Mr. Rupp: All right.

The Court: The objection may be overruled with the same understanding.

(Year 1933 operations, the Pacific Telephone and Telegraph Company—state of Washington admitted in evidence and marked plaintiff's exhibit No. 12.)

[fol. 82] Mr. Rupp:

Q. Now, then, whence were the figures derived as shown on the last four exhibits? Where, for instance, did you get the gross operating revenue for the Pacific Telephone and Telegraph Company for the year 1932?

A. That figure was taken from the annual report to the Department of Public Works, state of Washington.

Q. Whence did you get the amount of interstate gross operating revenue for that year?

A. That was determined from an analysis of the revenue account itself.

Mr. Sharpe: What did he say?

Mr. Rupp: It is determined from an analysis of the revenue account itself.

[fol. 83] Mr. Sharpe: That is not shown by the report?

A. No.

Mr. Rupp:

Q. To accommodate Mr. Sharpe, tell him how you ascertained at $1,123,536.49 was the interstate revenue of the Pacific Company for the year 1932?

A. What was that figure you read?

Q. 1932, $1,123,536.49.

A. Oh, I see. That figure for revenues was obtained from the records of the company, its books of the revenue receipts.

Q. Do the books of the company show the amount of interstate revenue received?

A. No, sir, we had to analyze the revenues accounts by sources to find it.

Q. Explain a little more in detail what you did.

A. Well, to determine—can I speak of this in a general fashion?

Mr. Rupp: Surely.

A. To determine the interstate and intrastate segregation of property, revenues and expenses, you must first understand that whenever any subscriber or any customer of a telephone company places a toll call, we make out a toll ticket for that call, the operator that passes the call makes out a toll ticket. That toll ticket shows, among other things, the originating point and the telephone customer's number and the point of destination of the call. It also shows the time interval, or the amount of time that customer used that toll circuit in his conversation. Those tickets are made out on every toll call and, therefore, we [fol. 84] have an absolute record of every toll message, whether interstate or intrastate. We handle, Your Honor, about, somewhere in the vicinity of five million toll messages a year. We analyzed these toll tickets, all available in the state at the various toll centers where they originated. We analyzed of those total five million tickets, one million, two hundred fifty thousand tickets. I want to show you what a toll ticket looks like. Here is a toll ticket from Olympia, Washington, to Tacoma and an intrastate toll call. It originated at Olympia, telephone number 361, by this gentleman and terminated at Tacoma and the amount

of time used on that circuit was two minutes. There is a similar ticket for an interstate call from Olympia, telephone 374, to Portland, Oregon, time of conversation, two minutes. That time of conversation is determined from when the subscriber reaches the party called. This ticket is put in a calculgraph and stamped on the back. When the conversation ceases and the operator takes down the ticket, it is stamped again and the time is determined from those two stamps. That is how we determined the time used on each conversation for billing purposes. Now we, therefore, knew from analyzing this 1,250,000 toll tickets, the number of messages, the amount of time used, the amount of time use of the property for those messages and, also knew the length of haul for each of those messages within the state. Taking those three factors we added them up to get the "message-mile-minute" use of the property on toll calls. Relating—we knew the "message-mile-min-
[fol. 85] ute" use for interstate business and for intrastate business, because the tickets were first segregated between interstate and intrastate; therefore, we knew the relation for the intrastate business to the total business, and we knew the relation of the intrastate time use of the property to the total time use. That gave us the ratios to apply to the various accounts in these tabulations that have been submitted to the total revenues to get the intrastate amount, to get the interstate, and so forth.

Q. So far as the dollars of revenue derived from interstate toll telegraph and telephone calls which the subscriber pays, as an interstate telephone or telegraph call, that is known and recorded on the books of the company?

A. Yes, sir.

Q. Both actual dollars to add up the amount paid by the subscriber for a telephone message from Olympia to San Francisco, you take as Washington's share of that interstate revenue, the circuit haul between Olympia and Vancouver, do you not?

A. Yes, sir.

Q. Assuming, for the sake of argument, that the circuit mileage between Olympia and Vancouver is one-tenth of the total circuit haul between Olympia and San Francisco, there would be allotted to the state of Washington on the books of the company one-tenth of the amount which that subscriber paid for that call?

A. That is correct, yes, sir.

Q. Now, then, in addition to that, there is in this inter-
[fol. 86] state revenue, not only Washington's proportion on circuit mileage basis of revenue derived from interstate telephone and telegraph calls but the amount received by the company from program supply?

A. Yes, sir.

Q. That is radio service, is it not?

A. Yes, sir.

Q. And that is wholly interstate?

A. Yes, sir.

Q. All expenses are interstate, all property used in connection therewith is interstate and revenue is interstate?

A. Yes, sir.

Q. So, in the figure of one million odd dollars, the amount received by the company for program supply and Washington's proportion on a circuit mileage basis is the interstate revenue basis of the telephone and telegraph revenue?

A. Yes, sir.

Q. The Pacific Company has testimony already before this court that it does both an interstate and intrastate business?

A. Yes, sir.

Q. What can you say as to whether the entire property of that company used or useful in rendering intrastate and interstate business is devoted at different times to the carrying of these two classes of service?

A. The entire property is devoted, at different times, to carrying on both classes of service, and we can have it do
[fol. 87] both classes of service at one and the same time.

Q. Is there any further subdivision of the interstate and intra-state business of the Pacific Company?

A. Yes, sir.

Q. What is that subdivision?

A. That is between local service and toll service.

Q. Define local and toll service.

A. Local is between customers located in the same exchange. Toll is between customers located in different exchanges.

Q. That is to say, local is between two people located within the exchange area of Olympia?

A. Yes, sir.

Q. Roughly, the city limits?

A. Yes, sir.

Q. And it extends sometimes beyond it?

A. Yes, sir.

Q. Toll service is service between Olympia and some other exchange located outside the city of Olympia?

A. That is correct.

Q. Have you prepared a chart showing the use of the telephone plant for a local call and intra-state toll call and an interstate toll call?

A. I have, yes, sir.

Q. Is the chart which I now hand you the chart to which you just referred?

A. Yes, sir, it is.

Mr. Rupp: I offer that in evidence. If Your Honor please.

[fol. 88] Mr. Sharpe: I object to it without it being explained further.

Mr. Rupp: All right, we will explain it.

Q. Now, will you take this chart and show us, first, how a telephone plant is used in a local call?

A. Now, on the right hand side of this diagram, I have shown enclosed in dotted lines an exchange boundary, the multi-office exchange, say, typical of the Seattle exchange in the state of Washington. There are more offices in the Seattle exchange than are shown here. In this particular chart are shown three offices in triangular relation, one being a manual office, the other a dial office and the third a toll office. In the lower left and right hand corners of that exchange I have shown a residence subscriber's telephone located in the residence subscriber's home and the business subscriber's phone located in his office in an office building. A call between the residence subscriber and the business subscriber's office, in the multi office exchange of Seattle is a local call and local use and because both of these subscribers are within the same state, the service is intrastate. Now, the route of such a call, beginning with the residence subscriber's telephone on the left is via the solid red line to the manual central office connecting to the solid green line running to the dial office, connecting again to the solid red line to the subscriber's instrument in the office building. Now, beginning with the residence sub-

scriber's telephone again, the classes of plant used in such a local call are as follows: subscriber's station telephone, [fol. 89] which consists in this case of a desk stand telephone with the bell box and associated apparatus. From that telephone, a pair of inside wires run to the point of exit of the building. Those wires, of course, are carefully put in and fixed to the walls and so forth, and terminated on the outside of the building with a pair of fuses to protect it from accidental electrical shock. From the point of the building exit to the first pole is a drop wire, a pair of insulated wires, to the first pole. That drop wire is connected to a pair in the diagram, a pair of aerial wires carried on crossarms and insulators supported by poles. At the end of that structure, it runs into a pair of conductors in an underground cable in an underground conduit into the central office and terminates on the switchboard. The operator on the left puts up the connection on an interoffice trunk, shown by the green line. There are hundreds of these trunks running from the manual office to the dial office. In the diagram, they are a pair of conductors in an underground cable. At the dial office the connectors work automatically without the aid of an operator and connect to the subscriber's loop running from the dial office to the office building. Again, the wires from the dial office to the subscriber's telephone in the diagram, are a pair of conductors carried in underground cable through the underground conduits, being cross connected in a terminal box in the basement to what we term a riser cable running up to a private branch exchange, which, in this case, is on the third floor, from which the subscriber's telephone is [fol. 90] served. The private branch exchange operator puts up the connection on the riser cable and inside wiring to the subscriber in the office building. That is the route and the property used in a local call.

I might say further, for economic reasons, subscriber's loops may be either wholly in aerial wire, or wholly in aerial cable supported by poles, or wholly in underground cables, in underground conduits, or may be a combination of all three, depending on the conditions which we face in the community. As a rule, the large cables carry a large number of conductors. Subscribers' cables range in size from a cable of a few pairs of conductors to 1818 pairs of conductors, 3,636 wires encased in a lead sheath. Inter-

office trunks, carried in inter-office trunk cables range from a few pairs to say, three or four or five hundred, or six hundred pairs, and the gauges of these conductors run from 19 gauge to 26 gauge B. & S.

Q. Will you take the chart and note the use of the telephone plant for an intrastate toll call?

A. To the left of the multi-office exchange boundary is shown, enclosed within dash-dotted lines a single office exchange. This is another exchange located within the state of Washington, say, for instance, the exchange of Olympia here. As shown in the multi-office exchange, it also shows for the single office exchange at Olympia, the customer's station in his residence, and the manual office switchboard at the Olympia office to which it is connected. The call from this customer to the business customer at Seattle is an [fol. 91] intrastate toll call and the use of the property in that call is intrastate toll use. Now, as before, the route of that call from the customer's station at Olympia is via the solid red line to the local manual central office, where it is connected to the solid yellow line running to the toll office in Seattle, and from the toll office in Seattle, connected again to the same dial office, or the dial office from which the business customer is served, and is connected again to the solid red line to the subscriber's telephone in the office building.

Starting again at the residence customer's station, we have the customer's telephone instrument, inside wiring to the point of exit from the house, the drop wire to the first pole, the conductors in open wire, aerial cable, to the manual local—manual central office where it is cross connected now into an underground dip running into the office. There the operator connects it to the toll line carried in a pair of aerial wires to the point up here at the top of the diagram where it goes into a pair of conductors, carried in underground cable through an underground conduit to the toll office. In the toll office a cross connection is made to a toll switching trunk connected to the local dial office from the toll offices like an inter-office connection in the ordinary manner in an ordinary inter-office call to the dial office. At the dial office, it is connected again to the subscriber's loop running to the subscriber in the business office. Precisely [fol. 92] the same facilities are used in the subscriber's loop for the intrastate call as for the local call in the case

I cited previously. Likewise, the subscriber's station instrument and the subscriber's loop to the central office can be used and is used by the subscriber for a local call that he wants to place from his station to some other friend's station in the city of Olympia. These two portions of property are used in both intrastate toll and local calls.

Now, the toll line—I want to go back a little. The toll line from the local manual central office in Olympia is, in this case, a pair of copper conductors connected to the toll office in the city of Seattle. It may be a phantom circuit derived from two pairs of copper conductors, to get three telephone circuits working simultaneously without interference to each other; or it may be a carrier circuit arrangement of vacuum tubes and apparatus operating at high frequency. It allows us to put on one pair of copper wires, three additional speech channels, all operating independently of each other. We can have three channels of carrier on one pair of wires, three communications going over the three channels, including the conversation over the ordinary telephone wire, without interference. In using a carrier system, it is many times superimposed on an intrastate circuit, say from Seattle to Vancouver, Washington. On that circuit from Seattle to Vancouver, Seattle can be talking to Vancouver and can also be talking to San Francisco over carrier channels, on the same telephone wires. The carrier channel at Vancouver, instead of stopping, goes [fol. 93] on over another pair of wires or carrier channel. Over this pair of wires there can be some party talking to San Francisco on the same pair of wires, while a person in Seattle is talking to Vancouver.

Q. And another to Olympia?

A. Yes, and another to Olympia and another to some place on the same loop, there being a possibility of four telephone conversations over one pair of wires simultaneously, without interference.

Q. How about telegraph?

A. Telegraph business is done over the same wires as telephone. By means of balancing equipment, we derive telegraph service without interfering with the telephone conversation, in much the same way as the carrier circuit, using different frequencies with the telephone than telegraph. On a carrier channel we can put twelve telegraph channels in the space that the speech would take, on three

carrier channels we can have thirty-six telegraph channels, or twenty-four telegraph channels and two telephone channels, or any combination we want. They all work simultaneously over the same wires without interference.

Q. That is to say, if you saw out here, on a pole line, a pair of wires, there could be going over that pair of wires in a certain sense at one and the same time, a telephone conversation between Olympia and Vancouver, another between Olympia and San Francisco, and twelve or eighteen or twenty-four telegraph messages at the same time?

A. That is correct, yes, sir.

[fol. 94] Mr. Sharpe: He hasn't finished it.

Mr. Rupp: No.

Q. Now, will you take the same chart and show the use of the telephone plant in making an interstate toll call, and combining it with, when you get through, with the telephone end of it, the use made for telegraph purposes?

A. Now, to the left of the single office exchange, I have just been discussing for the intrastate call, I show a dash-dotted line, "State line" and to the left of that, a manual office located outside the state.

Mr. Sharpe: You mean one operated by girls instead of automatic?

A. In contra-distinction to the dial.

Mr. Rupp: It wouldn't make any difference for the purpose of this chart.

A. I tried to get all the types. This manual office to the left of this line is, say, the exchange at Astoria, Oregon. As shown in the local and intrastate calls, I show here the customer's station in the customer's residence, the telephone instrument in his station connecting to the central office over the subscriber's loop, thence over the solid blue line, in this case again a toll line similar to the toll line described for the intrastate call. Because it is a long toll call, we have to route it through a repeater station. A repeater station, or repeater, is a combination of vacuum tubes, resistances, and condensors so arranged to amplify the minute sounds to the receiving point at such strength as to give satisfactory loudness and clearness of conversa-
[fol. 95] tion. That toll line is routed from the manual office at Astoria to the toll office in Seattle. There it is cross connected again to the same toll switching trunk to

the dial office and again connected at the dial office to the office building telephone over the subscriber's loop. It is the same subscriber's loop that was used for a local call and for an intrastate toll call. In Seattle any subscriber anywhere in the system uses his telephone instrument and wires connecting it to the nearest central office on either local business, intrastate toll business or interstate toll business. That is jointly used at the will of the subscriber at different times for all three types of business. And the same is true of the subscriber over here. This man, at will, may make a local, intrastate, or interstate toll call over the same facilities.

Now, these toll lines are all supported by a minimum number of pole structures, generally located on private rights of way to keep them off the highways as far as we can get them, and the toll switching trunks from the toll to the dial office are carried in cables. In many instances the toll offices, I might say in most instances, the toll office is located in a single office exchange in the same office building as the subscriber's telephone switchboard. In the multi-office, it is generally in the down town main central office. It can be either a separate line of switchboard apart from the subscriber's switchboard, it can be a section of [fol. 96] the telephone switchboard in line with the subscriber's switchboard, or a position in the subscriber's switchboard itself. And in some cases in the large cities, say Chicago and New York and other points, it might be located in a separate building, but that is very unusual. The usual case in Washington is to find the switchboard in the local central office, and the multi-office, in the down town exchange office building. And in some cases, there are some three units of local switchboard. I mean three separate central offices in one building.

Q. In the city of Olympia, of course, the toll switchboard is in the only building we have in Olympia.

A. Yes, sir.

Q. In Seattle, in the building at Third and Seneca?

A. Third and Seneca.

Q. There are no toll switchboards in any of the other twelve exchange buildings in Seattle?

A. No, although some of the subscriber's switchboards are used for toll.

Q. What would you say, in view of the description you have given, as to whether or not the various parts of the company's property in the state of Washington are used both in interstate and intrastate business at different times and for different purposes?

A. All——

Mr. Sharpe: I object to that as being covered by the previous testimony.

Mr. Rupp: Now, I offer in evidence the chart.

The Court: It may be admitted.

Mr. Sharpe: No objection.

[fol. 97] (Above mentioned chart admitted in evidence and marked plaintiff's exhibit 15.)

Mr. Rupp:

Q. Now, what can you — as to whether or not all these various parts of telephone plant and equipment used by the company in the state of Washington are separable or inseparable, unmingled or commingled, independent or mutually dependent?

Mr. Sharpe: I object to that as not proper expert testimony. It is shown by the testimony of the witnesses and for the Court to determine from the testimony of the witness the fact.

Mr. Rupp: He can say what the fact is.

Mr. Sharpe: If it is a deduction proper to make from the testimony already given, it is not necessary to fortify it by an expert answer calling for a conclusion. That is for the Court to determine from the evidence, not for the witness to determine. Your Honor can't be assisted in arriving at your conclusion by the conclusion of the witness of the fact he has set forth. That is the very question in the case, is whether or not, as far as the plaintiff is concerned, whether or not necessary facilities are commingled so they can't be segregated and that is for the Court to determine, not for this witness to determine.

The Court: He may answer the question.

Mr. Sharpe: Exception.

A. Inseparable, commingled and mutually dependent.

[fol. 98] Q. From what you said, the same outside facilities, the same exchanges, and the same central office equip-

ment installed in the exchange buildings are used in the transmission of messages, whether either interstate or intrastate, and are operated by the same employees, using the same facilities, whether it is interstate or intrastate?

A. Yes, sir.

Q. Suppose an attempt was made to separate the intrastate business from the interstate business, can it be done?

A. It can not.

Mr. Sharpe: I object to that as immaterial, calling for the conclusion of the witness.

The Court: I think the answer may stand.

Mr. Sharpe: Exception.

Mr. Rupp:

Q. Suppose we abandon the intrastate business in the state of Washington, how much of the equipment is used in conducting both classes of business and how much is used for the intrastate business?

Mr. Sharpe: Objection.

The Court: He may answer.

Mr. Rupp:

Q. Taking up first the station customer's loop and station apparatus.

A. In the subscriber's loop, segregation of the property, that is always the red line in this diagram, over 92½% of that property would have to be used if we did solely an interstate business.

[fol. 99] Q. Now, how do you know that is true?

A. Well——

Mr. Sharpe: That is a big one. It will take a long time to answer that question.

Mr. Rupp: It has to be answered and he wants to proceed to answer it. It isn't a matter of guess on our part. It is actual knowledge.

A. The telephone property, from what I have said heretofore, is a very complex and intricate structure. In order to keep track of that property and know what its function is, how it is used and where it is used, and so forth, the company has to keep very elaborate records, in other words, keep records showing the classification, location and

type, and so forth, for every part of their plant and equipment in the various cities and towns and states. I made an inspection of the various records, maps, drawings of this property and, from my experience as a telephone engineer, I was able to determine what part of that property was in exclusive local use, exclusive intrastate use, or exclusive interstate use. Having determined that, the balance of the property was in joint use. I knew the amount of that property in dollars, of the total property carried on the books. I deducted from that amount the amount of property in exclusive use and the result was the amount of property in joint use for the three services.

Q. Have you prepared a statement showing the subscriber's loops and supporting structures, the total cost of those items of property and the amount in dollars of that property which is jointly used?

[fol. 100] A. Yes, I have.

Q. Is the document I now hand you the result of your studies such as you have just described?

A. It is.

Mr. Rupp: I offer that in evidence.

Mr. Sharpe: I object to it on the ground it is immaterial and there is also underlying data from which this document is procured that has not been produced. It is evidently made up from records of the office of the company, to a great extent.

Mr. Rupp: If it is desired it be produced, we will produce it.

Mr. Schweppe: We will let you check it. Will that satisfy you?

Mr. Sharpe: I don't know what it is made up from.

A. The regular operating maps and records of the company, by which it keeps track of its business, our everyday working records.

Mr. Rupp:

Q. That is, that the company has to know, for instance, where a particular piece of underground conduit is?

A. Yes, sir.

Q. It has a map that shows the exact length of it, where the man-holes are, and so forth?

A. Yes, sir. What cables and how many in it, what ducts in use and wires and what is in use, and where and in——

Q. The location of the poles owned by the company and all poles of a joint interest, whether one-half, one-third or one-sixth?

[fol. 101] A. Yes, sir.

Mr. Rupp: If it is necessary, we will produce the records.

Mr. Sharpe: Your Honor will see the defendants are helpless in checking the testimony of the witness. The plaintiff produces a witness undoubtedly qualified as far as his ability is concerned, nevertheless it is impossible for the defendant to check his testimony in regard to the percentage of property he claims is used in all three of these services jointly or the percentage used in interstate only, and so forth, and consequently it would be impossible for us, in justice to my client, to permit this testimony to go in unchallenged without having an opportunity in some way to check the underlying data from which it was prepared.

The Court: They tendered it to you.

Mr. Sharpe: It isn't tendered. Where is it?

The Court: They said they would bring it.

Mr. Sharpe: That isn't the way to prove a case, Your Honor, put the underlying data in first.

Mr. Schweppe: Does he want to try the case for six months?

Mr. Sharpe: No, but I withhold my decision about requiring the evidence until after my cross-examination of the witness. If it is apparent it would be useless and unnecessary to produce the evidence, I will be glad to waive it if it is possible for us consequently to waive it.

[fol. 102] Mr. Rupp: That document, I take it, is in.

The Court: That is 16.

Mr. Sharpe: It is in, then, over my objection, because I——

The Court: Yes.

Mr. Sharpe: I haven't had an opportunity to object to the time it was offered: I don't think it had been received. It certainly wasn't until I made my objection to it.

The Court: It may be understood your objection was

made and the record may show your full objection prior to the receipt of it.

Mr. Sharpe: Your Honor is receiving it unqualifiedly at this time?

The Court: The same as the other exhibits. You will not be precluded.

Mr. Sharpe: Your Honor holds the document is admissible without the production of the underlying data?

The Court: You have just said in your objection you reserved the right to—(interrupted)

Mr. Sharpe: I don't think the document should be in until I have an opportunity to exercise my privilege in the regard. I stand on the objection at this time. I will be glad, if possible, to waive the objection, but I don't want to waive it at this time, or have it understood that it is waived in any sense of the word.

The Court: You are not waiving anything. I can't see [fol. 103] how there is any possibility.

Mr. Sharpe: I think Your Honor's ruling should be reserved until I have an opportunity to cross-examine.

Mr. Schweppe: Your Honor can admit it subject to the right of cross-examination.

The Court: That is what I was doing.

(The Pacific Telephone & Telegraph Company, subscribers' loop and supporting structures book cost statement admitted in evidence and marked plaintiff's exhibit No. 16.)

Mr. Rupp:

Q. This exhibit number 16 shows the total cost of various items of property comprehended under what you have termed subscribers' loops and supporting structures?

A. Yes, sir.

Q. The total cost as shown under that, reading "right of way exchange", for instance, $27,783.00, is taken from what source?

A. The books.

Q. The books of the company, and that is equally true of all of the figures shown in the first column?

A. Yes, sir.

Q. So is the total cost shown by the books of the company and reported to the Department of Public Works, $14,169,215.00?

A. For subscribers' loops.

Q. Out of this you find $13,108,077.00 was jointly used?

A. Yes, sir.

Q. Or 92.51 percent was jointly used of these particular items of property?

[fol. 104] A. Yes, sir.

Q. I think I can, perhaps, shorten this thing somewhat. For the purpose of this segregation, you have divided the property into subscribers' loops and supporting structures to which you just testified, and various other classes of property used, subscribers' switchboards, and so forth.

A. Every part of the property I described in this diagram has been set up separately.

Q. Do the eight sheets which I now hand you show as to the remaining items of property of the company as shown by the books of the company and reported to the Department of Public Works, the total cost of that property, the amount jointly used, or exclusively used locally, or for toll?

A. Yes, they do.

Mr. Sharpe: I——

Mr. Rupp: It is the same thing as the other. I am going to give him a copy now.

Now, I offer the remaining eight sheets to which I have just referred as a portion of exhibit 16.

Mr. Sharpe: I object, Your Honor, on the ground it appears from the exhibits that the same is made up from data taken from the books of the company and that the underlying data from which the exhibits are prepared have not been received, offered or received in evidence. I also object upon the ground that the exhibits and the data shown [fol. 105] in the exhibits is wholly immaterial and irrelevant to the matters at issue in this case, which is the validity of the occupational tax law applied to these particular companies.

The Court: It may be admitted with the same understanding as heretofore.

(Eight sheets above referred to admitted in evidence as an additional part of exhibit no. 16.)

Mr. Rupp: I never want any controversy with any counsel at any time. If it is desired that we produce the books and the maps and records from which these figures are derived, we will do it. If Mr. Sharpe doesn't want then pro-

duced, that is something else. I am perfectly willing that he shall have an opportunity to cross examine and then state his attitude, but I want the record clear to show I am willing to produce this mass of material which underlies these exhibits for his examination, and if necessary in this courtroom, I quite agree it might take a whole railroad train to bring them, but I agree to bring them. But we are now offering to produce the original record of each and every one of these figures.

Mr. Sharpe: I am not in a position to say yet whether or not I make the request for the production of the underlying data.

Mr. Rupp:

Q. You have prepared, have you not, a summary sheet [fol. 106] summarizing the figures shown on exhibit 16?

A. Yes, sir.

Q. By these various classes you have used in making up 16?

A. Yes, sir.

Mr. Rupp: I offer that in evidence.

Mr. Sharpe: Same objection. I understand 16 was the original, together with the additional eight pages.

Mr. Rupp: Had I thought of it, I would have put it in with it because it is a mere summary.

The Court: Do you want it as 17 then, or part of 16?

Mr. Rupp: I think we will make that a separate one.

(Pacific Telephone and Telegraph Company summary of jointly used property admitted in evidence and marked plaintiff's exhibit 17.)

Mr. Rupp:

Q. Now, Mr. Mastick, for Mr. Sharpe's benefit and in order that he will not be misinformed about anything whatsoever, will you tell us a little bit about how you arrived at the figures admitted about which you testified at the beginning of today's procedure? How many people were engaged in that task?

Mr. Sharpe: The message he described? What was that question?

Mr. Rupp: I want him to tell how, in part, the figures

to which you are objecting were derived, the mechanics he went through to get them.

A. Well, in the first place, as I said earlier in the day, we had five million tickets available to study. We analyzed of those one million, two hundred fifty thousand. [fol. 107] To do that we had to organize a force of people which at times ran as high as one hundred fifty, and averaged, over a period of nearly ten months, some twenty or twenty-five people. Particular analysis of toll tickets took a crew of thirty-five experienced toll operators six weeks to segregate the information necessary to determine the time use and distance that those messages were hauled over the circuits of the company.

Mr. Rupp:

Q. Well, in addition to this examination of this one million, two hundred fifty thousand toll tickets, what else did these people do?

A. Now, in addition to the examination of the tickets—I might say that the toll tickets themselves only show the time the subscribers used the circuit. The time the operator used the circuit was determined by analyzing some fifty thousand tickets over a period, I believe, of approximately five days; that is, I mean, a bunch of time tickets accumulated over five days for the holding time of the circuit as far as the operator was concerned, was determined. The holding time was added to the subscribers' time, giving the total time the circuit was used for any call and drawn down finally for all calls.

Q. What else was done?

A. The tickets—I don't know as I quite get it——

Q. The calls, themselves, were observed, the boards and so forth, were they not?

A. Oh, yes, in connection with determining the time use of other parts of the property: the subscribers' switchboards, switching trunks, subscribers' lines and so forth. [fol. 108] We made service observations of the various subscribers' switchboards throughout the state, counted the number of messages and the number of connections that were put up on these switchboards over an interval of time and from those things we were able to determine the total annual time use of each of these elements of property I have been discussing.

[fol. 109] Mr. Mastick (on stand).

Mr. Rupp:

Q. I think you have stated, but I am not quite certain and want to be, why did you analyze this million, two hundred fifty thousand of toll tickets?

A. I analyzed those toll tickets because we wanted to find out how to apportion between interstate and intrastate the expenses, the revenues and the property of the company in the state of Washington.

Q. Now, going back to one of the earlier exhibits in this case which shows the separation of revenues between intrastate and interstate,—what exhibit number is that? Exhibit number 12 for 1933 and exhibit number 11 for 1932, for the Pacific Company. The books of the company disclose the entire amount of interstate revenue for the Pacific Company for the years 1932 and 1933?

A. No, sir, they do not.

Q. What do they disclose?

[fol. 110] A. The amount of interstate revenue derived from message tolls. That is for inter-exchange business. That is, toll calls between exchanges.

Mr. Sharpe: Between exchanges of the Pacific Company? You mean exchanges owned by the Pacific Company?

A. No, between any exchange—all exchanges.

Mr. Rupp:

Q. Where the message crosses the state lines?

A. Yes, sir.

Q. It discloses Washington's proportion of the revenue derived from a message, say originating in Tacoma, going to New York?

A. Yes, sir.

Q. And Washington's proportion of that is based on a per line haul revenue?

A. Yes, sir.

Q. Is that true of all interstate messages?

A. Yes, sir.

Q. That is shown on the company's books?

A. No, sir.

Q. Is that amount for 1932 as shown by the books of $1,123,536.49 shown in the first line of your exhibit 11?

A. No, sir.

Q. Why not?

A. Because of this fact. In the rate structure of the telephone business, we have two subdivisions. We have what is known as exchange rates and what is known as inter-exchange rates. The exchange rate is the rate of the [fols. 111-116] monthly amount a subscriber pays for his local exchange service, for connections within the exchange area, anybody he wants to call. That also includes access to the toll board when he wants it for inter-exchange business, intrastate or interstate business. The inter-exchange rates of the company are as between exchanges from the toll board in one exchange to the toll board in another exchange. Consequently, in the revenues from the subscribers' service, there is a certain amount of money which is allocable to the toll. The Supreme Court of the United States, in its recent decision in Smith versus the Illinois Bell Telephone Company, I think, 282 U. S., 133, laid down the rule that toll service was to be considered as starting at the station and terminating at the station. That is, from the originating subscribers' transmitter to the receiver of the terminating subscriber and it is that amount of money that has to be added on the books to the amount of interstate business shown by the books to give the interstate toll of $1,123,536.49.

[fol. 117] Q. Now, then, Mr. Mastick, what, as shown by your exhibit of the property of the Pacific Company, what is jointly used in the year 1932 and the year 1933? You have the percentage right there, I think.

A. The percentage of property jointly used in local intrastate toll and interstate toll by the Pacific Telephone and Telegraph Company in the state of Washington was 88.48 percent.

[fol. 118] Q. That is for the year what?

A. For December 31, 1932. That is the only study I have made.

Q. What would be the effect of the Pacific Company, first, abandoning its interstate business in the state of Washington, its intrastate business in the state of Washington?

Mr. Sharpe: I object to that as calling for a conclusion of the witness. The Court can determine from the evidence before it.

The Court: He may answer.

A. In the first place, if we abandoned the intrastate business for solely interstate business, we would have to retain nearly 90% of the property to do it. The revenues received from the interstate business, $1,123,536.49 is approximately one-tenth of the total gross revenues received from the combined intrastate and interstate business. Now, it is obvious, even from the standpoint of taxes alone, that if we had to retain 90% of the property to do interstate business, the taxes alone would wipe out the gross interstate revenue, to say nothing of the maintenance to be paid for on the 90% of the plant retained, the depreciation on the property and other expenses that goes with the operation of the property. As I see it, to do solely interstate business and retain 90% of the property, we would go broke.

[fol. 119] Q. You could raise the rates?

A. We would have to raise it twenty or thirty times what it is today.

Q. Do you think you could do business under that schedule of rates?

A. No, sir.

Q. Well, could you efficiently and economically conduct an interstate business over one system and an intrastate business over another system?

Mr. Sharpe: I object to that as calling for a conclusion of the witness, a matter of expert testimony, that the Court is called upon to determine in this case.

The Court: He may answer.

A. Your Honor, I have been in this business twenty-eight years and as chief engineer of this company in this area of the states of Washington, Idaho and Oregon, I designed and prepared estimates for more than $40,000,000 gross plant additions in those three states and know you could not economically or practically separate the property to carry on interstate and intrastate business.

Q. Do you know of any place in the world where a purely interstate telephone plant is built and purely interstate business is conducted?

A. No, sir, I do not.

Q. I think possibly, for the benefit of Court and counsel, that upon the summary sheet for the Pacific Company, at least, you should explain why no figures appear on that

sheet under the items 10, 11 and 12, being program sup-
[fol. 120] ply, leased plant to A. T. & T. Company and Clarkston, Washington.

A. Program supply and plant leased to the A. T. & T. Company is an interstate business. Clarkston, Washington presents a very peculiar situation. It is served by the Lewiston exchange. There is no exchange in Clarkston. The subscribers' loops run to Lewiston, Idaho. The local service is interstate.

Q. When two people in the city of Clarkston talk to one another, the call is interstate?

A. Right.

Q. Because it has to go across the State line to Lewiston and back to the other subscriber in Clarkston, across the Stateline?

A. Yes, sir.

Q. That you have considered purely interstate?

A. Yes, sir.

Q. The leased line, or the plant leased to the A. T. & T. Company is leased in connection with the operation by the American Telephone and Telegraph Company of a circuit running from Seattle across the State line to the east?

A. Yes, sir.

Q. And of course, program supply, being radio, is purely interstate?

A. Yes, sir.

Q. You have had something to do with the designing of the telephone property, have you not?

A. Yes, sir.

Q. You designed about $40,000,000 worth of it?

[fol. 121] A. Yes, sir.

Q. What would you say as to whether the property is necessarily designed to do both classes of business, both intrastate and interstate simultaneously with physical use?

Mr. Sharpe: I object to the last of that as calling for a conclusion. The first part, I don't think is objectionable. I will object to it on the further ground the question is dual in its nature and submits to the witness two or more questions, and calls for a conclusion of the witness. I object to the last part of the question because it calls for a conclusion of the witness and that is a matter for the determination of the Court in this case.

The Court: He may answer.

A. Well, the Telephone Company sets itself up to give a universal service, and that includes both intrastate and interstate service and the plant is designed to handle both classes of service simultaneously or at different times over the same facilities operated by the same employees through the same exchanges.

Mr. Rupp: I think, Mr. Sharpe, you may inquire.

[fol. 122] Cross-examination.

By Mr. Sharpe:

Q. Mr. Mastick, you are the general staff engineer of the company, and in response to a letter from the Tax Commission to the Pacific Telephone and Telegraph Company, you prepared a letter and statement as to the taxes and assessments on real and personal property taxes paid in the state of Washington, and the assessments on real and personal property under date of July 19,1934, did you not? The two statements covering the Pacific—the operating property of the Pacific and Home Telephone Companies for the years 1932 and '33? I will ask you—show you this document.

A. Yes, sir, I prepared these. They were prepared under my supervision.

Q. They are correct, are they?

A. To the best of my knowledge, they are, yes, sir.

Mr. Sharpe: I ask that they be received in evidence. I wish the privilege of substituting copies because they are the only ones we have.

Mr. Rupp: Never have any hesitation about that. No objection.

(Letter of July 19th, 1934, together with statements of taxes and assessments admitted in evidence and marked defendant's exhibit number 19.)

Mr. Sharpe: At this time I wish to withdraw this and let Mr. Olaison make a copy of it. You may check it.

Mr. Rupp: All right.

[fol. 123] Mr. Sharpe:

Q. You stated, Mr. Mastick, when you said that the, I believe you stated in connection with the payment of the

taxes, that neither the Home Company nor the Pacific Company had paid any portion of the occupational tax imposed under the terms of chapter 191, Laws of 1933?

A. Yes.

Q. Have they paid any taxes under the law of the city of Seattle, imposed by the occupational tax of Seattle?

A. Not in the years 1932 and '33.

Q. Did they, in the year 1934?

A. Seattle occupational tax.

Mr. Rupp: I can answer. I think they paid $661,000 in the months of June, July and August, being the payment for that portion of the year 1932, all of the year 1933 and that portion of the year 1934 to the time, the months of June, July and August.

Mr. Sharpe: That is the city ordinance attacked in the United States Supreme Court and sustained by the State Supreme Court, reported in 174, Wash.

Mr. Rupp: Yes, sir.

Mr. Sharpe: And appealed to the United States Supreme Court.

[fol. 124] Q. Mr. Mastick, you say the books of the company show the apportionment to the different states of [fol. 125] revenue from interstate toll calls? There is a showing of that kind made on the books of the company?

A. I mean to say the books of the company show the interstate revenues that accrue to Washington.

Q. That accrue to Washington.

A. Not on our books. The books of the Pacific Company do.

Q. Somewhere?

A. Yes.

Q. In other words, they apportion the interstate revenues by states?

A. Correct.

Q. On their books?

A. Yes, sir.

Q. In some way which you say is not strictly in accordance with the 282 U. S.

A. I think you misunderstood it. They make the apportionment to the states, the Pacific Company does, on a mileage haul basis of revenue from inter-exchange business.

Q. You say a mileage haul basis. That is mileage of line, you mean?

A. Yes, sir.

Q. For instance, if there is any interstate long distance call originating in Washington or terminating in Washington and the mileage of line in Washington is one hundred miles and mileage of line in Oregon is two hundred miles, Washington would be apportioned one-third and Oregon two-thirds of the revenue from the long distance toll as shown on your books?

[fol. 126] A. Yes, sir.

Q. That is the method you used with the division of all inter-exchange tolls in your books?

A. Yes, sir.

Q. The exchange itself has no part, portion of the revenue in either case? At either end, on the books of the company?

A. No, sir.

Q. It is your effort to give the exchanges some consideration in the division of this revenue on long interstate tolls that you have modified to some extent the showing made on your books?

A. That is what the Supreme Court says we have to do.

Mr. Rupp: I think you are both wrong.

Mr. Sharpe: Explain why you did it then.

Mr. Rupp: I will explain. Certain portions of the toll revenue, a certain portion of the originating toll revenue in Olympia is credited to the Spokane exchanges as compensation for the work which it does in connection with that toll business. That is right, isn't it?

A. You mean the Olympia exchange; yes.

Q. Mr. Sharpe: You mean that is in the ordinary course and is reported on your books?

Mr. Rupp: I don't know if it is set up on the books, but the exchange is compensated for the work it does in connection with a toll message, and we attempt to derive what is a fair return on the property in the city of Olympia. We take twenty percent of the toll business originating in the [fols. 127–129] city of Olympia, and say that is to be credited to the exchange as revenue for the exchange to compensate it for the work in toll business.

A. Yes, sir.

[fol. 130] Mr. Sharpe: You say you compared some 5,000,000 tickets for the year 1933, to segregate, find out what happened to each of the messages?

The Witness:

A. I said we handled about 5,000,000 toll messages or more, and analyzed 1,250,000 of them.

Q. A quarter of them?

A. Yes.

Q. You didn't have to go through them one at a time to find which involved interstate and which local messages?

A. We certainly did. That is what the 150 people were doing for six weeks.

Q. Your company hasn't adopted a plan for segregating local from the interstate business, isn't that why you had the difficulty?

A. What purpose is there for the company to make that [fol. 131] segregation? It is only to meet the demands of the regulatory bodies.

Q. Do you make the statement in the books?

A. They are analyzed currently, those tickets, month by month.

Q. You could keep the books in shape to show the apportionment to the States in these interstate tolls?

A. No, they can't do that. They can, so far as the interexchange business is concerned, but not the local exchange.

Q. There is no interstate local exchange except for Clarkston?

A. That is the only case exchange service is exclusively interstate. Every exchange has some use of the property in interstate business.

Q. You mean 282 U. S.?

A. Under that ruling.

Q. You don't think you could do it in entering the tickets on the books, make the allowance to the exchanges?

A. No.

Q. And still you are satisfied, in making the apportionment, not to allow in these, long and partial incoming, the long distance tolls between stations, you are satisfied with a system which yields its receiving station nothing at all as their part of contribution to the long distance toll?

A. I don't think that has anything to do with the intrastate and interstate proposition.

Q. If it is fair between stations, isn't it true in the interstate?

[fol. 132] A. We operate in the state of Washington one hundred ten exchanges. Each is compensated by twenty percent of the originating toll business. It works itself out and compensates one to the other, and we don't have to take into account the incoming business. We figured it out the twenty percent is a yard stick to compensate the same exchanges.

Q. You fall back on averages to compensate the station?

A. Yes, sir.

Q. And give the originating station twenty percent and the receiving station nothing, on the basis they will reciprocate?

A. Yes, sir.

Q. Now, we will take your—now take plaintiff's exhibit number 11. I think you have a copy of it there. The first item is gross operating revenues. And under—in the first vertical column, you have an item of ten million dollars plus.

A. Yes, sir.

Q. Those revenues are for the year 1932?

A. Yes, sir.

Q. And on plaintiff's exhibit number 12, there is a corresponding column for 1933?

A. Yes, sir.

Q. Which is nine million dollars plus. Those are all pure—are revenues from purely local business, are they not?

A. Intrastate business.

Q. Now, the next vertical column shows the revenues from interstate? The revenues or money items shown in [fol. 133] that vertical column are what you consider the state's proportion of the revenues received from interstate long distance calls?

A. I don't know as I understand.

Q. Plus what you get from telegraphs?

A. This includes all services we render. The total, the $11,456,965.46 is the total gross revenues for all services in the state of Washington. The second, just to the left of that, are the interstate apportionments of that, arrived at, and is as I heretofore testified to.

Q. And first shows for Washington for all services?

A. Yes, sir.

Q. The next shows the Washington proportion of the interstate?

A. That is right, yes.

Q. And those are the interstate revenues developed by Washington and their pro rata on interstate revenues incoming?

A. Yes, sir.

Q. The next item, B, licensee revenue debtor.

A. The amount paid to the American Telephone and Telegraph Company for services they render us.

Q. In what connection?

A. In connection with all sorts of things such as engineering advice, accounting advice, commercial and traffic advice, operating advice of all kinds. That payment is made under the license contract with the American Telephone and Telegraph Company to furnish us services of all sorts and characters and to permit us to use their patents, [fol. 134] and so forth.

Q. What is it, a percentage?

A. One and one-half percent, yes, sir.

Q. You pay the American Telephone and Telegraph Company, the parent company owning the most of the stock, one and one-half percent of the revenues received by you from all sources?

A. Yes, sir.

Q. Which you call licensee revenues?

A. Yes, sir.

Q. And you say it is paid out to compensate the parent company for certain services rendered by that company to you?

A. Yes, sir.

Q. Why isn't it charged as an operating expense instead of a revenue?

A. Under the new accounting circular, it is considered an operating expense. Under the old requirements to December 31, 1932, the first issue of the Interstate Commerce Commission circular, it was deducted.

Q. Which do you think is the proper way, as an accountant, not doing it as the Interstate Commerce Commission says, but looking at it as an accountant, which do you think is the proper way?

A. I don't set myself up as an accountant.

Q. You have made out the income statements?

A. One doesn't have to be an accountant to do that. I have taken the figures from the books and apportioned them and set them up in that form.

Q. Who is here as an accountant?

[fol. 135] A. Mr. Sheldon.

Q. The next item is item D, total operating expenses. Now, where do you get those operating expenses for the report to the Department of Public Works? Where is the report?

Mr. Rupp: Right there.

A. It is 1932, isn't it? On one of the inserts we furnish the Department of Public Works.

Mr. Sharpe:

Q. What is the amount for 1932?

A. The amount for 1932 is $7,967,601.12.

Q. You have $7,512,247.00.

A. That is intrastate.

Q. Intrastate. And the total $8,213,000.00 on your statement.

A. There are certain other deductions not reported in 1932.

Q. One of those deductions is depreciation, is it not?

A. No, sir.

Q. What? Don't you treat depreciation as an operating expense?

A. Depreciation expense is given here in the report.

Q. Is it?

A. Oh, yes.

Q. Well, if it is given there—(interrupted)

A. Depreciation of plant and equipment, $2,464,912.03.

Q. Is it shown on these statements?

A. It is shown on page 303, account 320, telephone operating expenses, line 29.

Q. How much?

[fol. 136] A. $2,464,912.03.

Q. How do you arrive at that $2,464,912.03 for the year 1932? Do you take a certain percentage of the equipment, plant and so forth, or certain items of your accounts?

A. Mr. Sharpe, we determine yearly a depreciation rate to be applied to all classes of telephone plant.

Q. Applicable to all classes?

A. For each class of property we determine a separate depreciation rate.

Q. And multiply that rate when it is approved by somebody? Who is it does it?

A. As I recall it, we furnish the Department of Public Work with those depreciation rates we use in computing these figures and furnish them to the Interstate Commerce Commission of the United States.

Q. And also use them in making up your books?

A. Certainly.

Q. You use a different rate as to each item each year?

A. Whenever there is any change in conditions, in service life, or that sort of thing, yes.

Q. Do you change those depreciation rates as to different items of equipment ordinarily each year or do you not?

A. I think not. I think we change them whenever it seems there has been some change in the art, or something of the sort, which requires a change of charge for the types of equipment and so forth. If it is necessary, we make them every year; if not, when it is necessary.

Q. Have you any record on your books as to the total accrued depreciation of your plant and equipment in the State of Washington?

[fol. 137] A. Depreciation reserve?

Q. Yes.

A. No, sir.

Q. You don't keep that for the system?

A. Yes, sir.

Q. Where in your books, in your reports, do you show the accrued depreciation reserve?

A. In the annual report, I suppose it is shown here on some page, if I can find it. May I inquire of Mr. Sheldon? He is more familiar with the pages of the reports than I am.

Mr. Sharpe: Surely.

Mr. Rupp: Of course.

Mr. Sharpe: 224, page, would that be correct?

Mr. Rupp: I can't see how the amount of reserve has anything to do with this page, but I am not going to object to it. It has——

Mr. Sharpe: You have shown what percentage of return

you are getting on your cost. Let's see how much you are getting on your cost less depreciation.

Mr. Rupp: Less depreciation of what?

Mr. Sharpe: Depreciation of additions and betterments. I presume you keep your books right.

Mr. Rupp: The depreciation shown in the annual report for the company as a whole is an expense item and has nothing to do whatsoever, either with the value of the property, or the cost of the property, or anything else. There is no more connection between them than between [fol. 138] daylight and darkness. One is an expense and the other is a different item. You can't subtract apples from pears and get melons.

Mr. Sharpe:

Q. Do you have anything to do with the determination of the depreciation factors?

A. No, sir.

Q. Who determines those each year?

A. They are determined by the inventory and cost engineer.

Q. And have been for a long number of years?

A. Yes, sir.

Q. Ever since you have been in business, you have been doing the same thing?

A. Yes, sir.

Q. And each year, of course, this depreciation reserve increases, does it not?

A. Well, I don't know as I could say that.

Mr. Rupp: I can answer it. It does not. It goes up and down. Some years it is more than it was the year before, and sometimes it is less.

Mr. Sharpe: In other words, this depreciation allowance is supposed to make good the actual physical depreciation of the property in which, of which the plant and equipment of the company consists, is it not?

A. It is to take care of—(interrupted).

Q. Actual physical deterioration of it?

A. To take care of the property.

Q. On page 224 you show the accrued depreciation to be [fol. 139] $57,765,570.78?

A. 224?

Q. Page 224, I think, of your annual report to the Department of Public Works.

Mr. Rupp: That is right as shown for that year, it is $57,000,000—(interrupted).

A. $57,765,570.78.

Mr. Sharpe:

Q. For the year ending December 31, 1932?

A. Right.

Q. What is it for the year ending December 31, 1933? Page 238 in that report. Depreciation reserve. All right, for 19——

Mr. Rupp: Balance at the close of the year?

Mr. Sharpe: As of the end of the year 1933, the depreciation reserve was $56,636,997.39, was it not?

A. Yes, as shown by the report.

Q. As shown by the report. Now, then, for year—will you turn to your report for the year ending 1932, and find out the total investment in plant and *investment* of the company?

A. For the state of Washington?

Q. No, for the system.

A. All right. I have it.

Q. What page?

A. Page 204, line 43, column E.

Q. All right, the total investment in fixed capital installed?

A. That is right, the entire fixed capital installed.

Q. As of the end of the year 1932, was $246,108,035.61, was it not?

[fol. 140] A. Yes, sir.

Q. And at the end of the year 1934 you had a similar statement somewhere?

A. '33.

Q. Page 33?

A. No, I say 1933.

Q. Where do you find it in this one?

A. Page 202.

Q. All right, for the end of the year 1933, investment in telephone plant for the system as of the end of the year 1933? $247,446,618.85?

A. That is right.

Mr. Rupp: Except in one respect. That is not the system investment, that is the company investment.

A. Company investment.

Mr. Rupp: That is entirely different. We would have several million to add for system. We would have several hundred million to add for system. This is company figures. You asked if that was system figures. The Pacific system is—the Pacific system and the Pacific Company are two different animals.

Mr. Sharpe:

Q. You say that is the amount standing in the name of the Pacific Telephone and Telegraph Company that is referred to there?

A. Yes, sir.

Mr. Rupp: I didn't want to get the system and the com-[fol. 141] pany mixed. We are dealing with two hundred forty-seven million dollars in one case and four hundred fifty million dollars in the system.

Mr, Sharpe:

Q. State whether or not the figures you have given with respect to investment in telephone plant, of it belonging to the company, we will say, not belonging to the system which, in the case of the year 1933, was two hundred forty-seven million dollars plus compares with your figures in plaintiff's exhibit 6 in the fourth vertical column, amounting to fifty-six million dollars plus.

A. That is the actual performance appraisal, not the amount on the books.

Q. In what respect does this differ from the figures on the books?

Mr. Rupp: About seven hundred thousand dollars difference.

Mr. Sharpe: About seven hundred thousand dollars for the entire system?

A. For the state of Washington.

Mr. Sharpe:

Q. The actual, the item investment in telephone plant is the equivalent, is it not, in meaning and terms and limita-

tions of actual performance and appraisal? In what respect do they differ?

Mr. Rupp: I think I see what you want. You are trying to compare the figures of the report for the Pacific Company as a whole with the figures for the state of Washing- [fol. 142] ton. The one comparable thing is the amount on the books. That is plaintiff's exhibit 1, rather than plaintiff's exhibit 6.

Mr. Sharpe: The amount on the books. The comparable figures with the item investment in telephone plant appearing on page 202 of the report of 1933 would be column 4, vertical column 4, of plaintiff's exhibit 1.

Mr. Rupp: It would be the last figure for 1933, the total for the year?

A. Yes.

Mr. Rupp: No, again you are trying to compare two entirely different animals. The figures shown on page 202 of the annual report to the Department of Public Works for the Pacific Company for December 31, 1933, can not be compared with any of the figures directly in these exhibits and the reason for it is plain and apparent and obvious. These figures, the figure shown, 1933 total, at the end of the year, as you will notice, includes average working assets of $1,565,594.00, and there is not shown on page 202 of the report to the Department any average working assets for the Pacific Company as a whole. There are, of course, other reasons you can't directly compare them, but that is—(interrupted)

Mr. Sharpe: All right, I will concede the last reason is one, and probably a good one, but what are the other [fol. 143] reasons you can't compare them?

Mr. Rupp: You could compare them, but what would you get when you got it?

Mr. Sharpe: In what respect do they not correspond, the one within the State and the other for the system?

Mr. Rupp: Obviously, of course. Things like right of way, land, buildings and central office equipment; if you wanted to find a ratio between the amount shown on the books of the Pacific Company for land, buildings, right of way, central office equipment, as compared with the figures shown on page 202, a direct comparison can be made. That is quite true. But I don't know what it would get

you when you got it, because down here you have undistributed cost of property, $441,970.56. You will remember that we have taken out of this figure here shown on plaintiff's exhibit 1, a figure of something over $12,000.00, which is the undistributed cost of property in the state of Washington of the Pacific Company and you would have to subtract out those figures again to make a comparison.

Mr. Sharpe: Other than that, there is no reason why we couldn't compare the exhibit 1 with the page 202.

Mr. Rupp: By making those changes, I suppose, you [fol. 144] could compare them. I would give you a ratio between plant and equipment for the state of Washington as compared with the company as a whole, but it wouldn't tell you anything more about the depreciation reserve than if you said you walked five miles to Olympia in one pair of shoes and could eat ten apples tomorrow, because there is no direct connection between them.

Mr. Sharpe:

Q. In other words, with the total investment, first, I want to say, in this investment in telephone plant, there is no deduction for depreciation, is there?

A. As reported on the annual report?

Q. As reported on page 202.

A. No.

Q. Then the investment in telephone plant as of the end of 1933, for the company is $247,000,000 plus, as already shown?

A. Yes.

Q. And the depreciation reserve for the same items of property covered in this investment in telephone plant are shown on page 238 to be fifty-six million dollars plus?

A. Yes.

Mr. Rupp: That isn't true, either, because—I just want to keep you straight, because in these figures shown on page 202, there are items of property that are not depreciable. We can turn to page 238 and turn to the items of [fol. 145] property to which the reserve relates, if you want to put it that way, there are some items on page 202 that are not on page 238. For instance, in this 247 million dollars, as I pointed out a minute before, there is undistributed cost of property in the sum of $441,000,000. There

is no comparable space here under the reserve for that particular item of property.

Mr. Sharpe: In other words, there are some things you don't depreciate at all. You wouldn't depreciate real estate, would you?

Mr. Rupp: No, of course.

Mr. Sharpe: I say, out of the total shown in the item on 202, I have pointed out and demonstrated investment in telephone plant, there are items for which a reserve has been set up of some fifty-six million dollars plus.

Mr. Rupp: That is a more correct statement.

Mr. Sharpe:

Q. You say you don't keep track of your accrued reserve by states?

A. No, sir. It is a system total.

Q. Is there any reason why the same relation would not apply between the depreciation reserve and the investment in company's plant for the entire company, Pacific Company, and in the state of Washington, why the same relation should not exist between the depreciation reserve and the investment in the company's plant for the entire company and with the state of Washington? Is there any rea- [fol. 146] son the same relation should not exist as between the two?

A. I never thought about it.

Mr. Rupp: Let me ask you a simple reply question.

Mr. Sharpe: I am talking to the witness now. In this particular case it is all right.

A. I don't know.

Mr. Sharpe:

Q. You don't know. Is there any reason why a different percentage should apply in the state of Washington than the company as a whole as between depreciation reserve and the total investment in plant?

A. I have never thought about it, Mr. Sharpe. I can't answer.

Q. You couldn't tell, except by personal analysis of every piece of equipment and piece of property in the state, to determine whether there is any difference as between that

percentage in the state and the percentage for the company as a whole?

A. There are undoubtedly different rates of depreciation in different states under different conditions. On that basis, I would say we couldn't.

Q. You would have to analyze the property?

A. Yes, sir.

Q. To determine whether there was a difference in the state of Washington and for the entire country?

A. I don't know how else we could find out.

Mr. Rupp: Perhaps I can clear you up. The fact is, a study is being made, and has been going on for a year and a half, to see if we can ascertain how this reserve can be [fol. 147] apportioned to the state. The Interstate Commerce Commission has requested such action, and the study has been under way for a year and a half, but it is not completed, more than that this must be true: Suppose we operated in three states, and in one we made six percent, and in the other we didn't take in enough to set up a reserve. The minute we tried to apply a reserve for the whole company against a state that never made enough to set up a reserve, we are going to get a wrong result. How are the people of the state of Washington to look to a reserve set up in California?

Mr. Sharpe: You have set up your reserve, and I am using it for this purpose.

Mr. Rupp: You can't use it for this state.

Mr. Sharpe: Let us know, then, what it is.

Mr. Rupp: Nobody knows, because nobody ever asked us to set up a reserve for a state except within the last year and a half, and we are endeavoring to make the study and it is a long, complicated job and, in my estimation, doomed to failure because you have to take into consideration what you take in.

Mr. Sharpe:

Q. Now, we seem to have a little time before five o'clock. We will study this picture.

Mr. Rupp: They, after all, are usually agreeable things.

[fol. 148] Mr. Sharpe:

Q. Referring to plaintiff's exhibit number 15, I guess you have a copy of it there. Now, the first area, we will mark "A".

A. I called it Seattle in my testimony.

Q. We will call this "B" and the one to the extreme left, "C". I think it will be simpler to call the areas A, B and C, and if Your Honor doesn't object, I would like to have them marked that way. Well, we really should mark this lower one "B" because the other merely carries it through.

All right, now. You have assumed, in preparing this study shown by plaintiff's exhibit number 15, that the Pacific Telephone and Telegraph Company own all the equipment and plants of A, B and C, all of the plants shown upon the exhibit?

A. I don't know as I said anything about it, but it is all right to assume that.

Q. All right, let us assume that the Pacific Company owns all the plant shown in the multi-office exchange.

A. Yes, sir.

Q. Plant A. And that a foreign company, other than the Pacific Company, owns plant B, and that the Pacific Company owns the connecting lines, the lines that connect plant B with plant A. Is there, in the state of Washington, any situation in which the—we will speak of plant B as a local exchange area, is that fair?

A. That is fair, yes.

Q. And plant A as a local exchange area, plant A belonging to the Pacific Company, plant B to a foreign company, [fol. 149] let us say the Home Company of Castle Rock.

Mr. Rupp: That isn't a good illustration, because we own 100% of it. Take Ellensburg, because that is purely an independent outfit.

Mr. Sharpe: Well, assume B is Ellensburg, then.

Q. Are there situations where the connecting line such as plant B on plaintiff's exhibit 15 is owned by an independent company, independent of the Pacific Company?

A. You mean the exchange property is independent of the Pacific Company? Yes, at Ellensburg.

Q. Do you make connections of long distance service between Ellensburg and Seattle?

A. Yes, sir.

Q. In what way does the making of the connection between Ellensburg and Seattle differ from the method of making connections between Olympia, where the company owns the plant, and Seattle?

A. None at all.

Q. In what way does the character of the property utilized in the Ellensburg plant differ from the plant in Olympia in making the connection?

A. Not at all as far as the exchange plant is concerned.

Q. Who owns the line between the Ellensburg Company and Seattle, toll lines?

A. The Pacific Company.

Q. Who owns the toll office, the equipment in the toll office in Ellensburg?

A. I presume the Ellensburg Company owns it.

Mr. Rupp: They do. I am attorney for them. I know.

Mr. Sharpe: I thought you said it was wholly independent.

[fol. 150] Mr. Rupp: It is, but they see no objection to hiring me. They thought I knew something about the telephone business, I guess, but I know as a matter of fact, as a matter of actual fact, that the toll switchboard in Ellensburg is owned by the Ellensburg Telephone Company, that being a trade name for John M. Faust.

Mr. Sharpe:

Q. We will speak of Ellensburg as a foreign exchange area.

A. Yes. You mean an independent exchange?

Q. Yes. How many independent exchanges are there in the state of Washington comparable with Ellensburg?

A. In size or exchanges?

Q. In number of exchanges?

A. I would say in the vicinity of one hundred—or one hundred two.

Q. In the vicinity of a hundred. Is there any case where an inter-exchange toll service is rendered between each one of these one hundred two foreign exchanges and exchanges belonging to the Pacific Telephone Company in the same manner as toll service is rendered between Olympia, belonging to the Pacific Company and Seattle, belonging to the Pacific Company?

A. If they connect with the Pacific system; they are all handled the same.

Q. Don't all of these one hundred two companies connect with the Pacific system?

A. I presume they do, yes.

Q. And the inter-exchange service, which is the toll [fol. 151] service, is handled in exactly the same way between each of those one hundred two companies and exchanges belonging to the Pacific Company as between stations belonging to the Pacific Company?

A. Yes.

Q. In how many of those one hundred two exchanges or the areas occupied by those one hundred two foreign exchanges, does the Pacific Company have duplicate services and duplicate equipment, and duplicate plant or a duplication of plant and equipment?

A. We don't have any plant and equipment in the independent exchanges. They operate it themselves. The exchange service is delineated by the Department of Public Works.

Q. Non competitive? You couldn't compete with them?

A. No.

Q. You don't have any duplication of plant and equipment?

A. No.

Q. Do you have duplication of plant and equipment with any exchanges in the state of Washington belonging to another company?

A. No, sir.

Mr. Rupp: Maybe I can help you a little. The West Coast Company operates in the counties of Snohomish, Island, Skagit, and possibly in Whatcom County. They own and operate—own and operate the exchanges in that county. They have toll lines of their own and we do have a toll line running through those counties. To that extent, there [fol. 152] might be duplication.

A. But there is no competition.

Mr. Rupp: We both may have plant on the same road in those counties, but they also connect with us, Mr. Sharpe, that may help you.

(Whereupon an adjournment was taken until nine-thirty a. m. January 10th, 1935.

(Upon reconvening at nine-thirty a. m. January 10th, 1935, the following proceedings were had:

Mr. Mastick (on stand).

Mr. Rupp: Before Mr. Sharpe resumes his cross-examination, let me say I made a statement here yesterday which was erroneous. I stated that the amount paid to the City of Seattle for occupational tax levied by that city by the seventh of August, was $660,000 odd dollars. That was wrong. The amounts paid by the seventh of August to the City under the occupational tax ordinance was $488,922,02, $167,-708.75 of that amount having been paid on the seventh day of June, $221,286,34 having been paid on the seventh day of July, and $99,926.93 having been paid on the seventh day of August.

We did pay to the City of Seattle at about that time, a total, as I remember it, and I think I am still correct, of $660,000; the difference between this amount of $488,922.02 [fol. 153] and that amount arose in this fashion: After the City imposed this occupational tax, and while the litigation concerning that tax was continuing, the City imposed a further tax upon us of $13,000 and some odd dollars, roughly, each month. We had not paid that tax for many months and at the time we arrived at an understanding with the City of Seattle about all this tax matter, the payments that were due from us, assuming the ordinance under which that 13,000 odd dollars a month was valid, amounted to a sum sufficient to, which added to the $488,000 dollars brought total payment by the seventh of August up to $660,000.

I forgot yesterday, when I made that statement, that the amount paid included this 13,000 some odd dollars per month levied under another ordinance passed by the City of Seattle.

Mr. Sharpe: All right.

Q. Mr. Mastick, we referred yesterday to exchanges that were owned by companies that were independent of the Pacific Company or the American Telephone Company as foreign exchanges and the areas covered by those exchanges as foreign exchange areas, is that fair to use those terms?

A. Yes, if you use it with the understanding they are independent connecting companies.

[fol. 154] Q. Where long distance telephone messages are transmitted from foreign exchanges to exchanges of the Pacific Company, you have certain contracts, that is the Pacific Company, that is certain contractural relations with the company operating the foreign exchanges?

A. That is right.

Q. What are the terms of those contracts, are they of standard form? Is the same general form used with each of these companies or are there different forms?

A. I am not qualified to answer. I have never seen one of them, so I am not capable to saying anything of the detail.

Q. Who knows?

A. I know in a general way what the contracts provide regarding compensation to those exchanges.

Q. Which of the gentlemen of the company here would know of the forms of contract, if you know?

A. I don't think any of them would.

Q. You say you know in a general way what those contracts provide?

A. Yes.

Q. What are the general provisions?

A. Those general connecting exchanges usually get thirty percent of the originating toll revenues.

Q. Where the call originates with the foreign exchanges, thirty percent?

A. Yes, sir.

Q. Of the total toll from station to station?

A. The total. Thirty percent of the total originating [fol. 155] inter-exchange revenues, interstate and intrastate revenues.

Q. Whatever they are?

A. Yes.

Q. Then you have special provisions in regard to transcontinental tolls?

A. From connecting company exchanges?

Q. Yes.

A. I don't know them.

Q. You only get a certain percent for transmitting, a certain percentage of the toll for transmitting from Seattle to New York?

A. Our line haul. Whatever the relation of haul in our territory is to the total length of haul.

Q. It is transmitted over the American Telephone and Telegraph Company lines?

A. From Seattle, yes.

Q. Isn't that true of all territory of the Pacific Telephone and Telegraph?

A. No, it is all territory embraced by the Pacific Telephone and Telegraph Company in the states of Washington and Idaho.

Q. Not in California?

A. California would go over the central trans-continental line from San Francisco.

Q. Oh. Suppose you got a call from Seattle to Paris, what proportion would the Pacific Telephone and Telegraph Company get?

A. I don't know. We get our line haul, whatever it is. I don't know the arrangements for trans-oceanic messages.

[fol. 156] Q. Suppose you get a message to a ship on the ocean.

A. I don't know anything about those rates.

Q. Foreign exchanges get the same rate as inter-exchanges, thirty percent of the total?

A. It would get thirty percent of whatever the Pacific Company was entitled to on originating business.

Q. Suppose the message was received by this foreign line and originated on the Pacific line, would the foreign line get anything at all?

A. No, sir.

Q. Suppose the foreign line operated part of it, operated as a part of its system, a toll line like the West Coast. The West Coast operates in Everett, does it not, on local exchanges and also operates toll lines?

A. In certain of the counties, yes.

Q. Suppose a message originated on the West Coast line and was transmitted partly over the toll line of the West Coast and partly over the Pacific Company's lines. How would that be divided up, in the same way?

A. I don't know. I never had occasion to inquire into that particular situation.

Q. Who does know, anybody here? Do you know, Mr. Rupp?

Mr. Rupp: I will tell you what I think is the fact. I would have to check it. I think a call originating at Mt. Vernon in the West Coast Company's territory and going,

we will say, to Portland—the West Coast Company would receive that call, of course. It would go from Mt. Vernon to Everett wholly on the lines, if it went that way, on the [fol. 157] lines of the West Coast Company. My recollection is they would receive that portion of the revenue themselves, that went over their line. And wherever they connected with the Pacific Company outside the city of Everett, somewhere between Seattle and Everett, the—— I don't know if they get any proportion of the haul from there or not. I don't know about that.

Mr. Sharpe: As you understand it, the toll from Mt. Vernon to Portland would be the sum of the tolls over the West Coast lines and the Pacific lines, the total toll? Each company gets its particular toll on that call?

Mr. Rupp: I think so.

Mr. Sharpe: That would be true whichever way the message went?

Mr. Rupp: I think so.

Mr. Sharpe: That only occurs where the company owns part of the toll line?

Mr. Rupp: Yes, and that is an unusual situation.

Mr. Sharpe:

Q. Where the company owns a local exchange, it only receives a percentage of the outgoing call?

A. Yes, sir.

Q. And none of the incoming calls?

A. No, sir.

Mr. Sharpe: I wish to offer in evidence these two forms of contracts which, I imagine, are representative of the [fol. 158] contracts entered into between the Pacific Company and outside exchanges. The one between the Pacific Telephone and Telegraph Company and Howerton, doing business as the Ilwaco Company, and the Pacific Company and the Oregon-Washington Telephone Company.

[fol. 159] I will admit these are contracts of that date between Howerton and the Pacific Company and the Oregon-Washington and the Pacific Company.

(The Pacific Telephone and Telegraph Company connecting agreement with J. A. Howerton admitted in evidence and marked defendants' exhibit no. 20).

(Connecting agreement with Oregon-Washington Telephone Company admitted in evidence and marked defendant's exhibit no. 21.)

Mr. Sharpe:

Q. Now, if incoming calls on these foreign exchanges are collect, are collect calls, in that event, the incoming station receives part of the compensation, do they not?

A. I believe they do.

Q. Do you know what part? The same part as if they were a sending company?

A. No, I don't.

Q. These are more or less standard relations?

A. Always contractural relations between the two parties.

Q. You have these contractural relations with each of these one hundred two foreign exchanges in the state of Washington?

A. Yes, sir.

Q. Outside the state of Washington in the territory occupied by the Pacific Company, there are also a large [fol. 160] number of foreign exchanges?

A. Yes, sir.

Q. Referring to the territory outside of the state of Washington.

A. Yes, sir.

Q. There are several hundred?

A. No doubt.

Q. Do you know the number?

A. No, sir.

Q. Approximately?

A. No, sir.

Q. Now, referring to foreign exchanges, as exchanges that are independent, not of the Pacific Company, but of the Bell system in the whole United States, there would be several thousand of these foreign exchanges, would there not?

A. Undoubtedly.

Q. Now, so far as you know, are the operations of the Pacific Company with any of these foreign exchanges located outside of the state of Washington competitive or non-competetive, which?

A. I don't know of any competetive system on the Pacific Coast.

Q. Do you have any competetive system in territory served by the Bell system, so far as long distance is concerned?

A. Not of my own knowledge.

Q. Do you know of any, of any case as to any of these foreign exchanges, either within or outside the state of Washington where there is a duplication of service as be-
[fol. 161] tween the Pacific Company or the Bell system and the independent companies?

A. I do not, specifically.

Q. In each of those cases the long distance, the arrangement for handling long distance messages as between the foreign exchanges and the Bell system is handled by, as a result of a contract entered into between the Bell Company and the—(interrupted).

A. So far as the Pacific Company is concerned.

Q. It would be true of all of the Bell system?

A. I don't know.

Q. So far as the Pacific system is concerned, it would be true?

A. Yes, sir.

Q. What you have said of the relation between the exchange at Ellensburg and the Pacific Company and the transmission of toll messages between Ellensburg and the Pacific Company would apply equally to the transmission of toll messages between the Pacific Company and any one of these foreign exchanges, either within or without the State of Washington, would it not?

A. Yes, sir.

Q. Suppose, for some reason, the Pacific Company should elect—and the Ellensburg Company should get together, and the two companies should agree the Ellensburg Company should sell out all of its operating property to the Pacific Company and the Pacific Company would thereafter continue to furnish to Ellensburg the same service which it now furnishes, both local and long distance, that is, which the two companies now furnish jointly?

[fol. 162] A. In other words, the Ellensburg Company becomes a part of the Pacific Company?

Q. Yes. And all of the property of the Ellensburg Company is transferred to the Pacific Company, sold and de-

livered, and assume that the service, the same efficient service, is furnished by the Pacific Company after the consolidation as before, as was previously furnished by the two companies acting independently? How much additional property would the Pacific Company have to acquire in order to furnish the same service, efficient service?

A. How much additional property beyond what the Ellensburg Company now owns?

Q. In addition to what the two companies now own, how much would have to be acquired to furnish the same service?

A. I don't see that any.

Q. How much property which is now owned by the two companies independently, could be disposed of as a result of a merger?

A. Not any, that I know of.

Q. Suppose the Pacific Company came to the conclusion that the—that it didn't care to operate the Olympia exchange any more as a part of the Pacific Company's property but that it would dispose of the Olympia Company, so far as the furnishing of local service was concerned, and that thereafter the Olympia properties would be operated in the same manner as the Ellensburg properties now owned by some independent company, it would be perfectly possible for some independent company to buy of the Pacific [fol. 163] Company the properties used by it, principally used by the Olympia division?

A. The exchange properties, yes.

Q. And perfectly possible for that company to have the same operating agreements as the Ellensburg Company, that is, with the Pacific Company, would it not?

A. Yes, sir.

Q. How much; and assume, now, that a new company is organized and the new company takes over the Olympia exchange and thereafter Olympia to be operated in the same manner as the Ellensburg property is now operated. How much additional property would the two companies have to acquire in order to carry on the operation in the same manner the property is now being operated by the Pacific Company?

A. None whatever.

Q. How much property could the two companies dispose of, if any?

A. None, whatever.

Mr. Rupp: You are including in your question the fact the Interstate Commerce Commission would have to agree to the purchase or sale of property. We can't buy—(interrupted)

Mr. Sharpe: I—(interrupted)

Mr. Rupp: We can't buy or sell property unless they agree to it, and the independent company couldn't.

Mr. Sharpe: That is assuming the legal technicalities.

Q. That would be true of foreign exchanges such as Olympia that was now being operated by the Pacific Company, local exchange, would it not?

[fol. 164] A. I could speak for the state of Washington.

Q. For the state of Washington?

A. Yes.

Q. In other words, if the two companies were split, one using, one operating the local exchange and one operating, continuing to operate the balance of the system, you wouldn't have to acquire any more property and wouldn't sell any more in order to continue to function with the same degree of efficiency?

A. No.

Q. Now, suppose the Bell Telephone System, which is the parent company, we will say the American Telephone & Telegraph Company, with the consent of the Interstate Commerce Commission, elected to so operate thereafter, that one company, let us say, the Pacific Telephone and Telegraph Company, would thereafter handle all of the interstate business now handled by the Pacific Company and wouldn't handle any, that is all of the interstate business with the exception of that portion of that part of the interstate service handled by the local exchanges, you contend under the 282 decision that the exchange does contribute a part of the interstate service where it handles the message at one end?

A. Yes.

Q. Let's assume the American Telephone and Telegraph Company elect to have the Pacific Telephone and Telegraph Company handle only interstate business and all of the interstate business with the exception of that portion handled by the local exchange as held by the 282 U. S.

[fol. 165] A. The Pacific Company handles both now.

Q. Let's assume them, hereafter, to handle only interstate business, but all of it, with the exception of that part handled by the local exchanges.

A. What has the Bell system to do with that?

Q. Let's assume the Pacific Company thereafter is to assume only to operate only its interstate business and no other business.

A. All right.

Q. And it was to handle all the interstate business with the exception of that part handled by the local exchanges in connecting long distance calls.

A. All right.

Q. Let's suppose that some other company, say company B, was to handle all other, all the other business now handled by the Pacific Company in the state of Washington, that is possible?

A. No, sir, I don't think so.

Q. I mean it is conceivable, is it not? That——

A. Hypothetically. The premise you set up.

Q. Let's suppose that these companies are friendly and non-competetive. They would be, would they not, one handling the local business and one inter-state?

A. Yes, sir.

Q. And it is possible for each company to make joint user arrangements with the other company for use of its property for handling messages, one way and another?

A. I don't know as to that. It would be a very complicated joint user contract. I fail to see how you could unscramble the interstate and intrastate business. All are [fol. 166] carried on the same toll lines and wires, intrastate and interstate.

Q. One company could pay the other a reasonable charge for the use?

A. It would be a glorious time trying to figure up that charge.

Q. If it was necessary, it could be done, could it not? If each company in that case were perfectly friendly and willing to enter into joint user arrangements, each could use the property of the other, would they normally, under those circumstances, each duplicate the service of the other?

A. I would hate to be the company that took over the interstate business.

Q. Now, do you conceive, as a business man, that if the two companies undertook to perform that service, one the interstate and one the local, would they, as a matter of fact, as good business men, duplicate the exchanges?

A. I can't see any point in that fact.

Q. I am assuming that the condition exists.

A. The fact is, it is one company.

Q. In your complaint you have assumed you are surrendering all your local business and doing only an interstate business. I am assuming what you say you are assuming in your complaint. I want to know whether, under those circumstances, you think those two companies would duplicate all of their equipment, as good business men. I am assuming they are friendly and perfectly willing to enter into equitable contracts for the joint use of the two [fol. 167] companies of the same common property. Could it be done?

A. No such thing has even been done to my knowledge.

Q. I don't care whether it has been done. I want to know could it be done?

A. I don't know whether it could be done practically or economically or at all.

Q. If the company owning all of the lines necessary to handle the local business, all of the lines necessary to handle the local long distance, the intrastate long distance business, could that company—that company could handle, I think you testified yesterday, the messages transmitted, the interstate messages transmitted between the state of Washington and other points in other states. In other words, you testified the same lines between Vancouver, Washington, and Seattle, could not only handle simultaneously messages between Vancouver and Seattle, Vancouver and Olympia, and Chehalis and Seattle, and San Francisco.

A. Well, Mr. Sharpe, you are setting up to say the same property shall be in use. The only thing you saw above that is a hypothetical division of ownership of the property.

Q. No, say a joint user agreement, one company to pay to the other a certain revenue or rental for the use of that particular property in transmitting its messages.

A. One company owns the entire property and leases the rights to two other hypothetical companies? Certainly, the system would operate.

Q. And it could operate on, how much additional prop-
[fol. 168] erty would it have to acquire to operate that way?
A. None whatever.

Q. And it could operate and cover the two kinds of service with, the two forms, of service, with the same efficiency as now?

A. Not necessarily. You have three organizations operating the same property and there will be greater expense involved.

Q. Bookkeeping. But so far as equipment is concerned and operating property is concerned, there would be no reason for any duplication at all, would there?

A. No, sir.

Mr. Rupp: What is this, one of these "make-work plans" under the New Deal? You have three sets of general managers and counsels and so forth. If you have three companies, you have three sets of attorneys. Now, there is no use talking—(interrupted).

Mr. Sharpe: Well, perhaps the mortality table would help out after a while.

Mr. Rupp: I am afraid it is rather—

Mr. Sharpe:

Q. That could be all done if mutually agreeable to the two companies?

A. Yes, sir.

Q. Wouldn't it be economically sound for two companies, whether they were in any way affiliated or not, if such was the plan of procedure, one to handle only local and one only interstate business?

A. No, I don't think it would be an economical arrangement, not for the rate payer.

[fol. 169] Q. It would be more economical for the rate payer if you duplicated the equipment than for—(interrupted).

A. I didn't understand your question.

Q. Even as between two independent companies, proposing to do the identical thing I have suggested, one to operate locally only, the other to operate, handle only the interstate business, wouldn't it be the most economical thing for the two companies to do, for one to lease its property

to the other under a joint user arrangement, rather than to duplicate the service as between the two companies?

A. Naturally.

Q. As a matter of fact, where two companies are non-competitive, they never do duplicate their equipment, do they?

A. No.

Q. Now, the American Telephone and Telegraph Company own the lines between Seattle and the city limits of Chicago?

A. They own the line east from Seattle.

Q. To Chicago?

A. Yes.

Q. To the city limits?

A. I don't know as to that.

Q. In handling the lines, business from Seattle to Chicago, you use the lines of the Bell Company?

A. They connect with the Illinois Bell Company in Chicago and the Pacific in Seattle.

Q. What arrangements would be made for the payment of the service? What does the American Telephone Company [fol. 170] lease for the purpose of handling the message, lease the equipment of the Illinois Bell Company, or how would it be arranged?

A. You mean a call from Seattle to Chicago? We would use the facilities of the Illinois Bell Company in Chicago and the Bell system to Chicago.

Q. With a division of the tolls on the division lines?

A. Yes, a percentage.

Mr. Sharpe: Now, in order to get this thing categorically straight, I would like to read you my conception of the, my conception of the operations of the telephone and telegraph exchanges, both local and foreign, and ask you to state whether or not they are correct and in what respect, if incorrect, if it is agreeable to the Court. Of course, that is unusual, but this is a peculiar case in that it is rather technical and it is quite important to get a whole picture.

Mr. Rupp: I don't know how you will get anywhere that way. I will see if there is anything to do if he does that.

Mr. Sharpe:

Q. Now, I will ask you this, or I will make this statement, and ask you if it is correct: in areas of comparatively

dense populations, such as cities and towns, there are certain local exchange areas, that is local exchanges, established, are there not?

A. Yes, sir

Q. Those can be referred to as local exchange areas?

[fol. 171] A. Yes, sir.

Q. In those areas each customer is supplied at his residence or place of business with a telephone set consisting of a mouthpiece and transmitter?

A. He is furnished with a lot more than that, a desk stand, bell box and condenser and so forth.

Q. Into this mouthpiece, the individual using the service —we will call him the user—speaks, and he also has, the transmitter of the message, has a receiver from which the user of the apparatus receives oral messages. That is true?

A. Yes, sir.

Q. The location of the telephone sets are commonly referred to as stations, are they not?

A. Yes.

Mr. Rupp: No, a location.

A. The telephone station is a bell box——

Mr. Sharpe: What is a station?

A. The station is the telephone apparatus at the customer's residence or place of business.

Q. I say this telephone set is referred to commonly as a station?

A. Yes.

Q. Now, each telephone set is connected by one or more wires with a central office known as a local exchange?

A. Yes.

Q. At which telephonic connections are made between stations connected therewith by means of switchboards?

A. That is right.

Q. Made by the following process: each station is given [fol. 172] an arbitrary number?

A. Yes, sir.

Q. The customer wishing to converse with some other station, that is the calling customer, we will call him, establishes telephonic connection with the company's switchboard operator by removing the receiver from the hook?

A. Yes, sir.

Q. And informing such operator of the number of the station with which he wants connection established?

A. Yes, sir.

Q. Unless it is an automatic connection.

A. In which case he dials.

Q. The operator, by means of electric switches, forming a part of the switchboard—the operator then, by means of electric switches forming a part of such switchboard, establishes the connection desired and signals the customer at the desired station; that is, the called customer?

A. Yes, sir.

Q. When such connection has been made, by means of a signal, or buzzer with which each set is equipped?

A. That is true, yes.

Q. Such called customer then, by removing his receiver from its hook, establishes telephonic connections with such calling customer and receives the telephonic message by means of such a receiver, and communicates his message to the calling customer through the mouthpiece and transmitted forming part of his telephone set. That is all true? [fol. 173] A. That is right.

Q. In lieu of this, the aforesaid method of establishing connections between the calling customers and the called customers, certain local exchanges are equipped with automatic devices by which the services of the switchboard operator are partially or entirely dispensed with and the calling customer establishes connection with the called customer desired by dialing the number of the desired station on a device provided on the calling telephone set, which dialing process automatically establishes telephonic connection with such desired station, if the desired line is not already busy?

A. That is true.

Q. Otherwise, an automatic apparatus indicates to the sending customer, by distinctive signal, that such called line is already busy. Is that true?

A. Yes.

Q. In large communities, such as cities of the first class, the Pacific Company has established more than one exchange. That is true, is it not?

A. Yes.

Q. Each of which exchange is connected with all others by a large number of telephone wires known as trunk lines?

A. Inter-office trunks.

Q. In all such cases telephonic connections between stations connected directly with the same exchange are established directly through the switchboards of such exchange as above set forth?

A. That is true.

[fol. 174] Mr. Rupp: Of course, this is silly and I don't know to what extent the Court is going to take it into consideration.

A. It is mere detail.

Mr. Sharpe:

Q. Telephonic connections between stations connected with one telephone exchange and some station connected with some other local exchange is made through such trunk lines connecting such exchanges?

A. Yes.

Q. Several connections are accomplished either automatically or through the agency of switchboard operators?

A. That is true.

Q. The Pacific Company customarily—I mean the plaintiff, Pacific Telephone and Telegraph Company, of course. The Pacific Company customarily receives compensation for service so rendered to its customers by a monthly charge or rental made to each such customer?

A. That is true.

Q. Such monthly charge or rental does not include such service as long distance service?

A. Yes, it does.

Q. Monthly rental?

A. Yes, sir. It gives the subscriber access to the toll board as well as enables him to make connection with the exchange area. There is a toll charge in that rate.

Q. But for long distance service an additional charge is made?

A. The inter-exchange rate, yes.

[fol. 175] Q. A separate, additional charge is exacted?

A. From the toll board at one exchange to the toll board at the other exchange.

Q. With respect to long distance. Each local exchange in each local exchange area, where there is but one such local exchange, or the central exchange of such local exchange area, where there is more than one exchange serving such area, is also equipped with a long distance switchboard?

A. Toll switchboard.

Q. That is correct, it is connected with that kind of a switchboard?

A. Yes, sir.

Q. If there is more than one exchange, there is only one toll board?

A. Yes, sir. It may be in a separate building or in the main office down town, or it may be in line on the local board, or part of the local board.

Q. This is connected by telephone wires with the local switchboard in the local exchange or central exchange?

A. By toll switching trunks and toll recording trunks and so forth.

Q. Each switchboard is connected by one or more telephone wires with the long distance switchboards of all other local exchanges or central long distance exchanges as the case may be, operated by the Pacific Company or with which, by contract, such company has physical connections?

A. That is right.

Q. And whether within or without the state of Washington?

A. That is correct.

[fol. 176] Q. Any customer in any such local exchange area desiring to establish telephonic communication with a station in some other local exchange area, first establishes connection with the Pacific Company's operator at the long distance switchboard located in his local exchange or central exchange, as the case may be?

A. Yes, sir.

Q. And then indicates to the operator the individual or station with whom or with which long distance connection is desired?

A. You are leaving out a step. Generally speaking, that is the way it works. It may be a manual office. In the manual office, the subscriber gets the local operator and she puts the connection up to the toll operator, who takes down the details of the call. In the dial system, you dial long distance direct. It goes through the system the same.

Q. Such local long distance operator then establishes a connection with the long distance switchboard located in the local exchange area in which the desired customer or station is located?

A. Yes, sir.

Q. Whereupon, the operator of the latter long distance switchboard establishes the connection between the switchboard and the desired customer in his or her area, and the telephonic connection and resulting conversation ensues, is that correct?

A. Yes, sir.

Q. Now, pay stations. In addition to the telephonic sets supplied to its customers, as aforesaid, the Pacific Com-
[fol. 177] pany has stations established at convenient points, which are known as "pay stations," furnished with telephone sets by means of which any individual desiring to communicate by telephone with any stations maintained be the company or its connections, may, by putting a coin or coins in a box provided therefore, equal to the toll or charge demanded for so doing, establish connection with the station in the manner hereinbefore described, both local and long distance. Is that correct?

A. Yes, sir.

Q. Private wire service. Certain customers of the Pacific Company are supplied by such company and its connections with direct telephonic connection between telephone sets located in its local exchange areas and the same and other local exchange areas, either within or without the state of Washington?

A. That is correct.

Q. This service, and we will call it "leased wire service," is that a fair name?

A. Yes.

Q. Is supplied to such customers as newspapers, stock brokers, news agencies, and radio stations?

A. That is right.

Q. Customers receiving such leased wire service, in consideration of such rentals paid to the Pacific Company and its connecting systems, are provided with the exclusive use of such telephonic connection between the desired telephone sets, either for the entire time or for certain agreed portions of the day. Is that correct?

[fol. 178] A. That is correct.

Q. Besides ordinary telephonic service over such leased wires, certain of such leased wires are equipped with devices known as teletype machines. Is that true?

A. That is true.

Q. And these machines are similar in appearance and operation to ordinary typewriters?

A. That is right.

Q. And by means of these machines the sender of the message at these stations typewrites it on the teletype machine at his station whereupon by means of various electrical equipment at the sending station and one or more receiving stations on such leased wire, machines at the receiving station or stations reproduce the message on recording machines installed for such purpose at such receiving stations?

A. Yes, sir.

Q. In other words, they transmit the written message by wire?

A. Through several machines at the same time with the same operation, yes, sir.

(Whereupon a recess was taken for fifteen minutes. Upon reconvening, the following proceedings were had:)

Mr. Mastick (on stand).

Mr. Sharpe:

Q. We were speaking about the leased wire service.

A. Yes, sir.

Q. Now, other leased wires are used for the transmission of telegraph messages by means of ordinary telegraph [fol. 179] sending and receiving sets.

A. Yes, sir.

Q. And also transmission of photo service?

A. Yes, sir.

Q. You spoke yesterday about the same series of wires by phantom and carrier circuits, making it possible to transmit a certain number of telephonic messages.

A. Yes, sir.

Q. And a certain number of additional telegraphic messages.

A. Yes, sir.

Q. The telephoto service would cover the telegraph field, would it?

A. Not at all. There is no similarity in principle of the two things.

Q. In addition to being able to transmit the telephonic messages, a certain number, you are also able to transmit telephoto?

A. No, a telephoto circuit is one of the highest grades we know how to provide. The frequency is far beyond speech, and you have to have exclusive circuits exclusively prepared for telephoto service. It is difficult to do and very expensive.

Q. You have to have wires especially constructed for it?

A. Specially prepared and balanced equipment.

Q. Can they be used for any other telegraphic and telephonic service?

A. Not when it is being used for telephoto service.

Q. It can be used?

A. It can be used for telephone, but it means taking down [fol. 180] the balancing equipment and the telephoto equipment required.

Q. Multiple service over the same wires. The telephone wires connecting the long distance switchboards in the various local exchange service areas are so equipped and operated that they are capable of being used and are used for the rendition of many services at one and the same time?

A. Yes, sir.

Q. That is not including the telephotic service?

A. Yes, sir.

Q. This multiple simultaneous service is made possible by certain equipment utilizing different radio bands of electrical energy?

A. We do not use radio frequencies in any of our telephone operations. We use high frequencies, but below radio. They run from 10,000 cycles to 30,000 cycles. Radio starts far above that.

Q. But they are bands of electrical energy?

A. Yes, sir, that is correct.

Q. It being possible to transmit teletype and telephonic messages and telegraphic messages by the means of such bands over the same physical circuit at the same time?

A. Bands is not a technical way of expressing it. They are actually frequencies.

Q. Frequencies. But, as a result, you are enabled to transmit—(interrupted).

A. On a particular type of line, we superimpose certain bands of speech frequencies.

Q. As a result of this method, you are able to transmit [fol. 181] telephone messages, teletype messages, and telegraph messages on the same physical circuits at the same time?

A. That is true to the extent I testified yesterday.

Q. On a physical telephone circuit extending from the long distance switchboard in Seattle, through Chehalis, Castle Rock, Vancouver, Washington, Portland, Oregon, long distance telephone messages may be transmitted simultaneously between telephone sets in the Seattle exchange and telephone sets in the exchange areas of each of the other cities?

A. I pointed out yeserday of a telephone conversation from here to Vancouver, and over the same wire from here to San Francisco and from here to Los Angeles, depending on the type of circuits, how many can be superimposed on the circuit simultaneously without interference.

Q. And the long distance service, teletype service, and telegraphic service, may be and is handled over the same physical telephone circuit?

A. That is correct.

Q. Between the various stations through which the circuit passes?

A. Yes, sir.

Q. Or between the terminii of such circuits at one and the same time?

A. Yes, sir.

Q. And without the character of one service in any way interfering with the performance of the other service?

A. Yes, sir.

Q. While leasing the wire for the performance of service [fol. 182] of one kind, such as transmission of radio programs, telephonic service and telegraphic service, the company utilizes such wires for the performance of other service to the extent of the capacity of the radio bands of such circuits?

A. Of the different circuits.

Q. Of such circuit with the same effect and result as if each of said services were handled over separate wires?

A. Correct.

Q. In certain local exchange areas which the Pacific Company furnishes with long distance telephone service, the local exchange telephone equipment is owned and maintained and operated by corporation, partnerships, or individuals, other than the said Pacific Company. That is true?

A. Yes.

Q. This is true, for instance, with respect to the telephone exchange areas in which the cities of Spokane, Castle Rock and Everett are located, and many other local exchange areas?

A. Yes, sir.

Q. Such telephone exchange areas, as agreed, may be referred to as "foreign exchange areas".

A. Yes, sir.

Q. In nearly all of such exchange areas, the telephone service furnished by the owning company is wholly non-competitive with the telephone service furnished by the Pacific Company?

A. Yes, sir.

Q. I said "nearly all" and you said "in all". You don't [fol. 183] know of any case where it is competitive?

A. That is right.

Q. As to all long distance messages transmitted to and from stations in said foreign exchange areas and points reached by the Pacific Company's long distance service, the Pacific Company, by contract with such owning companies, utilizes the telephone equipment of such local companies in the transmission of such long distance messages to and from telephone stations in such foreign exchange areas for which said Pacific Company pays such other company an agreed service charge or division of the long distance tolls.

A. As we just discussed this morning.

Q. The same is true of leased wire service, is it? What is the arrangement with regard to leased wire service, a station, for instance, located in one of the foreign exchange areas and in the Pacific lines?

A. If we made the lease of the leased wire, we would have to pay the connecting company for their part of that leased service. That would probably be a matter of contractual relationship again.

Q. Should the said Pacific Company elect to cease to perform any of its intrastate business, telephone and tele-

graph business, in the state of Washington, and thereafter render long distance telephone service between points in Washington and points in other states, rendering the same service it now performs, it could, if it could procure a purchaser therefore, sell and convey to some other corporation desiring to carry on the intrastate local and long distance telephone service in Washington now conducted by said [fol. 184] Pacific Company, all of the operating property and equipment of said Pacific Company now used by said company in furnishing its present intrastate local and long distance telephone service, it could do it?

A. No.

Mr. Rupp: I object to that. It assumes the Pacific Company can elect to cease intrastate operations, which it cannot do.

Mr. Sharpe: I assume it can lawfully do so.

Mr. Rupp: How can you assume that when the law says we can't?

Mr. Sharpe: If it demands a constitutional amendment, assume it. We are considering the physical possibilities, not the legal possibilities.

Mr. Rupp: The ground of my objection is that you cannot put a question to a witness in which he is asked to assume what it is legally impossible to do. We are trying a case by which the State seeks to exact from us a certain portion of our money. Now, obviously, that case must be tried under the constitution as it is, under the law as it is, and under the facts as they exist, not under some other hypothesis that we are living in Turkey under another constitution with a different set of statutes and a different set of facts. On what conceivable theory is the Court enlightened by asking the witness to answer a question based on [fol. 185] an assumption wholly impossible as a matter of law?

[fol. 186] Another hypothesis in the case is that we were able to secure a purchaser for this property. Are we to determine whether or not the statute is valid by finding out whether or not, under another state of facts, that we were able to find a purchaser for property of somewhere around fifty or sixty million dollars in the year 1935, whether or not the tax now imposed on the company which is earning, according to the evidence before this court, about one and one half per cent on the actual amount of money invested

in it, and thus determine on that hypothesis if we can find a purchaser for a company with that kind of an earning, is valid. I say again, a question that contains that assumption [fol. 187] which, in my judgment, is just as impossible as that we can elect to abandon the intrastate service. I don't think, as a matter of fact, we could any more sell the intrastate portion of this property, if there is such a thing, than we could withdraw from the intrastate business as a matter of law. Nobody would buy it with its present earning and possibility of future earning as now conducted in the state of Washington.

Mr. Sharpe: In reply to counsel's objection, Your Honor, I want to call the Court's attention to the amount—(interrupted).

The Court: I think we will get along faster, and you may proceed. I am quite well convinced myself as to the law of the matter, and I might say right now that I think that the test you are getting at, that was suggested in that one case, might be appropriate probably under the condition the court was then considering, but I think we are going far afield with it now. But I think we will get along faster to let you develop your case in your own way.

Mr. Sharpe:

Q. Now, if the Pacific Company did elect to cease to perform intrastate local or long distance service, and elected thereafter to render only long distance, interstate long distance service, as it now performs, and if the company could [fol. 188] secure a purchaser for its property principally used for its local service or intrastate service, it could, of course, sell and convey that property to another company, could it not?

A. Yes, but it wouldn't be doing a solely interstate business that way, because the local exchange does an interstate business over those facilities.

The Court: You can't make a record all talking at the same time.

Mr. Sharpe:

Q. And of course, if the Pacific Company, having elected to handle only interstate service, did elect to sell its property to some other company, it could reserve the right to

use that property by a joint user arrangement for its interstate service, could it not?

A. I suppose, by a contractural arrangement, it might do that.

Q. And if it did, by a satisfactory arrangement, enter into that sort of contract with the purchasing company, it wouldn't be necessary then, to duplicate the actual equipment of the two companies, to increase the amount of the equipment of the two companies in handling the two classes of service?

A. No.

Q. And if it sold out one piece of property, say Olympia property, to one company and its Seattle property to another company, it could make the same joint user contracts with each of those companies, could it not?

A. Yes. But still on the hypotheses, I take it.

Q. Yes, on the same hypotheses. There are now in the United States a large number of telephone companies doing [fol. 189] a long distance telephone business between approximately 5,000 local exchange areas. You said many thousand, you wouldn't say five thousand? Would you say five thousand is about right?

A. I don't know.

Q. In which the local telephone service is supplied by local telephone companies other than the company or companies doing the long distance business. There is a large number of them, thousands, you say, throughout the country?

A. Yes, sir.

Q. In none of these do such long distance companies maintain separate equipment for long distance only?

A. I don't understand the question.

Q. In none of those companies where these long distance —you say there is thousands of local exchange areas in which the exchange is owned by companies independent of those handling the long distance service?

A. Yes, sir.

Q. So far as you know, in none of those areas does the long distance company handling the long distance messages, maintain separate equipment for long distance use only?

A. That is right.

Q. But in such cases the long distance companies utilize,

by joint user agreements, the facilities of such local telephone companies in handling the long distance service?

A. Yes, sir. A long distance company may own the toll switchboard or the connecting company may. The long dis-
[fol. 190] tance company may supply the toll operators to operate the board. Those things vary in different cases.

Q. The location of the telephone wires is either overhead wires on the streets, and the only place where you—I will just state it, the telephone wires, by means of which the Pacific Company carries on its intrastate and interstate telephone service in the state of Washington are, except where leading into private property where telephone service is rendered or into the exchanges of said companies, either suspended on poles set in the public streets, roads, highways, and alleys of the state of Washington, or carried in underground conduits located in such public streets, roads, highways and alleys and I might add, also in certain cases, over easements owned by your company?

A. Right. We may use any one of three types of construction on toll lines; wires supported by poles, aerial wires supported by poles, wires in cables supported by poles, or wires in cables in underground conduits.

Q. And located on the highways or private rights of way?

A. Yes, sir.

Q. With respect to the Home Company, I mean the Home Telephone and Telegraph Company of Spokane, one of the plaintiffs in this case; this company, during the year 1933, and for many years prior thereto, operated its various telephone properties in the same manner as the Pacific carried on its local exchange business?

A. If you limit it to local exchange service, yes.

Q. Said Home Company had had and now has no operat-
[fol. 191] ing property in any state other than Washington?

A. That is right.

Q. It does no interstate business except that it receives from the Pacific Company and other interstate telephone companies, a certain proportion of the tolls received from the transmission of long distance interstate telephone messages originating or terminating at the telephone stations forming a part of its local exchanges as compensation for the use of its property in the transmission and receipt of such interstate toll messages and rental from leased wires?

A. I can't agree to that. They do an interstate toll business, have a toll plant in the city of Spokane and do business over that property that they own. True, only to the city limits of Spokane and the Spokane exchange boundary. In that area they render an interstate business.

Q. Render a part of the interstate business?

A. Yes, sir.

Q. To the extent of owning the line equipment?

A. And they also own the toll plant in the city of Spokane.

Q. Otherwise, that statement is correct that I made?

A. Well, I don't know.

Q. That is—(interrupted).

A. I lost track of the whole question.

Q. It does no interstate business, has no toll lines?

A. Yes, it has.

Q. I mean outside of the city.

A. Not outside of the city of Spokane; within the city it has.

[fol. 192] Q. That connects with the Pacific Company's toll lines?

A. Yes, sir.

Q. The only interstate business it does is to assist in handling the interstate long distance messages which are transmitted from the city boundaries of Spokane to some point out of the state?

A. It connects with the Pacific Company at the exchange boundary.

Q. Do you attend these rate hearings, all the rate hearings that have been had before the Department of Public Works of the State, instituted by either the Home Company or the Pacific Company during the last two or three years?

A. I never attended any of them.

Mr. Sharpe: That is all.

Redirect examination.

By Mr. Rupp:

Q. I think one matter needs to be cleared up. What is the purpose of crediting to the exchange a percentage of toll revenue?

A. Whenever an exchange handles a toll call or handles toll business, whether the toll business is interstate or in-

trastate, the exchange is put to some expense and they have to use certain exchange property in completing that call. Now, we have determined that that expense, that is, over a long period of years, amounts to about twenty percent of [fol. 193] the originating toll of that particular exchange, both interstate and intrastate. Now, we might—we credit that exchange with twenty percent of those originating tolls and care for the expense they are put to in handling both incoming and outgoing toll business over their property. The Pacific Company might as well charge to toll expense as to credit toll revenue to the exchanges, but we credit the toll revenue to the exchange so we know what the exchange properties are doing and what the toll properties are doing separately.

Q. If you wanted to find whether or not the Olympia exchange was experiencing a fair return on the fair value of that property, you would have to take into consideration the twenty percent credited to that exchange to take care of the toll functions that exchange performs.

A. Yes.

Q. And in the annual report to the Department furnished by the company each year, is there set out in dollars the twenty percent credited to the exchange?

A. Yes, sir, there is.

Q. Will you show His Honor where that is set forth?

A. That is account 310, particularly for the Aberdeen exchange on one of the insert to the annual report for the year 1933, message tolls, line 9, $9,575.05 is the amount credited to that exchange. It is twenty percent of the originating toll business of that exchange. Likewise, for Bellingham, the amount is $8,486.40. That represents twenty percent of the tolls originating at the Bellingham [fol. 194] exchange and we have set forth all of the principal exchanges, one by one, and those under a certain number of stations are found under what is termed remaining exchanges. These are the remaining exchanges and to those the amount of $66,225.72 was credited, representing twenty percent of all of the originating tolls originated by all of these remaining exchanges. We set forth separately on the next statement, the message tolls developed from toll line and that represents approximately 80% of the total toll message revenue, the remaining 20% being in here. If the toll revenues credited to these exchanges are added

to that figure, you get the total toll revenues reported by the Pacific Company in the state of Washington, $2,163,387.23.

Q. Now, what percentage—that 20% was credited to the exchange in the year 1933?

A. Yes, sir.

Q. Does the accounting circular provide, or in substance state, that the Interstate Commerce Commission consents and approves of that method of crediting to the exchanges?

A. Yes, sir, it does.

Q. You said this morning something about the Interstate Commerce Commission having jurisdiction. You meant now, the Federal Communications Commission has jurisdiction, the I. C. C. having no further jurisdiction. Now, what is the situation as to the Home Company with reference to this credit?

A. The same is true of the Home Company. They are credited with 20% of the originating toll revenues from the Spokane exchange.

[fol. 195] Q. Is the physical and operating situation, so far as payment of operators, the same in the Home Company as it is with reference to the exchanges of the Pacific Company?

A. No, it is not —. In the Pacific Company exchanges the Pacific Company toll is charged with the toll operator's expense and the Home Company is also; that is, the Pacific Company pays the toll operators' expense for the Home Company as well as for all of their own exchanges.

Q. What is paid to the connecting companies other than the Home Company?

A. As a rule, thirty percent.

Q. Why do they get thirty percent when the Home Company gets twenty percent and the exchanges of the Pacific Company are only credited with twenty percent?

A. In those cases, they own the toll switchboards as a general rule, and pay the toll operators' wages.

Q. Now, does this twenty percent credited to the exchanges of the Pacific Company, the twenty percent paid to the Home Company and the thirty percent generally paid to the connecting companies include interstate as well as intrastate revenue?

A. Yes, it does.

Q. During—I think there may be possibly some confusion with reference to some testimony of yesterday. In the case of a call from Seattle to San Francisco, the state of Washington, as you have testified, receives a portion of the revenue derived from that call, based upon the length of wire haul in the state of Washington as compared to the [fol. 196] total wire haul?

A. Yes, sir.

Q. Suppose the message originates in San Francisco and comes to the state of Washington, does the state of Washington receive anything from that message?

A. Yes, sir, it gets the same mileage haul.

Q. And that amount of money is in the figure shown in the annual report under message tolls?

A. Yes, sir.

Q. Now, what connection has this compensation to exchanges, or the payment made to connecting companies, with the separation of property, revenues and expenses shown in your exhibits 11 and 12, which relate to the Pacific Company and 13 and 14, which relate to the Home Company?

Mr. Sharpe: I object to that as calling for a conclusion. It is for the Court to determine from the evidence and not for this witness to draw his conclusion of it.

The Court: He may answer.

A. None whatever.

Mr. Rupp:

Q. Why not?

A. Because the 20% compensation is based on both interstate and intrastate tolls. In the interstate—intrastate segregation, we were trying to find out what proportion of the total gross revenues were interstate and what proportion of the total interstate-intrastate expenses were interstate, and what proportion of the property.

Q. How many interstate telephone messages were there in 1932, if you recall?

[fol. 197] A. Six hundred thirty-seven odd thousand.

Mr. Rupp: I offer in evidence, if Your Honor please, a letter from the Tax Commission of the state of Washing-

ton dated May 29, 1934, addressed to our firm and reply thereto dated June 29, 1934. The letter is without signature. I don't recall whether I signed the firm name or my own to it, but I wrote the letter and the return made in compliance with this demand of May 29th, 1934, of the Pacific Company for the months of August, September, October, November and December, 1933 and the return for the like period made by the Home Company.

The Court: They may be admitted.

(Letter of May 29, 1934, from Tax Commission, together with reply letter of June 29, 1934, and business tax return statement, admitted in evidence and marked plaintiff's exhibit no. 22.)

Mr. Rupp: I may say, Mr. Sharpe, I wrote a like letter for the Home Company and I may add further that a letter identical with the exception of the change of dates has been written to the Tax Commission each month as these returns have been filed.

[fol. 198] Recross-examination.

Mr. Sharpe: I might ask Mr. Mastick one question.

Q. What is your opinion, Mr. Mastick, as to whether or not, should the Pacific Company withdraw from this local telephone exchange service in the state of Washington, whether other companies or other individuals or other partnerships would undertake the furnishing of a local service to the communities. Is there—in other words, would there be an insistent demand for local telephone service in such communities as Olympia and other cities of the state?

A. Do you mean to ask me whether the public would put up with no telephone service?

Q. With no local telephone service.

A. I don't think they would for a minute.

Q. Some company or organization would furnish service to these communities?

A. Undoubtedly they would get—(interrupted).

Q. Or the cities themselves would furnish the service?

A. They might.

Mr. Rupp: They can't under the law.

Mr. Sharpe: I don't know what law you are speaking of.

Mr. Rupp: The statute of the state. There is no provision in this state for the city to go in the telephone business. It couldn't if it had the money and wanted to. They can't go butting into anything because they want to. They have to have the authority to do it.

Mr. Sharpe: Give them the authority.

Mr. Rupp: I am not speculating on what the Legislature is doing.

[fol. 199] Mr. Rupp: I rest.

(Witness excused.)

Mr. Otto B. Rupp, being a witness called on behalf of the defendants, after having first been duly sworn, testified as follows:

Direct Examination.

By Mr. Sharpe:

Q. Mr. Rupp, will you state—you are attorney for the Pacific Telephone and Telegraph Company?

A. I am a member of a firm which is attorney for the Pacific Telephone and Telegraph Company.

Q. You have been for a number of years heretobefore?

A. The firm has been attorney for the Pacific Telephone and Telegraph Company since some time prior to 1909. How long before that, I don't know.

Q. How long have you been associated with the firm that represents it in the state?

A. Since May, 1909.

Q. That is true, also, of the Home Company?

A. No.

Q. How long has your firm represented the Home Company?

A. We do not ordinarily represent the Home Company.

Q. You do represent them in this suit?

A. In this suit, yes.

Q. Have you represented them in all matters connected [fol. 200] with the occupational *eax*.

A. No.

Q. Who represented them?

A. The firm of Post, Russell, Payne and Davis, I think it is.

Mr. Schweppe: I don't think you caught the quesion. We have represented the Home Company in connection with the 1933 occupational tax.

A. I thought he meant the Spokane tax.

Mr. Sharpe:

Q. Your firm has represented the Home Company in matters connected with the occupational tax?

A. State occupational tax, surely.

Q. Do you know, Mr. Rupp, what efforts have been made by the Pacific Telephone and Telegraph Company before any state regulatory body or any Federal regulatory body, looking toward an increase of rates by reason of the enactment of the state occupational tax by chapter 191, laws of 1933?

A. Neither the Pacific Telephone and Telegraph Company nor the Home Telephone Company of Spokane has applied for an increase in telephone rates, telegraph rates or program supply rates to the Department of Public Works of the state of Washington, the Interstate Commerce Commission, or the Federal Communications Commission. Of course, interstate telephone and telegraph—interstate teletype rates or program supply, are not under the jurisdiction of the state of Washington. They have not made application to either Federal body having jurisdiction in that regard.

[fol. 201] Q. By reason of the occupational tax?

A. We haven't paid any.

Q. By reason of the enactment of the occupational tax law?

A. They have made no application for an increase since the enactment of that statute.

(Witness excused.)

Mr. Sharpe: The State rests, Your Honor, the defense.

[fol. 202] ORDER SETTLING STATEMENT OF FACTS

STATE OF WASHINGTON,
County of Thurston, ss:

On this 28th day of March, A. D. 1935, pursuant to due notice of application for settlement and certification of the statement of facts in the foregoing entitled action, the parties of said actions, appearing by their respective attorneys of record herein, the undersigned, Honorable D. F. Wright, Judge of said court, presiding at the trial of said action, now hereby settles the annexed and foregoing statement of facts as the Statement of Facts in said action and hereby certifies:

That the matters and proceedings embodied in the annexed and foregoing statement of facts, exhibits and other written evidence introduced and offered in evidence upon the trial of said action, and filed in the same causes and now marked and identified by me as follows: Plaintiff's exhibits numbers 1 to 18, inclusive, and number 22; and Defendants' exhibits numbers 19, 20 and 21; referred to and identified in the foregoing proposed statement of facts, are matters and proceedings occurring in said cause, and the same are hereby made a part of the record therein; and that the same contain all the testimony on which said cause was tried; evidence produced or offered by either of the parties to said action, together with all of the objections and exceptions of counsel taken to the reception or rejection of testimony, and the rulings of the Court therein, all documents and instruments in writing introduced or offered in evidence, and all the material facts, matters and proceedings heretofore occurring in said causes, and not already a part therein; and the Clerk is hereby ordered to attach to the said statement all of the original exhibits on file in said cause as herein identified and which the clerk of this court is ordered to transmit to the Clerk of the Supreme Court.

Done in open court this 28 day of March A. D. 1935.

D. F. Wright, Judge.

O. K. —— ——, —— ——, Attorneys for ——.

[File endorsement omitted.]

[fol. 203] It is hereby agreed that the foregoing statement of facts is correct; that plaintiffs have no amendments thereto; and that the trial Judge may sign the Certificate attached to the foregoing statement of facts without any notice to us.

McMicken, Ramsey, Rupp & Schweppe, attorneys for Plaintiffs. S. W. Hamilton, & R. G. Sharpe, Attys. for Defendants.

March 21, 1935

[fol. 204]

PLAINTIFF'S EXHIBIT No. 1

Thurston County Cause No. 15282-87

Date Admitted: Jan. 10, 1935

No. 15282

The Pacific Telephone and Telegraph Company

Amount on Books for Plant, Equipment and Working Assets

Total—State of Washington

Year	Net Addition to Plant and Equipment Each Year	Average Working Assets Each Year	Total End of Year	Average for Each Year
1922	$4,389,063	$960,716	$29,980,436	$27,785,904
1923	4,194,434	1,153,661	34,367,815	32,270,598
1924	2,057,812	1,159,178	36,431,144	35,402,238
1925	1,613,780	1,225,528	38,111,274	37,304,384
1926	3,038,881	1,334,036	41,258,663	39,739,222
1927	1,512,420	1,278,847	42,715,894	41,959,684
1928	3,063,515	1,407,458	45,908,020	44,376,262
1929	6,616,248	1,746,744	52,863,554	49,555,430
1930	4,081,341	2,029,215	57,227,366	55,186,695
1931	1,216,941	1,511,122	57,926,214	57,317,743
1932	246,275	1,475,115	58,136,482	58,013,344
1-1-1933*	84,029	.....	58,220,511	.....
1933	635,155†	1,565,594	57,675,835	57,993,413

* Reclassification of accounts.
† Red in copy.

[fol. 205] PLAINTIFF'S EXHIBIT No. 5

Thurston County Cause 15282-87

Date Admitted: Jan. 10, 1935

The Pacific Telephone and Telegraph Company

Decision on rate base in Case 5344, brought down to end of and average for each year, 1922—December 31, 1933, inclusive

Total—State of Washington

Commission Decision, June 30, 1922..... $28,216,854

Year	Net Additions to Plant and Equipment Each Year	Average Working Assets Each Year	Decision Brought Down to End of Each Year	Average for Each Year
1922*	$1,116,896	$960,716	$29,281,344	$28,216,854
1923	4,194,434	1,153,661	33,668,723	31,571,506
1924	2,057,812	1,159,178	35,732,052	34,703,146
1925	1,613,780	1,225,528	37,412,182	36,605,292
1926	3,038,881	1,334,036	40,559,571	39,040,130
1927	1,512,420	1,278,847	42,016,802	41,260,592
1928	3,063,515	1,407,458	45,208,928	43,677,170
1929	6,616,248	1,746,744	52,164,462	48,856,338
1930	4,081,341	2,029,215	56,528,274	54,487,603
1931	1,216,941	1,511,122	57,227,122	56,618,651
1932	246,275	1,475,115	57,437,390	57,314,252
1-1-1933**	84,029	.....	57,521,419	.....
1935	635,155†	1,565,594	56,976,743	57,294,321

* Net additions for the year 1922 are for the last six months only.
**Reclassification of accounts.
† Red in copy.

[fol. 206] PLAINTIFF'S EXHIBIT No. 6

Thurston County Cause 15282-87

Date Admitted: Jan. 10, 1935

The Pacific Telephone and Telegraph Company

Actual Performance Appraisal as of December 31, 1914, Brought Down to end of and Average for Each Year, 1915—December 31, 1933, Inclusive

Total—State of Washington

Actual performance appraisal as of December 31, 1914 excluding Spokane Exchange..... $16,151,055

Year	Net additions to plant and equipment each year	Average working assets each year	Actual performance appraisal brought down to end of each year	Average for each year
1915.....	$345,962	$601,169	$16,480,001	$16,307,020
1916.....	416,014†	453,875	15,916,693	16,124,700
1917.....	518,652	521,998	16,503,468	16,244,142
1918.....	367,749	656,204	17,005,423	16,821,548
1919.....	958,021	865,027	18,172,267	17,693,256
1920.....	1,952,389	859,853	20,119,482	19,143,287
1921.....	4,660,520	905,017	24,825,166	22,494,906
1922.....	4,389,063	960,716	29,269,928	27,075,396
1923.....	4,194,434	1,153,661	33,657,307	31,560,090
1924.....	2,057,812	1,159,178	35,720,636	34,691,730
1925.....	1,613,780	1,225,528	37,400,766	36,593,876
1926.....	3,038,881	1,334,036	40,548,155	39,028,714
1927.....	1,512,420	1,278,847	42,005,386	41,249,176
1928.....	3,063,515	1,407,458	45,197,512	43,665,754
1929.....	6,616,248	1,746,744	52,153,046	48,844,922
1930.....	4,081,341	2,029,215	56,516,858	54,476,187
1931.....	1,216,941	1,511,122	57,215,706	56,607,235
1932.....	246,275	1,475,115	57,425,974	57,302,836
1-1-1933*.....	84,029	.....	57,510,003	.....
1933.....	635,155†	1,565,594	56,965,327	57,282,905

* Reclassification of accounts.
† Red in copy.

[fol. 207]

PLAINTIFF'S EXHIBIT No. 11

Thurston County Cause No. 15282-87

Date Admitted: Jan. 10, 1935

The Pacific Telephone and Telegraph Company

State of Washington

Year 1932 Operations

	Telephone and telegraph services		
	Intrastate	Interstate	Total
(a) Gross operating revenues	$10,333,428.97	$1,123,536.49	$11,456,965.46
(b) Licensee revenue — Dr.	150,518.54†	10,658.06†	161,176.60†
(c) Total operating revenues	$10,182,910.43	$1,112,878.43	$11,295,788.86
(d) Total operating expenses	7,512,247.46	701,049.80	8,213,297.26
(e) Net revenue from operations	$2,670,662.97	$411,828.63	$3,082,491.60
(f) Taxes (actual 1932)	1,373,085.20	137,456.19	1,510,541.39
(g) Operating income	$1,297,577.77	$274,372.44	$1,571,950.21
(h) Amount on books for plant, equipment & working assets — average year 1932	$51,050,988.98	$6,962,355.51	$58,013,344.49
(i) Ratio operating income to books	2.54%	3.94%	2.71%
(j) Commission decision 5344 brought down to Dec. 31, 1932— average year 1932	$50,435,796.68	$6,878,455.32	$57,314,252.00
(k) Ratio operating income to commission dec.	2.57%	3.99%	2.74%
(l) Actual performance appraisal — Average year 1932	$50,425,750.74	$6,877,085.26	$57,302,836.00
(m) Ratio operating income to actual performance appraisal	2.57%	3.99%	2.74%

† Red in copy.

[fol. 208] PLAINTIFF'S EXHIBIT No. 12

Thurston County Cause No. 15282-87

Date Admitted: Jan. 10, 1935

The Pacific Telephone and Telegraph Company

State of Washington

Year 1933 Operations

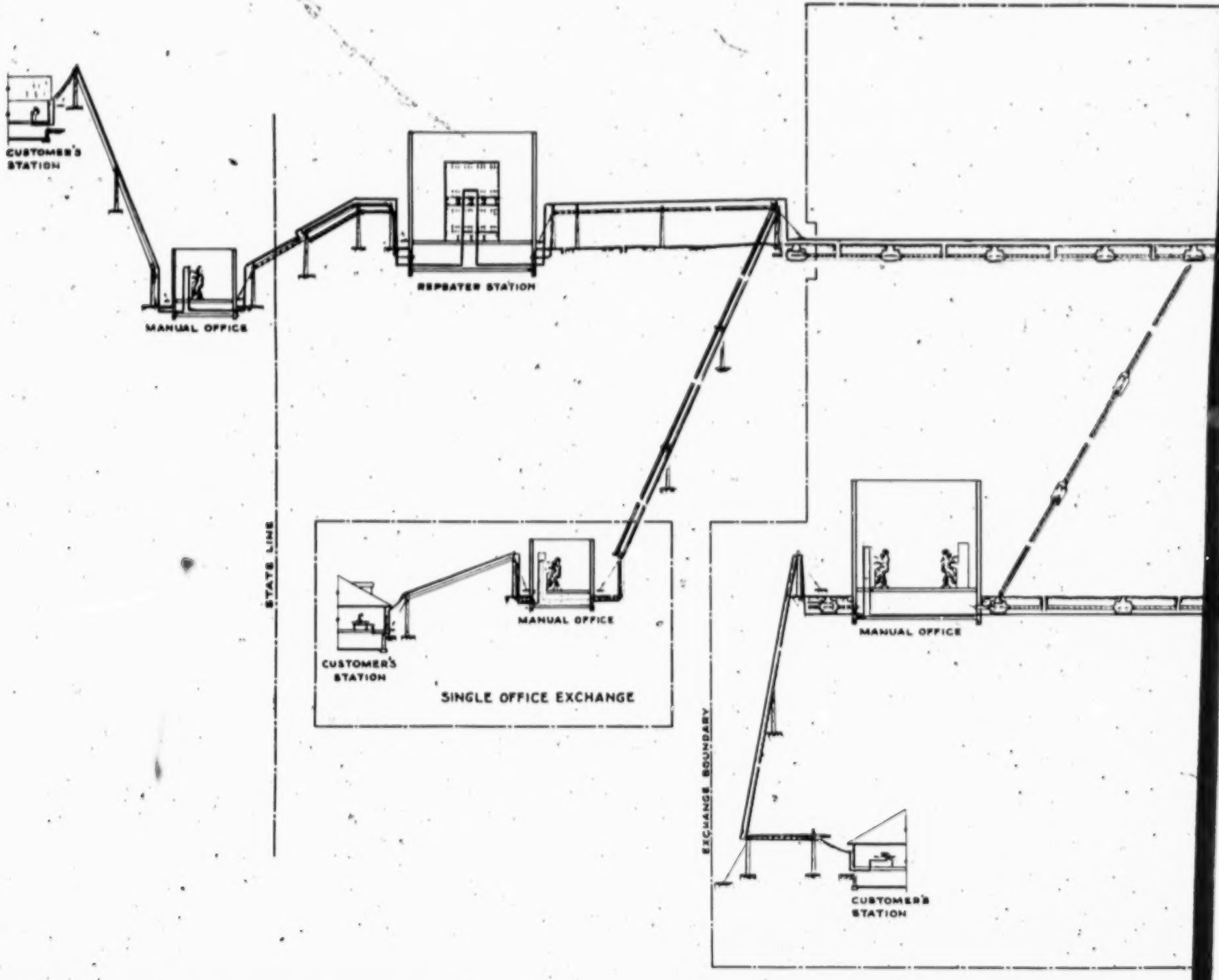
	Telephone and telegraph services.		
	Intrastate	Interstate	Total
(a) Gross operating revenues	$9,317,598.94	$932,424.74	$10,250,023.68
(b) Uncollectible operating revenues*	86,725.36†	9,004.11†	95,729.47†
(c) Total operating revenues	$9,230,873.58	$923,420.63	$10,154,294.21
(d) Total operating expenses	$7,009,241.85	$640,692.04	$7,649,933.89
(e) Net revenues from operations	$2,221,631.73	$282,728.59	$2,504,360.32
(f) Taxes (actual 1933)	$1,440,293.29	$164,502.85	$1,604,796.14
(g) Operating income	$781,338.44	$118,225.74	$899,564.18
(h) Amount on books for plant, equipment & working assets — average year 1933	$51,033,449.19	$6,959,963.43	$57,993,412.62
(i) Ratio of operating income to books	1.53%	1.70%	1.55%
(j) Commission decision 5344 brought down to Dec. 31, 1933— average year 1933	$50,418,257.65	$6,876,063.35	$57,294,321.00
(k) Ratio of operating income to commission dec.	1.55%	1.72%	1.57%
(l) Actual performance appraisal — Average year 1933	$50,408,211.72	$6,874,693.28	$57,282.905.00
(m) Ratio of operating income to actual performance appraisal	1.55%	1.72%	1.57%

* Actual net losses for year 1933.

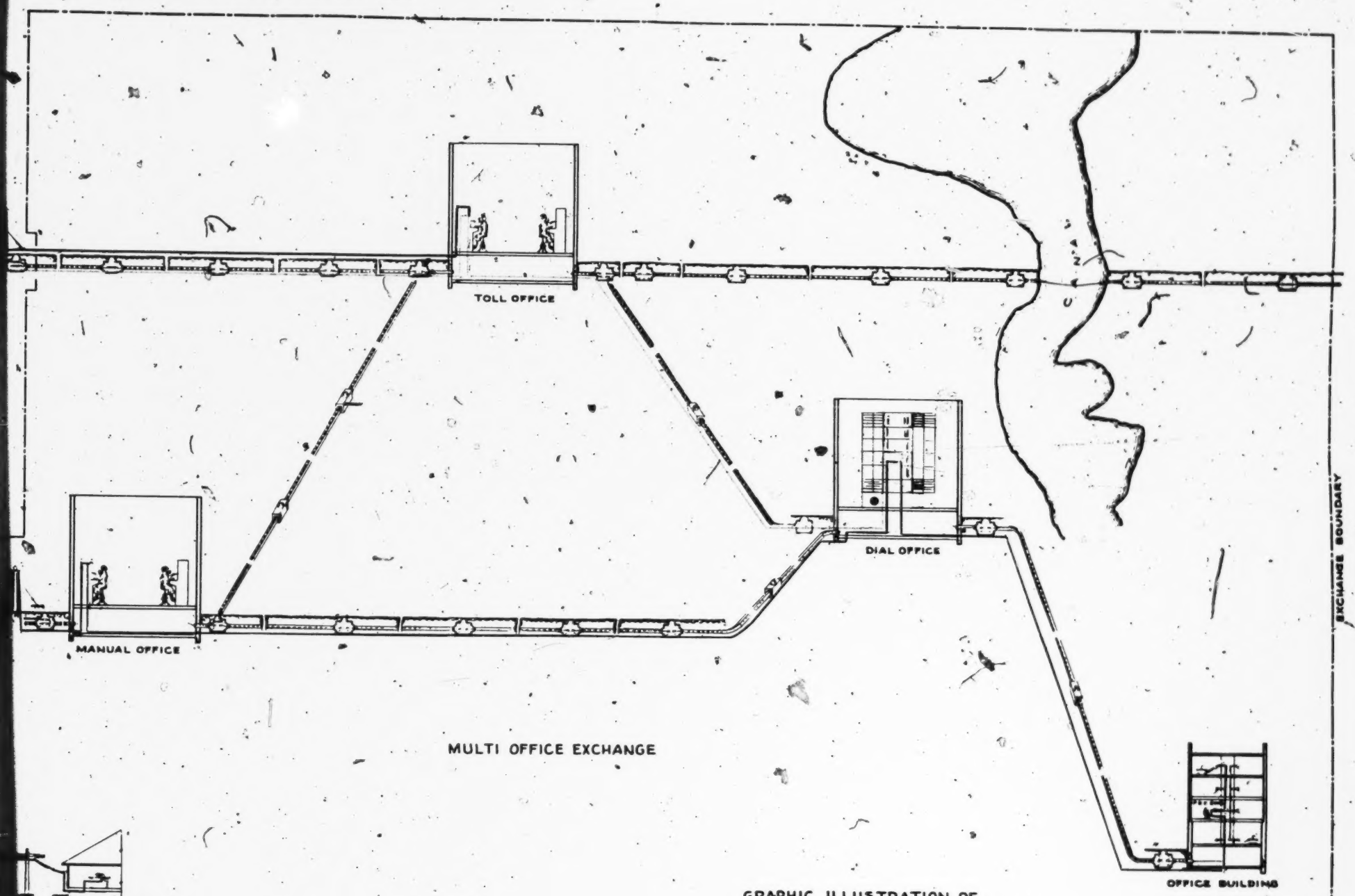
† Red in copy.

(Here follows 1 drawing, folio 209.)

Plaintiff's Exhibit No.15,
Thurston County Cause No. 15
Date Admitted Jan 10-1935.



Plaintiff's Exhibit No.15,
Thurston County Cause No. 15282-87
Date Admitted Jan 10-1935.



GRAPHIC ILLUSTRATION OF
THE USE OF TELEPHONE PLANT
FOR A LOCAL CALL
AN INTRASTATE TOLL CALL
AND

[fol. 210] PLAINTIFF'S EXHIBIT No. 16

Thurston County Cause No. 15282-87

Date Admitted: Jan. 10, 1935

The Pacific Telephone and Telegraph Company

State of Washington

Subscribers Loops and Supporting Structures—Book Cost

Class of plant	Total cost	Jointly used
Right-of-way—Exchange	$27,783	$27,714
Right-of-way—Toll	3,587	3,519
Exchange pole lines	2,677,688	2,674,411
Exchange aerial cable	3,769,789	3,768,018
Exchange Aerial wire	890,935	888,277
Exchange drop wire	799,768	799,768
Exchange U. G. Conduit	2,224,407	1,897,404
Exchange U. G. cable	3,342,331	2,688,997
Exchange submarine cable	74,153	56,890
Toll pole lines	207,839	207,507
Toll aerial cable	4,064	3,465
Toll aerial wire	11,314	11,314
Toll U. G. Conduit	26,657	25,625
Toll U. G. cable	99,219	49,733
Toll submarine cable	9,681	5,435
Total	$14,169,215	$13,108,077
		92.51%

[fol. 211] The Pacific Telephone and Telegraph Company

State of Washington

Station Equipment—Exchange—Book Cost (Excludes Telegraph and Toll Stations)

Class of plant	Total cost	Jointly used
Station apparatus	$2,756,991	$2,677,724
Station installations	1,317,905	1,283,122
Interior block wires	46,279	46,279
Private branch exchanges	1,337,249	1,109,631
Intercom. systems	311,693	311,693
Booths and special fittings	120,322	120,322
Total	$5,890,439	$5,548,771
		94.20%

Station Equipment—Toll Stations

	Total cost	Jointly used
Station apparatus	$81,888	$81,888
Station installations	38,691	38,691
Interior block wire	1,343	1,348
Private branch exchanges	32,312	32,312
Intercom. systems	9,078	9,078
Booths & special fittings	8,752	8,752
Total	$172,069	$172,069
		100.00%

[fol. 212] The Pacific Telephone and Telegraph Company

State of Washington

Subscribers' Switchboards—Book Cost (Including Land and Buildings)

Class of plant	Total cost	Jointly used
Central office equipment, manual	$2,691,146	$2,199,637
Central office equipment, Step-by-step	252,423	237,254
Central office equipment, panel	7,027,420	6,199,881
Other equipment of central offices	162,283	162,283
Land—Exchange	662,648	622,509
Buildings—Exchange	3,458,546	3,174,832
Total	$14,254,466	$12,596,396
		88.37%

[fol. 213]

The Pacific Telephone and Telegraph Company

State of Washington

Inter-Office Trunks, Including Associated Equipment such as Jacks, Plugs, Relays, Etc. (Private Local Lines)

Class of Plant	Local Use Exclusively
Exchange Pole Lines	$3,277
Exchange Aerial Cable	1,771
Exchange Aerial Wire	2,658
Exchange U. G. Conduit	327,003
Exchange U. G. Cable	653,334
Exchange Submarine Cable	17,263
Exchange Right-of-way	69
Total Outside Plant	$1,005,375

Outgoing Trunk Jacks and Dial Equipment Associated with Inter-Office Trunks, and Private Line Services

Class of Plant	Local Use Exclusively
Central Office Equipment, Manual	$491,499
Central Office Equipment, Step-by-Step	15,169
Central Office Equipment, Panel	827,539
Total Inside Plant (Jacks and Associated Equipment)	$1,334,207
Total	$2,339,582

[fol. 214]

The Pacific Telephone and Telegraph Company

State of Washington

Toll Trunks-Book Cost

Class of Plant	Total Cost	
Toll Switching Trunks	$98,348	
Toll Recording Trunks	10,841	
C. L. R. Trunks	29,725	
Total	$138,914	
	100.00%	Jointly Used
A-B Toll Trunks	$19,039	
	100.00%	Exclusively either Interstate or Intrastate.

[fol. 215]

The Pacific Telephone and Telegraph Company

State of Washington

Toll Switchboards Including Toll Use of Local Exchange Switchboards, Land and Buildings

Class of Plant	Total Cost
Land—Exchange	$338,903
Land—Toll	4,637
Buildings—Exchange	1,421,946
Buildings—Toll	28,455
Central Office Equipment, Manual	496,628
Central Office Equipment, Step-by-Step	23,742
Central Office Equipment, Panel Dial	310,501
Central Office Equipment, Toll & Tandem	1,280,795
Central Office Equipment, Other	47,935
Total	$3,953,542

Above Plant 100% Jointly Used

[fol. 216] The Pacific Telephone and Telegraph Company

State of Washington

Toll Lines (Including Supporting Structures but Excluding Long Lines Equipment)

Class of plant	Total cost	Jointly used
Right-of-way, exchange	$ 984	$ 984
Right-of-way, toll	312,703	312,703
Exchange pole lines	114,423	114,423
Exchange aerial cable	130,294	130,294
Exchange aerial wire	41,218	41,218
Exchange drop wire	24,413	24,413
Exchange U. G. conduit	390,968	390,968
Exchange U. G. cable	217,694	217,694
Exchange submarine cable	15,015	15,015
Toll pole lines	3,657,934	3,657,934
Toll aerial cable	684,003	684,003
Toll aerial wire	3,297,270	3,297,270
Toll U. G. conduit	478,902	478,902
Toll U. G. cable	741,694	741,694
Toll submarine cable	241,250	241,250
Total	$10,348,765	$10,348,765
		100.00% Jointly Used

[fol. 217] The Pacific Telephone and Telegraph Company

State of Washington

Long Lines

Class of plant	Total cost	Jointly used
Long lines	$826.109	$826,109
		100.00% Jointly Used

[fol. 218] The Pacific Telephone and Telegraph Company

State of Washington

Telegraph and Other Services

Class of plant	Total cost	Jointly used
Telegraph	$1,064,221	$1,064,221
Program	602,488	Interstate 100%
American Telephone and Telegraph Company leased plant	243,425	Interstate 100%
Clarkston, Washington	89,363	Interstate 100%
Total	$1,999,497	

[fol. 219] PLAINTIFF'S EXHIBIT No. 17

Thurston County Cause No. 15282-87

Date Admitted: Jan. 10, 1935

The Pacific Telephone and Telegraph Company

State of Washington

Summary of Jointly Used Property

Class of plant	Total cost	Jointly used
1. Subscribers' loops	$14,169,215	$13,108,077
2. Station equipment (Local)	5,890,439	5,548,771
3. Station equipment (Toll)	172,069	172,069
4. Subscribers' switchboards	14,254,466	12,596,396
5. Inter-office trunks	2,339,582	.....
6. Toll switchboards	3,953,542	3,953,542
7. Toll lines	10,348,765	10,348,765
8. Long lines	826,109	826,109
9. Telegraph	1,064,221	1,064,221
10. Program supply	602,488	.....
11. Leased plant to A. T. & T. Co	243,425	.....
12. Clarkston, Washington	89,363	.....
Total	$53,972,723	$47,756,864

88.48% Jointly Used

[fol. 220] DEFENDANT'S EXHIBIT No. 19

(3 Sheets)

S1454 W.

Letterhead of the Pacific Telephone and Telegraph Company Washington and Idaho Area

Defendant's Exhibit No. 19. Thurston County Cause No. 15282-87. Date Admitted Jan. 10, 1935.

Seattle, July 19, 1934.

Tax Commission of the State of Washington, Olympia, Washington.

Attention: Mr. C. A. Manschreck

GENTLEMEN:

The attached two statements have been compiled in response to your letter of request of July 11, addressed to the San Francisco offices of this Company. On these statements, compiled separately for the years 1932 and 1933, we show by counties the assessed value of the real prop-

erty and the taxes paid thereon, the assessed value of the personal property, the taxes paid thereon, and the ratio of assessed to "full" value applied by the county assessor, and the total assessed value and the total taxes paid thereon, all as applying to the properties of The Pacific Telephone and Telegraph Company, State of Washington, and The Home Telephone and Telegraph Company of Spokane.

Yours truly, The Pacific Telephone and Telegraph Company, by R. W. Mastick, General Staff Engineer.

HWF:ES. Attachments.

[fol. 221] The Pacific Telephone and Telegraph Company and The Home Telephone and Telegraph Company of Spokane
Year 1932

Company and county	Real property		Personal property			Real and personal property	
	Assessed value—1932 by county assessors	Net taxes paid for year 1932	Assessed value—1932 by county assessors	Assessment ratio applied by assessors	Taxes paid for year 1932	Assessed value—1932 by county assessors	Total taxes paid for year 1932
The Pacific Telephone and Telegraph Company							
Adams	$.....	$.....	$42,632	.50	$1,913.87	$42,632	$1,913.87
Asotin	.....	.....	57,438	.50	4,079.70	57,438	4,079.70
Benton	.....	.....	19,440	.50	974.21	19,440	974.21
Chelan	6,740	420.39	111,627	.47	5,883.03	118,367	6,303.42
Clallam	1,948	135.92	169,573	.50	11,541.89	171,521	11,677.81
Clark	3,930	295.43	369,340	.50	25,198.63	373,270	25,494.06
Columbia	.....	.....	46,807	.50	1,829.94	46,807	1,829.94
Cowlitz	29,475	1,900.71	464,226	.50	27,609.83	493,701	29,510.54
Douglas	.....	.....	69,479	.50	2,858.67	69,479	2,858.67
Ferry	.....	.....	14,700	.45	793.75	14,700	793.75
Franklin	.....	.....	53,911	.50	3,383.20	53,911	3,383.20
Garfield	.....	.....	31,900	.50	1,459.57	31,900	1,459.57
Grant	.....	.....	38,736	.50	1,865.11	38,736	1,865.11
Grays Harbor	19,840	2,030.40	414,730	.40	41,528.83	434,570	43,559.23
Jefferson	.....	.....	48,600	.45	2,744.29	48,660	2,744.29
King	1,156,480	83,523.76	8,739,510	.50	644,229.38	9,895,990	727,753.14
Kitsap	18,960	1,509.22	289,970	.48	22,246.65	308,930	23,755.87
Kittitas	12,550	766.80	150,895	.50	7,138.65	163,445	7,905.45
Klickitat	.....	.....	2,555	.43	113.01	2,555	113.01
Lewis	4,066	316.94	249,395	.40	17,647.50	253,461	17,964.44
Lincoln	.....	.....	115,870	.50	4,647.22	115,870	4,647.22
Mason	.....	.....	51,865	.50	3,449.79	51,865	3,449.79
Okanogan	560	35.31	108,680	.50	6,365.39	109,240	6,400.70
Pacific	.....	.....	75,951	.46	6,495.47	75,951	6,495.47
Pend Oreille	.....	.....	3,681	.50	151.07	3,681	151.07

913

The Pacific Telephone and Telegraph Company and The Home Telephone and Telegraph Company of Spokane
Year 1932—Continued

Company and county	Real property		Personal property			Real and personal property	
	Assessed value—1932 by county assessors	Net taxes paid for year 1932	Assessed value—1932 by county assessors	Assessment ratio applied by assessors	Taxes paid for year 1932	Assessed value—1932 by county assessors	Total taxes paid for year 1932
The Pacific Telephone and Telegraph Company							
Pierce	198,092	16,754.79	1,995,265	.50	170,816.70	2,193,357	187,571.49
San Juan	100	4.59	56,017	.38	2,718.56	56,117	2,723.15
Skagit	.....	.....	50,930	.40	3,171.32	50,930	3,171.32
Skamania	.....	.....	560	.50	59.07	960	59.07
Snohomish	670	38.61	153,175	.40	11,149.76	153,845	11,188.37
Spokane	.....	.....	217,379	.50	10,986.69	217,379	10,986.69
Stevens	30	1.53	69,360	.44	3,833.36	69,390	3,834.89
Thurston	6,150	487.80	313,238	.50	23,349.66	319,388	23,837.46
Wahkiakum	.....	.....	12,120	.40	780.18	12,120	780.18
Walla Walla	28,080	1,695.54	335,925	.46	18,851.06	364,005	20,546.60
Whatcom	16,150	1,109.12	496,107	.50	35,458.59	512,257	36,567.71
Whitman	.....	.....	177,850	.41	6,801.29	177,850	6,801.29
Yakima	67,650	4,659.07	447,360	.42	30,686.96	515,010	35,346.03
Total—Pacific Co.	$1,371,471	$115,685.93	$16,067,257	Avg. .487	$1,164,811.85	$17,638,728	$1,280,497.78
The Home Telephone and Telegraph Company of Spokane	$173,370	$9,602.45	$1,979,350	.50	$112,449.19	$2,152,720	$122,051.64
Total—State of Washington	$1,744,841	$125,288.38	$18,046,607	Avg. .488	$1,277,261.04	$19,791,448	$1,402,549.42

Notes—
Real property taxes are net after 3 per cent. rebate for full, single payment.
Included in King County figures are an assessment of $6,000.00 on non-operating personal property and taxes on the same of $446.88.

General Staff Engineer, Seattle, July 18, 1934.

Year 1933

Company and county	Real property		Personal property			Real and personal property	
	Assessed value—1933 by county assessors	Net taxes paid for year 1933	Assessed value—1933 by county assessors	Assessment ratio applied by assessors	Taxes paid for year 1933	Assessed value—1933 by county assessors	Total taxes paid for year 1933
The Pacific Telephone and Telegraph Company							
Adams	$.....	$.....	$40,420	.50	$1,646.00	$40,420	$1,646.00
Asotin	.....	.....	53,775	.50	2,929.29	53,775	2,929.29
Benton	.....	.....	18,540	.50	805.24	18,540	805.24
Chelan	6,740	444.63	105,381	.47	5,223.69	112,121	5,668.32
Clallam	1,948	111.88	161,387	.50	9,239.20	163,335	9,351.08
Clark	3,930	223.01	330,840	.50	16,537.28	334,770	16,760.29
Columbia	.....	.....	44,333	.50	1,537.79	44,333	1,537.79
Cowlitz	29,475	1,497.01	384,683	.45	18,694.10	414,158	20,191.11
Douglas	.....	.....	66,180	.50	3,076.31	66,180	3,076.31
Ferry	.....	.....	14,065	.47	640.33	14,065	640.33
Franklin	.....	.....	52,135	.50	2,399.56	52,135	2,399.56
Garfield	.....	.....	30,300	.50	1,151.22	30,300	1,151.22
Grant	.....	.....	37,906	.50	1,749.32	37,906	1,749.32
Grays Harbor	19,840	2,161.91	380,430	.40	40,443.59	400,270	42,605.50
Jefferson	.....	.....	47,556	.46	2,359.76	47,556	2,359.76
King	1,156,340	70,227.67	7,804,520	.47–.50	486,141.91	8,960,860	556,369.58
Kitsap	18,960	1,160.38	282,340	.48	17,312.90	301,300	18,473.28
Kittitas	12,550	699.37	144,640	.50	5,868.89	157,190	6,568.26
Klickitat	.....	.....	2,673	.43	84.82	2,673	84.82
Lewis	4,066	448.01	226,420	.40	12,041.94	230,486	12,289.95
Lincoln	.....	.....	105,066	.50	3,327.87	105,066	3,327.87
Mason	.....	.....	49,340	.50	2,581.00	49,340	2,581.00
Okanogan	560	30.96	102,600	.50	4,612.15	103,160	4,643.11
Pacific	.....	.....	71,077	.46	5,239.47	71,077	5,239.47

The Pacific Telephone and Telegraph Company and The Home Telephone and Telegraph Company of Spokane
Year 1932—Continued

Company and county	Real property		Personal property			Real and personal property	
	Assessed value—1932 by county assessors	Net taxes paid for year 1932	Assessed value—1932 by county assessors	Assessment ratio applied by assessors	Taxes paid for year 1932	Assessed value—1932 by county assessors	Total taxes paid for year 1932
The Pacific Telephone and Telegraph Company							
Pend Oreille	.....	.....	5,742	.50	219.83	5,742	219.83
Pierce	198,092	13,675.26	1,771,700	.47	124,480.12	1,969,792	138,155.38
San Juan	100	3.36	54,760	.39	2,009.60	54,860	2,012.96
Skagit	.....	.....	48,690	.40	2,099.48	48,690	2,099.48
Skamania	.....	.....	820	.46	46.35	820	46.35
Snohomish	670	30.42	153,800	.42	9,308.37	154,470	9,338.79
Spokane	.....	.....	184,000	.44	8,622.89	184,000	8,622.89
Stevens	30	1.38	66,785	.44	2,989.87	66,815	2,991.25
Thurston	6,150	420.31	295,628	.50	19,098.74	301,778	19,519.05
Wahkiakum	.....	.....	13,785	.50	709.83	13,785	709.83
Walla Walla	28,080	1,427.27	345,595	.50	16,338.12	373,675	17,765.39
Whatcom	16,150	895.17	466,027	.50	26,906.89	482,177	27,802.06
Whitman	.....	.....	148,560	.41	4,886.52	148,560	4,886.52
Yakima	67,650	3,871.61	413,080	.41	23,574.91	480,730	27,446.52
Total—Pacific Co.	$1,571,331	$97,129.61	$14,525,579	Avg. .467	$886,935.15	$16,096,910	$984,064.76
The Home Telephone and Telegraph Company of Spokane	173,370	8,643.88	1,640,000	.44	83,885.42	1,813,370	92,529.30
Total—State of Washington	$1,744,701	$105,773.49	$16,165.579	Avg. .464	$970,820.57	$17,910,280	$1,076,594.06

Notes—
Real property taxes are net after 3 per cent. rebate for full, single payment.
Personal property taxes are total for year. One-half has been paid to date.
King county Assessor applied ratio of .47 to tangible personal property and .50 to "franchise."

General Staff Engineer, Seattle, July 18, 1934.

[fol. 223] Certificate

STATE OF WASHINGTON,
County of Thurston, ss:

I hereby certify that the foregoing and attached document, consisting of three sheets, is a full, true and correct copy of the original letter dated July 19, 1934, from R. W. Mastic, General Staff Engineer of the Pacific Telephone and Telegraph Company, together with statements for the years 1932 and 1933 showing assessed value of the real property and the taxes paid thereon, the assessed value of the personal property, the taxes paid thereon, and the ratio of assessed to "full" value of the Pacific Telephone & Telegraph Company and the Home Telephone and Telegraph Company now on file in the office of the Tax Commission of the State of Washington at Olympia.

In witness whereof, I have hereunto set my hand and affixed the seal of the Tax Commission of the State of Washington, this 10th day of January, 1935.

Geo. L. Harrigan, Secretary of the Tax Commission of the State of Washington. (Seal.)

[fol. 224] DEFENDANT'S EXHIBIT No. 20

Received Aug. 11, 1933, Dept. Public Works

K 946 N A (2-30)

(Insignia of The Pacific Telephone and Telegrapgh Company)

The Pacific Telephone and Telegraph Company

Connecting Agreement

Agreement dated this 2nd day of August, 1933, between The Pacific Telephone and Telegraph Company, a corporation, herein called the Pacific Company and J. A. Howerton, doing business under the name and style of the Ilwaco Telephone and Telegraph Company herein called the Ilwaco Company.

Physical connection shall be established for the interchange of telephone and telegraph traffic between the sys-

tem operated by the Ilwaco Company, and the system operated by the Pacific Company, including systems of other companies with which either company to this agreement connects upon the following terms and conditions.

First. The system of the Ilwaco Company is designated on the annexed map, marked, "Exhibit A", and made a part of this agreement.

Second. Connection between the system of the Pacific Company and the system of the Ilwaco Company shall be made at the first or office pole of the Ilwaco Company at Ilwaco, Washington. The Ilwaco Company agrees that it will not connect the toll lines of the Pacific Company with the exchanges or toll lines of any individual, firm or corporation, other than those which may be mutually agreed upon.

Third. Each Company will make the proper switchboard or other connection and perform the necessary operating for prompt communication between its patrons and patrons of the other.

Fourth. Each company will construct, equip, maintain and operate its system so that good telephone and telegraph service shall be furnished to the public. The Ilwaco Company agrees to furnish and maintain adequate equip- [fol. 225] ment upon its switchboard for handling thereon the toll lines of the Pacific Company.

Fifth. Each Company shall take reasonable precautions in the location,, construction and maintenance of its lines for protection against hazard and interference from foreign wire lines.

Sixth. The charges for all traffic interchanged hereunder shall be in accordance with lawful published rates.

Seventh. Each company shall be responsible for all charges for traffic interchanged under this agreement and charged to its patrons or to patrons of any of its connecting companies and shall account to the other company for the latter's share thereof.

All accounts shall be adjusted and remittances in full shall be made by either company to the other not later

than the 25th of the month in which the intercompany statement is rendered.

Eighth. The Pacific Company agrees to pay to the Ilwaco Company compensation in amount equivalent to Twenty-five Per Cent (25%) of the Pacific Company's tolls charged against the patrons of the Ilwaco Company at the point of connection, it being mutually agreed that the foregoing is full compensation to the Ilwaco Company for furnishing and operating interexchange terminal equipment and facilities therefor in handling the interexchange telephone and telegraph traffic, for billing and collecting all charges for interexchange telephone and telegraph messages charged by the Pacific Company against the Ilwaco Company, for assuming any and all amounts which are charged, including any amounts which may be found to be uncollectible, for furnishing all necessary terminal equipment and facilities for handling interexchange messages from public telephones, for paying all commissions on interexchange message tolls originating at public telephones, for furnishing battery and ringing power necessary in the operating of interexchange telephone and telegraph traffic, for assuming all other and miscellaneous expenses incurred by the Ilwaco [fol. 226] Company in handling interexchange business. It is mutually agreed that no compensation as set out herein shall be paid by either company to the other on communications involving the toll lines of both companies, nor on "other line" tolls, nor on charges for messenger service.

Ninth. The provisions of Article Eighth above shall apply to Transatlantic, Transpacific, Ship-to-Shore, and any international communications not included in the foregoing originating on the system of the Ilwaco Company, and such communications for the purpose of computing compensation and prorate shall be considered as if each such Transatlantic communication had been a person-to-person message to the City of New York, each such Transpacific communication had been a person-to-person message to San Francisco, each such Shore-to-ship message had been a person-to-person communication to the appropriate shore transfer point for such messages, and any international communications not included in the foregoing shall be treated as terminating at the appropriate international

transfer point on or near the boundaries of continental United States.

Tenth. Each Company agrees to furnish the other, upon request, for statistical purposes, information regarding the number and classification of stations connected, public offices and tariffs. Each company shall keep proper records of its transactions hereunder and such records, together with the vouchers relating thereto, shall at all reasonable times be subject to inspection by the other.

Eleventh. Each of the companies hereto agrees to indemnify the other and hold it harmless from any and all liability for injury to persons or damage to property resulting in any way from the connection of its circuits with those of such other company. And each company hereto assumes all liability for, and agrees to indemnify and hold the other company harmless from damages of whatsoever nature, resulting from defects in plant construction, or [fol. 227] maintenance or for negligence, mistakes, delays, non-delivery or other defaults, in the interchange of telephone and telegraph business that may occur at its own offices or upon its own lines or that may be caused by the default of its own employees; and whenever the responsibility for any such default cannot be located, it is mutually agreed, that any damage or loss resulting therefrom shall be divided and born- equally by the companies hereto, but neither company shall be liable to the other for loss or damage resulting from interruptions to service which could not have been avoided by the exercise of reasonable care and diligence.

Twelfth. If either company shall default in the payment of any sum due hereunder, or shall violate any other provisions of this agreement, and if such default or violation shall continue for thirty (30) days after written notice thereof, the other company may terminate this agreement forthwith by written notice.

Thirteenth. The failure of either company hereto to comply with or to enforce or insist upon compliance by the other company with any of the terms and conditions of this agreement, or waiver by either company hereto of the same in any instance or instances, shall not be construed as a gen-

eral waiver or relinquishment of any terms or conditions, but the same shall be and remain at all times in full force and effect.

Fourteenth. ——.

Fifteenth. This agreement shall take effect as of the 21st day of July, 1933, and unless sooner terminated as herein provided, shall continue in force until the Twentieth day of July, 1934, and thereafter until and unless terminated by ninety (90) days' prior notice in writing from either company to the other.

Time is of the essence of this agreement.

This agreement shall be binding upon the respective companies hereto and their and each of their successors and assigns.

[fol. 228] In witness whereof, the said companies have caused this agreement to be executed in their behalf the day and year first above written.

The Pacific Telephone and Telegraph Company,
(Sgd) by H. D. Pillsbury, N. R. P., President.

Attest: (Sgd) W. G. Kleinschmidt, Secretary.

(Sgd) J. A. Howerton, Doing business under the name and style of the Ilwaco Telephone and Telegraph Company.

Witness: (Sgd) J. R. Howerton.
Form Approved: (Sgd) S. L. Wright, Attorney.

[fol. 229] Certificate

STATE OF WASHINGTON,
County of Thurston, ss:

I hereby certify that the foregoing and attached document is a full, true and correct copy of original Connecting Agreement dated August 2, 1933 between the Pacific Telephone and Telegraph Company and J. A. Howerton, doing business under the name and style of the Ilwaco Telephone and Telegraph Company, now on file in the office of the Department of Public Works of Washington at Olympia.

In witness whereof, I have hereunto set my hand and

affixed the seal of the Department of Public Works of Washington, this 9th day of January, 1935.

A. E. Rotchford, Secretary of the Department of Public Works of Washington. (Seal.)

Defendant's Exhibit No. 20. Thurston County Cause No. 16282-87. Date Admitted Jan. 10, 1935.

[fol. 230] DEFENDANT'S EXHIBIT No. 21

Dept. of Public Wks., Received Apr. 24, 1930, Ref'd to ——

Checked. H.W.-M.F.

Connecting Agreement

Agreement made March 26th, 1930, between The Pacific Telephone and Telegraph Company, a corporation, herein called the "Pacific Company" and the Oregon-Washington Telephone Company, a corporation, herein called the "Oregon Company".

Physical connection shall be established for the interchange of telephone and telegraph traffic between the system operated by the Oregon Company and the system operated by the Pacific Company, including systems of other companies with which each connects, upon the following terms and conditions:

First. The territory to be served by the Oregon Company will be the territory designated on map attached hereto, marked Exhibit "A" and which is made a part of this agreement.

Second. Connection between the system of the Pacific Company and the system of the Oregon Company shall be made at the first or office pole at Goldendale, Granger, Grandview, Mabton, Prosser, Sunnyside, Toppenish, Wapato and Zillah, Washington, and Hood River, Oregon, and at the Primary Rate Area at The Dalles, Oregon. The Oregon Company agrees that it will not connect the lines of the Pacific Company with the exchanges or toll lines of any individual, firm or corporation, other than those which may be mutually agreed upon, without the written consent of the Pacific Company.

[fol. 231] Third. Each company will make the proper switchboard or other connection and perform the necessary operating for prompt communication between its patrons and the patrons of the other.

Fourth. Each company will construct, equip, maintain and operate its system so that good telephone and telegraph service shall at all times be furnished to the public. Each company agrees to furnish and maintain adequate equipment upon its switchboards where necessary for handling thereon the toll lines of the other company.

Fifth. Under no condition shall the lines of either company, or of its connecting companies, be exposed to high tension lines unless protected in accordance with a recognized standard.

Sixth. The charges for all traffic interchanged hereunder shall be in accordance with lawful published rates.

Seventh. Each company shall be responsible for all charges for traffic interchanged under this agreement and charged to its patrons or to the patrons of any of its connecting companies, and shall remit to the other company for the latter's share thereof on or before the twenty-fifth of the month in which the intercompany statement is rendered.

The Pacific Company agrees to pay the Oregon Company a commission of 30 per cent of all the Pacific Company's tolls charged against the patrons of the Oregon Company at Goldendale, Grandview, Granger, Mabton, Prosser, Sunnyside, Toppenish, Wapato and Zillah, Washington. The Oregon Company agrees to pay to the Pacific Company a commission of 30 per cent of all the origin Company's tolls charged against the patrons of the Pacific Company at the Dalles. It is mutually agreed that the commissions mentioned are full compensation for performing all necessary operating, furnishing, all necessary terminal equipment and facilities therefor in handling the traffic, for bill-[fol. 232] ing and collecting all tolls, for assuming any and all amounts which are charged including any amounts which may be found to be uncollectible, for furnishing all necessary terminal equipment and facilities for handling Public Pay Stations, for paying all commissions due pay station subscribers on tolls originating therefor, for furnishing

battery and ringing power necessary in the operation of the toll traffic, for assuming all miscellaneous expenses incurred in handling the toll business, and for otherwise acting as toll agent. It is mutually agreed that no commission shall be paid by or to either company on tolls for communications in which the toll lines of both Companies are involved nor on "other line" tolls or charges for messenger service.

Eighth. The interchange of business shall be as follows:

1. Business originating at Granger, Grandview, Mabton, Prosser, Sunnyside, Toppenish, Wapato, Zillah, and Goldendale, and destined to points on the lines of the Pacific Company or its other connecting companies and vice versa shall be routed entirely over the lines of the Pacific Company.

2. Business originating at points on the lines of the Oregon Company routed via Hood River and the Dalles, Oregon, and Goldendale and Wapato, Washington, and destined to points on the lines of the Pacific Company or its other connecting companies and Company at Hood River, The Dalles, Goldendale and Wapato respectively.

3. Business originating at Granger, Grandview, Mabton, Prosser, Sunnyside, Toppenish, Wapato and Zillah and destined to Goldendale and vice versa shall be routed entirely over the lines of the Pacific Company.

4. Business originating at points on the lines of the Oregon Company routed via Hood River and The Dalles and destined to Granger, Grandview, Mabton, Prosser, Sunnyside, Toppenish, Wapato, Zillah and Goldendale and vice versa shall be transferred to or by the Pacific Company at Hood River and The Dalles, respectively.

5. Business originating at White Salmon and destined to The Dalles and vice versa shall be routed over the lines of the Pacific Company between The Dalles and Hood River.

[fol. 233] 6. Business between Granger, Grandview, Mabton, Prosser, Sunnyside, Toppenish, Wapato and Zillah may be routed over the lines of the Oregon Company.

7. The Oregon Company may establish direct connection between the following points on its system: Lyle and Goldendale; Goldendale and Mabton. In the event that direct connection is established between one or both of the routes mentioned, the Oregon Company may route business which originates and terminates on its system over said route or routes. When such connection or connections are established, it is mutually agreed that Paragraphs 3 and 4 above will be amended or cancelled to meet the changed conditions.

Ninth. The Oregon Company agrees to lease from the Pacific Company telephone circuit or circuits extending from the Pacific Company's central office in The Dalles, Oregon, to the present Primary Rate Area, a distance of approximately one and one-half (1.5) miles at which point the Oregon Company's toll lines terminates. The Oregon Company agrees to pay the Pacific Company for circuit or circuits so leased at the rate of four and 50/100 ($4.50) per month per circuit.

Tenth. The Oregon Company agrees to deliver to its patrons such of the Pacific Company's directories as are provided by mutual agreement. Under arrangements to be mutually agreed upon, the subscribers of the Oregon Company may be listed in the Pacific Company's directories and the Oregon Company agrees to furnish the necessary information upon request.

Eleventh. Each company agrees to furnish the other, upon request, for statistical purposes, information regarding the number and classification of stations connected, public offices and tariffs and to maintain records and accounts and in so far as they relate to the toll business interchanged, in such a manner and in such a way that said records and accounts may be open and available to either company's authorized representatives for inspection for the purpose of checking the accuracy and correctness of the monthly statements hereinbefore referred to.

[fol. 234] Twelfth. Each of the parties hereto agrees to indemnify the other and hold it harmless from any and all liability for injury to persons or damage to property resulting in any way from the connection of its circuits with those of such other party. And each party hereto assumes

all liability for, and agrees to indemnify and hold the other party harmless from damages of whatsoever nature resulting from defects in plant construction or maintenance, of for negligence, mistakes, delays, non-delivery, or other defaults in the interchange of telephone and telegraph business that may occur at its own offices or upon its own lines, or that may be caused by the default of its own employees; and whenever the responsibility for any such default cannot be located, it is mutually agreed that any damage or loss resulting therefrom shall be divided and borne equally by the parties hereto; but neither party shall be liable to the other for loss or damage resulting from interruptions to service which could not have been avoided by the exercise of reasonable care and diligence.

Thirteenth. If either company shall default in the payment of any sum due hereunder, or shall violate any other provision of this agreement, and if such default or violation shall continue for thirty (30) days after written notice thereof, the other company may terminate this agreement forthwith by written notice.

Fourteenth. It is mutually agreed that the Pacific Company may, at its option, maintain and operate its toll stations at Wishram and S. P. & S. Power House, Washington, as shown on Exhibit "A" referred to in Paragraph One of this Agreement. This agreement cancels and supersedes the Connecting Agreement between The Pacific Telephone and Telegraph Company and the Oregon-Washington Telephone Company dated February 25, 1928 due to expire June 1, 1947, and also cancels and supersedes the Connecting [fol. 235] Agreement between The Pacific Telephone and Telegraph Company and The Benton Independent Telephone Company dated March 21, 1917, and Supplemental agreement thereto dated June 21, 1918, which were assigned to the Oregon-Washington Telephone Company March 1, 1929.

Fifteenth. This agreement shall take effect on the twenty-first day of May, 1929, and, unless sooner terminated as herein provided, shall continue in force until the first day of June, 1947, and thereafter until and unless terminated by ninety (90) days' prior notice in writing from either company to the other.

Time is the essence of this agreement.

This agreement shall be binding upon the respective parties hereto and their and each of their successors and assigns.

In Witness whereof, the said companies have caused this agreement to be executed in their behalf this 26th day of March, 1930.

The Pacific Telephone and Telegraph Company, by H. D. Pillsbury, N. R. P., President. (Seal.)

Attest: W. J. Phillips, Secretary.

Oregon-Washington Telephone Company, by J. E. Smithson, President. (Seal.)

Attest: E. O. Blancher, Secretary.

Form Approved: Hugh Fullerton, Attorney.

[fol. 236] Certificate

STATE OF WASHINGTON,
County of Thurston, ss:

I hereby certify that the foregoing and attached document is a full, true and correct copy of original Connecting Agreement dated March 26, 1933, between the Pacific Telephone and Telegraph Company and the Oregon-Washington Telephone Company, now on file in the office of the Department of Public Works of Washington at Olympia.

In witness whereof, I have hereunto set my hand and affixed the seal of the Department of Public Works of Washington, this 9th day of January, 1935.

A. E. Rotchford, Secretary of the Department of Public Works of Washington. (Seal.)

Defendant's Exhibit No. 21. Thurston County Cause No. 15282-87. Date Admitted January 10, 1935.

[fol. 237] PLAINTIFF'S EXHIBIT No. 22

Thurston County Cause No. 15282-87

Date Admitted: Jan. 10, 1935

Commissioners: Harold H. Henneford, Chairman; Thomas S. Hedges, T. M. Jenner. George L. Harrigan, Secretary.

State of Washington Tax Commission, Olympia

May 29, 1934.

Messrs. McMicken, Ramsey, Rupp & Schweppe, Attorneys-at-Law, Colman Building, Seattle, Washington.

GENTLEMEN:

Relative to the filing of returns by The Pacific Telephone & Telegraph Company, The Home Telephone & Telegraph Company, Citizens Independent Telephone Company, Winlock Home Telephone Company and Home Telephone Company of Castle Rock, under the provisions of Chapter 191, Laws of 1933, as amended by Chapter 57, Laws of 1933, Ex. Sess., you are hereby advised that unless returns covering the period from August 1, 1933, to March 31, 1934, both dates inclusive, are filed by the said telephone companies with the Tax Commission of the State of Washington at its office in the City of Olympia, on or before June 4, 1934, the Commission will proceed to assess the tax against each company to which tax will be added a penalty of 10% for failure to make a return and likewise shall add a further penalty of one per cent per month of the amount of tax for each thirty days or portion thereof from the date upon which the tax was due, as provided by said law.

Very truly yours, Tax Commission of the State of Washington, by T. M. Jenner, Commissioner.

TMJ:K.

[fol. 238] Maurice McMicken. H. J. Ramsey. Otto B. Rupp. Alfred J. Schweppe. Maurice R. McMicken. Bernard Reiter. J. Gordon Gose. Winlock Miller, Jr.

McMicken, Ramsey, Rupp & Schweppe,
Attorneys and Counselors at Law,
657-71 Colman Building
Seattle, Washington

June 29, 1934.

State Tax Commission, Business Tax Division, Olympia, Washington.

GENTLEMEN:

The Pacific Telephone and Telegraph Company herewith files its business tax return, as provided for by Chapter 191, Laws of 1933, with amendments thereto, for the month of May, 1934.

Said filing is made under protest and without prejudice to the rights of said company to contest the validity of the act or acts under which the filing is made, either in the suit now pending or in any proceeding whatsoever subsequently brought either by the Company or by anyone else, and without prejudice to the rights of the Company to show, in any appropriate manner or proceeding, that the Tax Commission of the State of Washington has misinterpreted said act or acts, and without prejudice to the right of the Company to contest any tax, or portion thereof, which the Tax Commission may seek to impose under said act or acts.

Very truly yours, The Pacific Telephone & Telegraph Company, by —— ——, Its Attorneys.

Mail One Copy to the Tax Commission of the State of Washington—Retain One Copy for Your Files

Form 3906

BUSINESS TAX RETURN

Chapter 191, Laws of Washington, 1933, and Amendments Thereto

MONTHLY RETURNS MUST BE MADE IF TAX LIABILITY EXCEEDS $10.00 PER MONTH

Use Only One Line

This Return for the Month of August **1933**

OR

This Return for the Quarter Ending **193**

Remittances. Make remittance payable to TAX COMMISSION and mail it with this return to the BUSINESS TAX DIVISION, TAX COMMISSION OF THE STATE OF WASHINGTON, OLYMPIA, WASHINGTON, within 15 days after the close of the period covered.

The law provides penalties for failure to file returns and make payments within the time specified.

BE SURE THAT NAME AND ADDRESS ARE CORRECT

File Number

Name: The Pacific Telephone and Telegraph Company,

Street No.: 1200 Third Avenue,

City and State: Seattle, Washington.

This space for department use only

Remittance checked	File checked—Cash entry
Office review	Ledger checked
Audit—Office. Date	By
Audit—Field. Date	By
Final approval. Date	By

COMPUTATION OF TAX—BUSINESS CONDUCTED IN WASHINGTON

Column 1 Taxable Activities	Column 2 Business Classification	Column 3 Gross Amount	Column 4 Deductions	Column 5 Taxable Amount	Col. 6 Rate	Column 7 Amount of Tax	Column 8 Do Not Use
Selling Tangible Property	* Retailing				.005		
	Wholesaling				.002		
Manufacturing	Manufacturing—All lines				.0025		
Extracting	Logging—Mining—Fishing				.003		
	Oil and Natural Gas				.01		
	Extracting Other Products				.003		
Public Service and Utilities	Steam Railways				.015		
	Electric Interurban and Street Railways Urban Automotive Transp't'n				.005		
	Light and Power—Water				.03		
	Telephone—Telegraph	$813,806 37	$83,745 06	$730,061 31	.03	$21,901 84	
	Manufactured Gas				.02		
	Express and/or Car Companies				.02		
	Highway Transportation				.015		
	Other Utilities				.015		
					.015		
Financial	Banks, Savings Assoc., etc.				.004		
	Stock Broker, Security House, Finance Co.				.02		
Amusement	Recreation and Amusement				.015		
Publishing, etc.	Outdoor Advertising				.01		
	Newspaper, Periodical Pub.				.0025		
	Radio Broadcasting				.01		
Service and Other Activities	* Professional, service and other businesses not included above				.005		
	Total tax due for the period covered.....					$21,901 84	

* Persons, such as contractors, operators of garages, repair-shops, machine-shops and the like, engaging in business which combines the sale of tangible property with the rendition of service should report, under the line headed "Service and Other Activities," the gross income of the business, which includes gross proceeds of sales of tangible property as well as gross income from service charges, etc.

READ INSTRUCTIONS CAREFULLY

Be Sure to Complete the Back of this Form

239

131

DETAIL OF DEDUCTIONS

(From Summary shown in Column 4, reverse side)

Type of Deduction		Amount	
Trade Discounts	Trade discounts allowed and deducted by the seller		
Freight Out	Allowable to seller only, not to purchaser—Actual freight or delivery charges: (1) Paid to the carrier by the seller and invoiced to the purchaser as such, or (2) paid by the purchaser to the carrier (other than the seller) and deducted from the invoice price by the purchaser.		
Cash Discounts	Cash discounts actually allowed by the taxpayer and taken by the purchaser, if the amount thereof has been included in value of products, gross proceeds of sales or gross income reported for tax purposes.		
Motor Vehicle Fuel Tax	Amount collected by the taxpayer as an excise upon motor vehicle fuel (Gallons sold)		
	The following deductions are not allowable to persons taxable as manufacturers or extractors, measure of tax being "value of products"		
Interstate—Foreign	Proceeds of sales or income derived wholly in interstate or foreign commerce	$68,149	32
Sales to U. S. Gov't	Proceeds of sales to the United States Government, its departments or institutions	7,349	33
Sales to State	Proceeds of sales to the State of Washington, its departments or institutions. Counties, cities, school districts and the like are not state departments or institutions	8,246	41
TOTAL amount of deductions as reported in column 4, page 1		$83,745	06

DETAIL OF OPERATIONS—By Location

This schedule must be completed by each taxpayer whose return includes business transacted at more than one location in the state. Give details for each store, plant or location in the state, including main store or plant.

BUSINESS LOCATIONS INCLUDED IN RETURN			Gross Amount	Deductions	Taxable Amount	Amount of Tax
Name Under Which Operated	Street and No. or R. F. D.	Postoffice				
The Pacific Telephone and Telegraph Company	1200 Third Ayenue	Seattle, Washington	$813,806 37	$83,745 06	$730,061 31	$21,901 84
Totals represent amounts reported on reverse side			$813,806 37	$83,745 06	$730,061 31	$21,901 84

The undersigned taxpayer declares that he has read the foregoing return and certifies it to be correct.

Dated this 4th day of June, 1934 Firm name The Pacific Telephone and Telegraph Company

By (Sd) I.F.Dix

Office or title Vice President

240

If Additional Space is Needed, Attach Supplementary Sheets of This Size

Mail One Copy to the Tax Commission of the State of Washington—Retain One Copy for Your Files

Form 3906

BUSINESS TAX RETURN

Chapter 191, Laws of Washington, 1933, and Amendments Thereto

MONTHLY RETURNS MUST BE MADE IF TAX LIABILITY EXCEEDS $10.00 PER MONTH

Use Only One Line

This Return for the Month of September **193** 3

OR

This Return for the Quarter Ending _____ **193**

Remittances. Make remittance payable to TAX COMMISSION and mail it with this return to the BUSINESS TAX DIVISION, TAX COMMISSION OF THE STATE OF WASHINGTON, OLYMPIA, WASHINGTON, within 15 days after the close of the period covered.

The law provides penalties for failure to file returns and make payments within the time specified.

BE SURE THAT NAME AND ADDRESS ARE CORRECT

File Number

Name: The Pacific Telephone and Telegraph Company,

Street No.: 1200 Third Avenue,

City and State: Seattle, Washington

This space for department use only

Remittance checked	File checked—Cash entry
Office review	Ledger checked
Audit—Office. Date	By
Audit—Field. Date	By
Final approval. Date	By

COMPUTATION OF TAX—BUSINESS CONDUCTED IN WASHINGTON

Column 1 Taxable Activities	Column 2 Business Classification	Column 3 Gross Amount	Column 4 Deductions	Column 5 Taxable Amount	Col. 6 Rate	Column 7 Amount of Tax	Column 8 Do Not Use
Selling Tangible Property	* Retailing				.005		
	Wholesaling				.002		
Manufacturing	Manufacturing—All lines				.0025		
Extracting	Logging—Mining—Fishing				.003		
	Oil and Natural Gas				.01		
	Extracting Other Products				.003		
Public Service and Utilities	Steam Railways				.015		
	Electric Interurban and Street Railways Urban Automotive Transp't'n				.005		
	Light and Power—Water				.03		
	Telephone—Telegraph	$830,397 23	$86,504 02	$743,893 21	.03	$22,316 80	
	Manufactured Gas				.02		
	Express and/or Car Companies				.02		
	Highway Transportation				.015		
	Other Utilities				.015		
					.015		
Financial	Banks, Savings Assoc., etc.				.004		
	Stock Broker, Security House, Finance Co.				.02		
Amusement	Recreation and Amusement				.015		
Publishing, etc.	Outdoor Advertising				.01		
	Newspaper, Periodical Pub.				.0025		
	Radio Broadcasting				.01		
Service and Other Activities	* Professional, service and other businesses not included above				.005		

Total tax due for the period covered..... $22,316 80

* Persons, such as contractors, operators of garages, repair-shops, machine-shops and the like, engaging in business which combines the sale of tangible property with the rendition of service should report, under the line headed "Service and Other Activities," the gross income of the business, which includes gross proceeds of sales of tangible property as well as gross income from service charges, etc.

241

READ INSTRUCTIONS CAREFULLY

Be Sure to Complete the Back of this Form

DETAIL OF DEDUCTIONS

(From Summary shown in Column 4, reverse side)

Type of Deduction		Amount	
Trade Discounts	Trade discounts allowed and deducted by the seller		
Freight Out	Allowable to seller only, not to purchaser—Actual freight or delivery charges: (1) Paid to the carrier by the seller and invoiced to the purchaser as such, or (2) paid by the purchaser to the carrier (other than the seller) and deducted from the invoice price by the purchaser.		
Cash Discounts	Cash discounts actually allowed by the taxpayer and taken by the purchaser, if the amount thereof has been included in value of products, gross proceeds of sales or gross income reported for tax purposes.		
Motor Vehicle Fuel Tax	Amount collected by the taxpayer as an excise upon motor vehicle fuel (Gallons sold)		
	The following deductions are not allowable to persons taxable as manufacturers or extractors, measure of tax being "value of products"		
Interstate—Foreign	Proceeds of sales or income derived wholly in interstate or foreign commerce	$70,908	27
Sales to U. S. Gov't	Proceeds of sales to the United States Government, its departments or institutions	7,349	34
Sales to State	Proceeds of sales to the State of Washington, its departments or institutions. Counties, cities, school districts and the like are not state departments or institutions	8,246	41
TOTAL amount of deductions as reported in column 4, page 1		$86,504	02

DETAIL OF OPERATIONS—By Location

This schedule must be completed by each taxpayer whose return includes business transacted at more than one location in the state. Give details for each store, plant or location in the state, including main store or plant.

BUSINESS LOCATIONS INCLUDED IN RETURN			Gross Amount	Deductions	Taxable Amount	Amount of Tax
Name Under Which Operated	Street and No. or R. F. D.	Postoffice				
The Pacific Telephone and Telegraph Company	1200 Third Avenue	Seattle, Washington	$830,397 23	$86,504 02	$743,893 21	$22,316 80
Totals represent amounts reported on reverse side			$830,397 23	$86,504 02	$743,893 21	$22,316 80

The undersigned taxpayer declares that he has read the foregoing return and certifies it to be correct.

Dated this 4th day of June, 1934 Firm name The Pacific Telephone and Telegraph Company

By (Sd) I.F.Dix

Office or title Vice President

242

If Additional Space is Needed, Attach Supplementary Sheets of This Size

134

Mail One Copy to the Tax Commission of the State of Washington—Retain One Copy for Your Files

Form 3906

BUSINESS TAX RETURN

Chapter 191, Laws of Washington, 1933, and Amendments Thereto

MONTHLY RETURNS MUST BE MADE IF TAX LIABILITY EXCEEDS $10.00 PER MONTH

Use Only One Line

This Return for the Month of October **1933**

OR

This Return for the Quarter Ending _____ **193**

Remittances. Make remittance payable to TAX COMMISSION and mail it with this return to the BUSINESS TAX DIVISION, TAX COMMISSION OF THE STATE OF WASHINGTON, OLYMPIA, WASHINGTON, within 15 days after the close of the period covered.

The law provides penalties for failure to file returns and make payments within the time specified.

BE SURE THAT NAME AND ADDRESS ARE CORRECT

File Number

Name: The Pacific Telephone and Telegraph Company

Street No.: 1200 Third Avenue

City and State: Seattle, Washington

This space for department use only

Remittance checked	File checked—Cash entry
Office review	Ledger checked
Audit—Office. Date	By
Audit—Field. Date	By
Final approval. Date	By

COMPUTATION OF TAX—BUSINESS CONDUCTED IN WASHINGTON

Column 1 Taxable Activities	Column 2 Business Classification	Column 3 Gross Amount	Column 4 Deductions	Column 5 Taxable Amount	Col. 6 Rate	Column 7 Amount of Tax	Column 8 Do Not Use
Selling Tangible Property	* Retailing				.005		
	Wholesaling				.002		
Manufacturing	Manufacturing—All lines				.0025		
Extracting	Logging—Mining—Fishing				.003		
	Oil and Natural Gas				.01		
	Extracting Other Products				.003		
Public Service and Utilities	Steam Railways				.015		
	Electric Interurban and Street Railways Urban Automotive Transp't'n				.005		
	Light and Power—Water				.03		
	Telephone—Telegraph	$837,333 72	$85,398 97	$751,934 75	.03	$22,558 04	
	Manufactured Gas				.02		
	Express and/or Car Companies				.02		
	Highway Transportation				.015		
	Other Utilities				.015		
					.015		
Financial	Banks, Savings Assoc., etc.				.004		
	Stock Broker, Security House, Finance Co.				.02		
Amusement	Recreation and Amusement				.015		
Publishing, etc.	Outdoor Advertising				.01		
	Newspaper, Periodical Pub.				.0025		
	Radio Broadcasting				.01		
Service and Other Activities	* Professional, service and other businesses not included above				.005		

Total tax due for the period covered..... $22,558 04

* Persons, such as contractors, operators of garages, repair-shops, machine-shops and the like, engaging in business which combines the sale of tangible property with the rendition of service should report, under the line headed "Service and Other Activities," the gross income of the business, which includes gross proceeds of sales of tangible property as well as gross income from service charges, etc.

243

READ INSTRUCTIONS CAREFULLY

Be Sure to Complete the Back of this Form

DETAIL OF DEDUCTIONS

(From Summary shown in Column 4, reverse side)

Type of Deduction		Amount	
Trade Discounts	Trade discounts allowed and deducted by the seller		
Freight Out	Allowable to seller only, not to purchaser—Actual freight or delivery charges: (1) Paid to the carrier by the seller and invoiced to the purchaser as such, or (2) paid by the purchaser to the carrier (other than the seller) and deducted from the invoice price by the purchaser.		
Cash Discounts	Cash discounts actually allowed by the taxpayer and taken by the purchaser, if the amount thereof has been included in value of products, gross proceeds of sales or gross income reported for tax purposes.		
Motor Vehicle Fuel Tax	Amount collected by the taxpayer as an excise upon motor vehicle fuel (Gallons sold)		
	The following deductions are not allowable to persons taxable as manufacturers or extractors, measure of tax being "value of products"		
Interstate—Foreign	Proceeds of sales or income derived wholly in interstate or foreign commerce	$69,803	23
Sales to U. S. Gov't	Proceeds of sales to the United States Government, its departments or institutions	7,349	33
Sales to State	Proceeds of sales to the State of Washington, its departments or institutions. Counties, cities, school districts and the like are not state departments or institutions	8,246	41
TOTAL amount of deductions as reported in column 4, page 1		$85,398	97

DETAIL OF OPERATIONS—By Location

This schedule must be completed by each taxpayer whose return includes business transacted at more than one location in the tate. Give details for each store, plant or location in the state, including main store or plant.

BUSINESS LOCATIONS INCLUDED IN RETURN			Gross Amount	Deductions	Taxable Amount	Amount of Tax
Name Under Which Operated	Street and No. or R. F. D.	Postoffice				
he Pacific Telephone	1200 Thi rd	Seattle				
nd Telegraph Company	Avenue	Washington	$837,333 72	$85,398 97	$751,934 75	$22,558 04
Totals represent amounts reported on reverse side			$837,333 72	$85,398 97	$751,934 75	$22,558 04

The undersigned taxpayer declares that he has read the foregoing return and certifies it to be correct.

Dated this 4th day of June, 1934 Firm name The Pacific Telephone and Telegrapl Company

By (Sd) I.F.Dix

Office or title Vice President

If Additional Space is Needed, Attach Supplementary Sheets of This Size

VAC

136

Mail One Copy to the Tax Commission of the State of Washington—Retain One Copy for Your Files

Form 3906

BUSINESS TAX RETURN

Chapter 191, Laws of Washington, 1933, and Amendments Thereto

MONTHLY RETURNS MUST BE MADE IF TAX LIABILITY EXCEEDS $10.00 PER MONTH

Use Only One Line

This Return for the Month of November **193** 3

OR

This Return for the Quarter Ending ..... **193** .....

Remittances. Make remittance payable to TAX COMMISSION and mail it with this return to the BUSINESS TAX DIVISION, TAX COMMISSION OF THE STATE OF WASHINGTON, OLYMPIA, WASHINGTON, within 15 days after the close of the period covered. The law provides penalties for failure to file returns and make payments within the time specified.

BE SURE THAT NAME AND ADDRESS ARE CORRECT

File Number

Name: The Pacific Telephone and Telegraph Company

Street No.: 1200 Third Avenue

City and State: Seattle, Washington

This space for department use only

Remittance checked	File checked—Cash entry
Office review	Ledger checked
Audit—Office. Date	By
Audit—Field. Date	By
Final approval. Date	By

COMPUTATION OF TAX—BUSINESS CONDUCTED IN WASHINGTON

Column 1 Taxable Activities	Column 2 Business Classification	Column 3 Gross Amount	Column 4 Deductions	Column 5 Taxable Amount	Col. 6 Rate	Column 7 Amount of Tax	Column 8 Do Not Use
Selling Tangible Property	* Retailing				.005		
	Wholesaling				.002		
Manufacturing	Manufacturing—All lines				.0025		
Extracting	Logging—Mining—Fishing				.003		
	Oil and Natural Gas				.01		
	Extracting Other Products				.003		
Public Service and Utilities	Steam Railways				.015		
	Electric Interurban and Street Railways; Urban Automotive Transp't'n				.005		
	Light and Power—Water				.03		
	Telephone—Telegraph	$835,384 55	$87,281 02	$748,103 53	.03	$22,443 11	
	Manufactured Gas				.02		
	Express and/or Car Companies				.02		
	Highway Transportation				.015		
	Other Utilities				.015		
					.015		
Financial	Banks, Savings Assoc., etc.				.004		
	Stock Broker, Security House, Finance Co.				.02		
Amusement	Recreation and Amusement				.015		
Publishing, etc.	Outdoor Advertising				.01		
	Newspaper, Periodical Pub.				.0025		
	Radio Broadcasting				.01		
Service and Other Activities	* Professional, service and other businesses not included above				.005		

Total tax due for the period covered..... $22,443 11

* Persons, such as contractors, operators of garages, repair-shops, machine-shops and the like, engaging in business which combines the sale of tangible property with the rendition of service should report, under the line headed "Service and Other Activities," the gross income of the business, which includes gross proceeds of sales of tangible property as well as gross income from service charges, etc.

245

READ INSTRUCTIONS CAREFULLY

Be Sure to Complete the Back of this Form

137

DETAIL OF DEDUCTIONS

(From Summary shown in Column 4, reverse side)

Type of Deduction		Amount	
Trade Discounts	Trade discounts allowed and deducted by the seller		
Freight Out	Allowable to seller only, not to purchaser—Actual freight or delivery charges: (1) Paid to the carrier by the seller and invoiced to the purchaser as such, or (2) paid by the purchaser to the carrier (other than the seller) and deducted from the invoice price by the purchaser.		
Cash Discounts	Cash discounts actually allowed by the taxpayer and taken by the purchaser, if the amount thereof has been included in value of products, gross proceeds of sales or gross income reported for tax purposes.		
Motor Vehicle Fuel Tax	Amount collected by the taxpayer as an excise upon motor vehicle fuel (Gallons sold)		
	The following deductions are not allowable to persons taxable as manufacturers or extractors, measure of tax being "value of products"		
Interstate—Foreign	Proceeds of sales or income derived wholly in interstate or foreign commerce	$71,685	28
Sales to U. S. Gov't	Proceeds of sales to the United States Government, its departments or institutions	7,349	33
Sales to State	Proceeds of sales to the State of Washington, its departments or institutions. Counties, cities, school districts and the like are not state departments or institutions	8,246	41
TOTAL amount of deductions as reported in column 4, page 1.....		$87,281	02

DETAIL OF OPERATIONS—By Location

This schedule must be completed by each taxpayer whose return includes business transacted at more than one location in the state. Give details for each store, plant or location in the state, including main store or plant.

BUSINESS LOCATIONS INCLUDED IN RETURN			Gross Amount	Deductions	Taxable Amount	Amount of Tax
Name Under Which Operated	Street and No. or R. F. D.	Postoffice				
The Pacific Telephone and Telegraph Company	1200 Third Avenue	Seattle Washington	$835,384 55	$87,281 02	$748,103 53	$22,443 11
Totals represent amounts reported on reverse side.....			$835,384 55	$87,281 02	$748,103 53	$22,443 11

The undersigned taxpayer declares that he has read the foregoing return and certifies it to be correct.

Dated this 4th day of June, , 193 4 Firm name The Pacific Telephone and Telegraph Company

By (Sd) I.F.Dix

Office or title Vice President

246

If Additional Space is Needed, Attach Supplementary Sheets of This Size

138

Mail One Copy to the Tax Commission of the State of Washington—Retain One Copy for Your Files

Form 3906

BUSINESS TAX RETURN

Chapter 181, Laws of Washington, 1933, and Amendments Thereto

MONTHLY RETURNS MUST BE MADE IF TAX LIABILITY EXCEEDS $10.00 PER MONTH

Use Only One Line

This Return for the Month of December **193** 3

OR

This Return for the Quarter Ending _____ **193**____

Remittances. Make remittance payable to TAX COMMISSION and mail it with this return to the BUSINESS TAX DIVISION, TAX COMMISSION OF THE STATE OF WASHINGTON, OLYMPIA, WASHINGTON, within 15 days after the close of the period covered. The law provides penalties for failure to file returns and make payments within the time specified.

BE SURE THAT NAME AND ADDRESS ARE CORRECT

File Number

Name: The Pacific Telephone and Telegraph Company

Street No.: 1200 Third Avenue,

City and State: Seattle, Washington.

This space for department use only

Remittance checked	File checked—Cash entry
Office review	Ledger checked
Audit—Office. Date	By
Audit—Field. Date	By
Final approval. Date	By

COMPUTATION OF TAX—BUSINESS CONDUCTED IN WASHINGTON

Column 1 Taxable Activities	Column 2 Business Classification	Column 3 Gross Amount	Column 4 Deductions	Column 5 Taxable Amount	Col. 6 Rate	Column 7 Amount of Tax	Column 8 Do Not Use
Selling Tangible Property	* Retailing				.005		
	Wholesaling				.002		
Manufacturing	Manufacturing—All lines				.0025		
Extracting	Logging—Mining—Fishing				.003		
	Oil and Natural Gas				.01		
	Extracting Other Products				.003		
Public Service and Utilities	Steam Railways				.015		
	Electric Interurban and Street Railways Urban Automotive Transp't'n				.005		
	Light and Power—Water				.03		
	Telephone—Telegraph	$858,428 52	$90,711 17	$767,717.35	.03	$23,031 52	
	Manufactured Gas				.02		
	Express and/or Car Companies				.02		
	Highway Transportation				.015		
	Other Utilities				.015		
					.015		
Financial	Banks, Savings Assoc., etc.				.004		
	Stock Broker, Security House, Finance Co.				.02		
Amusement	Recreation and Amusement				.015		
Publishing, etc.	Outdoor Advertising				.01		
	Newspaper, Periodical Pub.				.0025		
	Radio Broadcasting				.01		
Service and Other Activities	* Professional, service and other businesses not included above				.005		

Total tax due for the period covered..... $23,031.52

* Persons, such as contractors, operators of garages, repair-shops, machine-shops and the like, engaging in business which combines the sale of tangible property with the rendition of service should report, under the line headed "Service and Other Activities," the gross income of the business, which includes gross proceeds of sales of tangible property as well as gross income from service charges, etc.

247

READ INSTRUCTIONS CAREFULLY

Be Sure to Complete the Back of this Form

139

DETAIL OF DEDUCTIONS

(From Summary shown in Column 4, reverse side)

Type of Deduction		Amount	
Trade Discounts	Trade discounts allowed and deducted by the seller		
Freight Out	Allowable to seller only, not to purchaser—Actual freight or delivery charges: (1) Paid to the carrier by the seller and invoiced to the purchaser as such, or (2) paid by the purchaser to the carrier (other than the seller) and deducted from the invoice price by the purchaser.		
Cash Discounts	Cash discounts actually allowed by the taxpayer and taken by the purchaser, if the amount thereof has been included in value of products, gross proceeds of sales or gross income reported for tax purposes.		
Motor Vehicle Fuel Tax	Amount collected by the taxpayer as an excise upon motor vehicle fuel (Gallons sold)		
	The following deductions are not allowable to persons taxable as manufacturers or extractors, measure of tax being "value of products"		
Interstate—Foreign	Proceeds of sales or income derived wholly in interstate or foreign commerce	$75,115	42
Sales to U. S. Gov't	Proceeds of sales to the United States Government, its departments or institutions	7,349	34
Sales to State	Proceeds of sales to the State of Washington, its departments or institutions. Counties, cities, school districts and the like are not state departments or institutions	8,246	41
TOTAL amount of deductions as reported in column 4, page 1		$90,711	17

DETAIL OF OPERATIONS—By Location

This schedule must be completed by each taxpayer whose return includes business transacted at more than one location in the state. Give details for each store, plant or location in the state, including main store or plant.

BUSINESS LOCATIONS INCLUDED IN RETURN			Gross Amount	Deductions	Taxable Amount	Amount of Tax
Name Under Which Operated	Street and No. or R. F. D.	Postoffice				
The Pacific Telephone and Telegraph Company	1200 Third Avenue	Seattle, Washington	$858,428 52	$90,711 17	$767,717 35	$23,031 52
Totals represent amounts reported on reverse side			$858,428 52	$90,711 17	$767,717 35	$23,031 52

The undersigned taxpayer declares that he has read the foregoing return and certifies it to be correct.

Dated this 4th day of June, 1934 Firm name The Pacific Telephone and Telegraph Company

By (Sd) I.F.Dix

Office or title Vice President

248

If Additional Space is Needed, Attach Supplementary Sheets of This Size

140

Mail One Copy to the Tax Commission of the State of Washington—Retain One Copy for Your Files

Form 3906

BUSINESS TAX RETURN

Chapter 191, Laws of Washington, 1933, and Amendments Thereto

MONTHLY RETURNS MUST BE MADE IF TAX LIABILITY EXCEEDS $10.00 PER MONTH

Use Only One Line

This Return for the Month of August **193** 3

OR

This Return for the Quarter Ending ____ **193** ____

Remittances. Make remittance payable to TAX COMMISSION and mail it with this return to the BUSINESS TAX DIVISION, TAX COMMISSION OF THE STATE OF WASHINGTON, OLYMPIA, WASHINGTON, within 15 days after the close of the period covered. The law provides penalties for failure to file returns and make payments within the time specified.

BE SURE THAT NAME AND ADDRESS ARE CORRECT

File Number

Name: The Home Telephone & Telegraph Company of Spokane

Street No.: 1200 Third Avenue

City and State: Seattle, Washington

This space for department use only

Remittance checked	File checked—Cash entry
Office review	Ledger checked
Audit—Office. Date	By
Audit—Field. Date	By
Final approval. Date	By

COMPUTATION OF TAX—BUSINESS CONDUCTED IN WASHINGTON

Column 1 Taxable Activities	Column 2 Business Classification	Column 3 Gross Amount	Column 4 Deductions	Column 5 Taxable Amount	Col. 6 Rate	Column 7 Amount of Tax	Column 8 Do Not Use
Selling Tangible Property	* Retailing				.005		
	Wholesaling				.002		
Manufacturing	Manufacturing—All lines				.0025		
Extracting	Logging—Mining—Fishing				.003		
	Oil and Natural Gas				.01		
	Extracting Other Products				.003		
Public Service and Utilities	Steam Railways				.015		
	Electric Interurban and Street Railways Urban Automotive Transp't'n				.005		
	Light and Power—Water				.03		
	Telephone—Telegraph	$98,426 23	$4,233 24	$94,192 99	.03	$2,825.79	
	Manufactured Gas				.02		
	Express and/or Car Companies				.02		
	Highway Transportation				.015		
	Other Utilities ____				.015		
					.015		
Financial	Banks, Savings Assoc., etc.				.004		
	Stock Broker, Security House, Finance Co.				.02		
Amusement	Recreation and Amusement				.015		
Publishing, etc.	Outdoor Advertising				.01		
	Newspaper, Periodical Pub.				.0025		
	Radio Broadcasting				.01		
Service and Other Activities	* Professional, service and other businesses not included above				.005		
	Total tax due for the period covered.....					$2,825.79	

* Persons, such as contractors, operators of garages, repair-shops, machine-shops and the like, engaging in business which combines the sale of tangible property with the rendition of service should report, under the line headed "Service and Other Activities," the gross income of the business, which includes gross proceeds of sales of tangible property as well as gross income from service charges, etc.

249

READ INSTRUCTIONS CAREFULLY

Be Sure to Complete the Back of this Form

141

DETAIL OF DEDUCTIONS

(From Summary shown in Column 4, reverse side)

Type of Deduction		Amount	
Trade Discounts	Trade discounts allowed and deducted by the seller		
Freight Out	Allowable to seller only, not to purchaser—Actual freight or delivery charges: (1) Paid to the carrier by the seller and invoiced to the purchaser as such, or (2) paid by the purchaser to the carrier (other than the seller) and deducted from the invoice price by the purchaser.		
Cash Discounts	Cash discounts actually allowed by the taxpayer and taken by the purchaser, if the amount thereof has been included in value of products, gross proceeds of sales or gross income reported for tax purposes.		
Motor Vehicle Fuel Tax	Amount collected by the taxpayer as an excise upon motor vehicle fuel (Gallons sold)		
	The following deductions are not allowable to persons taxable as manufacturers or extractors, measure of tax being "value of products"		
Interstate—Foreign	Proceeds of sales or income derived wholly in interstate or foreign commerce	$2,503	24
Sales to U. S. Gov't	Proceeds of sales to the United States Government, its departments or institutions	1,620	00
Sales to State	Proceeds of sales to the State of Washington, its departments or institutions. Counties, cities, school districts and the like are not state departments or institutions	110	00
TOTAL amount of deductions as reported in column 4, page 1.....		$4,233	24

DETAIL OF OPERATIONS—By Location

This schedule must be completed by each taxpayer whose return includes business transacted at more than one location in the state. Give details for each store, plant or location in the state, including main store or plant.

BUSINESS LOCATIONS INCLUDED IN RETURN			Gross Amount		Deductions		Taxable Amount		Amount of Tax	
Name Under Which Operated	Street and No. or R. F. D.	Postoffice								
The Home Telephone & Telegraph Company of Spokane	1200 Third Avenue	Seattle, Washington	$98,426	23	$4,233	24	$94,192	99	$2,825	79
Totals represent amounts reported on reverse side.....			$98,426	23	$4,233	24	$94,192	99	$2,825	79

The undersigned taxpayer declares that he has read the foregoing return and certifies it to be correct.

Dated this 4th day of June, 1934 Firm name The Home Telephone & Telegraph Company of Spokane

By (Sd) I.F.DIX

Office or title Vice President

250

If Additional Space is Needed, Attach Supplementary Sheets of This Size

142

Mail One Copy to the Tax Commission of the State of Washington—Retain One Copy for Your Files

Form 3906

BUSINESS TAX RETURN

Chapter 191, Laws of Washington, 1933, and Amendments Thereto

MONTHLY RETURNS MUST BE MADE IF TAX LIABILITY EXCEEDS $10.00 PER MONTH

Use Only One Line

This Return for the Month of September **1933**

OR

This Return for the Quarter Ending ____ **193**

Remittances. Make remittance payable to TAX COMMISSION and mail it with this return to the BUSINESS TAX DIVISION, TAX COMMISSION OF THE STATE OF WASHINGTON, OLYMPIA, WASHINGTON, within 15 days after the close of the period covered.

The law provides penalties for failure to file returns and make payments within the time specified.

BE SURE THAT NAME AND ADDRESS ARE CORRECT

File Number

Name: The Home Telephone & Telegraph Company of Spokane

Street No.: 1200 Third Avenue,

City and State: Seattle, Washington.

This space for department use only

Remittance checked	File checked—Cash entry
Office review	Ledger checked
Audit—Office. Date	By
Audit—Field. Date	By
Final approval. Date	By

COMPUTATION OF TAX—BUSINESS CONDUCTED IN WASHINGTON

Column 1 Taxable Activities	Column 2 Business Classification	Column 3 Gross Amount	Column 4 Deductions	Column 5 Taxable Amount	Col. 6 Rate	Column 7 Amount of Tax	Column 8 Do Not Use
Selling Tangible Property	* Retailing				.005		
	Wholesaling				.002		
Manufacturing	Manufacturing—All lines				.0025		
Extracting	Logging—Mining—Fishing				.003		
	Oil and Natural Gas				.01		
	Extracting Other Products				.003		
Public Service and Utilities	Steam Railways				.015		
	Electric Interurban and Street Railways Urban Automotive Transp't'n				.005		
	Light and Power—Water				.03		
	Telephone—Telegraph	$100,227 75	$4,161 24	$96,066 51	.03	$2,882 00	
	Manufactured Gas				.02		
	Express and/or Car Companies				.02		
	Highway Transportation				.015		
	Other Utilities				.015		
					.015		
Financial	Banks, Savings Assoc., etc.				.004		
	Stock Broker, Security House, Finance Co.				.02		
Amusement	Recreation and Amusement				.015		
Publishing, etc.	Outdoor Advertising				.01		
	Newspaper, Periodical Pub.				.0025		
	Radio Broadcasting				.01		
Service and Other Activities	* Professional, service and other businesses not included above				.005		
	Total tax due for the period covered.....					$2,882 00	

* Persons, such as contractors, operators of garages, repair-shops, machine-shops and the like, engaging in business which combines the sale of tangible property with the rendition of service should report, under the line headed "Service and Other Activities," the gross income of the business, which includes gross proceeds of sales of tangible property as well as gross income from service charges, etc.

READ INSTRUCTIONS CAREFULLY

Be Sure to Complete the Back of this Form

251

143

DETAIL OF DEDUCTIONS

(From Summary shown in Column 4, reverse side)

Type of Deduction		Amount	
Trade Discounts	Trade discounts allowed and deducted by the seller		
Freight Out	Allowable to seller only, not to purchaser—Actual freight or delivery charges: (1) Paid to the carrier by the seller and invoiced to the purchaser as such, or (2) paid by the purchaser to the carrier (other than the seller) and deducted from the invoice price by the purchaser.		
Cash Discounts	Cash discounts actually allowed by the taxpayer and taken by the purchaser, if the amount thereof has been included in value of products, gross proceeds of sales or gross income reported for tax purposes.		
Motor Vehicle Fuel Tax	Amount collected by the taxpayer as an excise upon motor vehicle fuel (Gallons sold)		
	The following deductions are not allowable to persons taxable as manufacturers or extractors, measure of tax being "value of products"		
Interstate—Foreign	Proceeds of sales or income derived wholly in interstate or foreign commerce	$2,431	24
Sales to U. S. Gov't	Proceeds of sales to the United States Government, its departments or institutions	1,620	00
Sales to State	Proceeds of sales to the State of Washington, its departments or institutions. Counties, cities, school districts and the like are not state departments or institutions	110	00
TOTAL amount of deductions as reported in column 4, page 1		$4,161	24

DETAIL OF OPERATIONS—By Location

This schedule must be completed by each taxpayer whose return includes business transacted at more than one location in the state. Give details for each store, plant or location in the state, including main store or plant.

BUSINESS LOCATIONS INCLUDED IN RETURN			Gross Amount	Deductions	Taxable Amount	Amount of Tax
Name Under Which Operated	Street and No. or R. F. D.	Postoffice				
The Home Telephone & Telegraph Company of Spokane	1200 Third Avenue	Seattle, Washington	$100,227.75	$4,161 24	$96,066 51	$2,882 00
Totals represent amounts reported on reverse side			$100,227 75	$4,161 24	$96,066 51	$2,882 00

The undersigned taxpayer declares that he has read the foregoing return and certifies it to be correct.

Dated this 4th day of June, 1934 Firm name The Home Telephone & Telegraph Company of Spokane

By (Sd) I.F.Dix

Office or title Vice President

252

If Additional Space is Needed, Attach Supplementary Sheets of This Size

144

Mail One Copy to the Tax Commission of the State of Washington—Retain One Copy for Your Files

Form 3906

BUSINESS TAX RETURN

Chapter 191, Laws of Washington, 1933, and Amendments Thereto

MONTHLY RETURNS MUST BE MADE IF TAX LIABILITY EXCEEDS $10.00 PER MONTH

Use Only One Line

This Return for the Month of October **1933**

OR

This Return for the Quarter Ending _____ **193**

Remittances. Make remittance payable to TAX COMMISSION and mail it with this return to the BUSINESS TAX DIVISION, TAX COMMISSION OF THE STATE OF WASHINGTON, OLYMPIA, WASHINGTON, within 15 days after the close of the period covered.

The law provides penalties for failure to file returns and make payments within the time specified.

BE SURE THAT NAME AND ADDRESS ARE CORRECT

File Number

Name: The Home Telephone & Telegraph Company of Spokane,

Street No.: 1200 Third Avenue,

City and State: Seattle, Washington.

This space for department use only

Remittance checked	File checked—Cash ent'd
Office review	Ledger checked
Audit—Office. Date	By
Audit—Field. Date	By
Final approval. Date	By

COMPUTATION OF TAX—BUSINESS CONDUCTED IN WASHINGTON

Column 1 Taxable Activities	Column 2 Business Classification	Column 3 Gross Amount	Column 4 Deductions	Column 5 Taxable Amount	Col. 6 Rate	Column 7 Amount of Tax	Column 8 Do Not Use
Selling Tangible Property	* Retailing				.005		
	Wholesaling				.002		
Manufacturing	Manufacturing—All lines				.0025		
Extracting	Logging—Mining—Fishing				.003		
	Oil and Natural Gas				.01		
	Extracting Other Products				.003		
Public Service and Utilities	Steam Railways				.015		
	Electric Interurban and Street Railways Urban Automotive Transp't'n				.005		
	Light and Power—Water				.03		
	Telephone—Telegraph	$100,866 96	$4,138 05	$96,728 91	.03	$2,901 87	
	Manufactured Gas				.02		
	Express and/or Car Companies				.02		
	Highway Transportation				.015		
	Other Utilities				.015		
					.015		
Financial	Banks, Savings Assoc., etc.				.004		
	Stock Broker, Security House, Finance Co.				.02		
Amusement	Recreation and Amusement				.015		
Publishing, etc.	Outdoor Advertising				.01		
	Newspaper, Periodical Pub.				.0025		
	Radio Broadcasting				.01		
Service and Other Activities	* Professional, service and other businesses not included above				.005		

Total tax due for the period covered..... $2,901 87

* Persons, such as contractors, operators of garages, repair-shops, machine-shops and the like, engaging in business which combines the sale of tangible property with the rendition of service should report, under the line headed "Service and Other Activities," the gross income of the business, which includes gross proceeds of sales of tangible property as well as gross income from service charges, etc.

253

READ INSTRUCTIONS CAREFULLY

Be Sure to Complete the Back of this Form

145

DETAIL OF DEDUCTIONS

(From Summary shown in Column 4, reverse side)

Type of Deduction		Amount	
Trade Discounts	Trade discounts allowed and deducted by the seller		
Freight Out	Allowable to seller only, not to purchaser—Actual freight or delivery charges: (1) Paid to the carrier by the seller and invoiced to the purchaser as such, or (2) paid by the purchaser to the carrier (other than the seller) and deducted from the invoice price by the purchaser.		
Cash Discounts	Cash discounts actually allowed by the taxpayer and taken by the purchaser, if the amount thereof has been included in value of products, gross proceeds of sales or gross income reported for tax purposes.		
Motor Vehicle Fuel Tax	Amount collected by the taxpayer as an excise upon motor vehicle fuel (Gallons sold)		
	The following deductions are not allowable to persons taxable as manufacturers or extractors, measure of tax being "value of products"		
Interstate—Foreign	Proceeds of sales or income derived wholly in interstate or foreign commerce	$2,408	05
Sales to U. S. Gov't	Proceeds of sales to the United States Government, its departments or institutions	1,620	00
Sales to State	Proceeds of sales to the State of Washington, its departments or institutions. Counties, cities, school districts and the like are not state departments or institutions	110	00
TOTAL amount of deductions as reported in column 4, page 1		$4,138	05

DETAIL OF OPERATIONS—By Location

This schedule must be completed by each taxpayer whose return includes business transacted at more than one location in the state. Give details for each store, plant or location in the state, including main store or plant.

BUSINESS LOCATIONS INCLUDED IN RETURN							
Name Under Which Operated	Street and No. or R. F. D.	Postoffice	Gross Amount	Deductions	Taxable Amount	Amount of Tax
The Home Telephone & Telegraph Company of Spokane	1200 Third Avenue	Seattle, Washington	$100,866 96	$4,138 05	$96,728 91	$2,901 87
Totals represent amounts reported on reverse side			$100,866 96	$4,138 05	$96,728 91	$2,901 87

The undersigned taxpayer declares that he has read the foregoing return and certifies it to be correct.

Dated this 4th day of June, 1934 Firm name The Home Telephone & Telegraph Company of Spokane

By (Sd) I.F.Dix

Office or title Vice President

If Additional Space is Needed, Attach Supplementary Sheets of This Size

254

146

Mail One Copy to the Tax Commission of the State of Washington—Retain One Copy for Your Files

Form 3906

BUSINESS TAX RETURN

Chapter 191, Laws of Washington, 1933, and Amendments Thereto

MONTHLY RETURNS MUST BE MADE IF TAX LIABILITY EXCEEDS $10.00 PER MONTH

Use Only One Line

This Return for the Month of November 193 3

OR

This Return for the Quarter Ending 193

Remittances. Make remittance payable to TAX COMMISSION and mail it with this return to the BUSINESS TAX DIVISION, TAX COMMISSION OF THE STATE OF WASHINGTON, OLYMPIA, WASHINGTON, within 15 days after the close of the period covered. The law provides penalties for failure to file returns and make payments within the time specified.

BE SURE THAT NAME AND ADDRESS ARE CORRECT

Name	The Home Telephone & Telegraph Company (File Number)
Street No.	of Spokane 1200 Third Avenue,
City and State	Seattle, Washington.

This space for department use only

Remittance checked	File checked—Cash entry
Office review	Ledger checked
Audit—Office. Date	By
Audit—Field. Date	By
Final approval. Date	By

COMPUTATION OF TAX—BUSINESS CONDUCTED IN WASHINGTON

Column 1 Taxable Activities	Column 2 Business Classification	Column 3 Gross Amount	Column 4 Deductions	Column 5 Taxable Amount	Col. 6 Rate	Column 7 Amount of Tax	Column 8 Do Not Use
Selling Tangible Property	* Retailing				.005		
	Wholesaling				.002		
Manufacturing	Manufacturing—All lines				.0025		
Extracting	Logging—Mining—Fishing				.003		
	Oil and Natural Gas				.01		
	Extracting Other Products				.003		
Public Service and Utilities	Steam Railways				.015		
	Electric Interurban and Street Railways Urban Automotive Transp't'n				.005		
	Light and Power—Water				.03		
	Telephone—Telegraph	$100,937 86	$4,251 98	$96,685 88	.03	$2,900 58	
	Manufactured Gas				.02		
	Express and/or Car Companies				.02		
	Highway Transportation				.015		
	Other Utilities				.015		
					.015		
Financial	Banks, Savings Assoc., etc.				.004		
	Stock Broker, Security House, Finance Co.				.02		
Amusement	Recreation and Amusement				.015		
Publishing, etc.	Outdoor Advertising				.01		
	Newspaper, Periodical Pub.				.0025		
	Radio Broadcasting				.01		
Service and Other Activities	* Professional, service and other businesses not included above				.005		

Total tax due for the period covered.... $2,900 58

* Persons, such as contractors, operators of garages, repair-shops, machine-shops and the like, engaging in business which combines the sale of tangible property with the rendition of service should report, under the line headed "Service and Other Activities," the gross income of the business, which includes gross proceeds of sales of tangible property as well as gross income from service charges, etc.

255

READ INSTRUCTIONS CAREFULLY

Be Sure to Complete the Back of this Form

142

DETAIL OF DEDUCTIONS

(From Summary shown in Column 4, reverse side)

Type of Deduction		Amount	
Trade Discounts	Trade discounts allowed and deducted by the seller		
Freight Out	Allowable to seller only not to purchaser—Actual freight or delivery charges: (1) Paid to the carrier by the seller and invoiced to the purchaser as such, or (2) paid by the purchaser to the carrier (other than the seller) and deducted from the invoice price by the purchaser.		
Cash Discounts	Cash discounts actually allowed by the taxpayer and taken by the purchaser, if the amount thereof has been included in value of products, gross proceeds of sales or gross income reported for tax purposes.		
Motor Vehicle Fuel Tax	Amount collected by the taxpayer as an excise upon motor vehicle fuel (Gallons sold)		
	The following deductions are not allowable to persons taxable as manufacturers or extractors, measure of tax being "value of products"		
Interstate—Foreign	Proceeds of sales or income derived wholly in interstate or foreign commerce	$2,521	98
Sales to U. S. Gov't	Proceeds of sales to the United States Government, its departments or institutions	1,620	00
Sales to State	Proceeds of sales to the State of Washington, its departments or institutions. Counties, cities, school districts and the like are not state departments or institutions	110	00
TOTAL amount of deductions as reported in column 4, page 1		$4,251	98

DETAIL OF OPERATIONS—By Location

This schedule must be completed by each taxpayer whose return includes business transacted at more than one location in the state. Give details for each store, plant or location in the state, including main store or plant.

BUSINESS LOCATIONS INCLUDED IN RETURN						
Name Under Which Operated	Street and No. or R. F. D.	Postoffice	Gross Amount	Deductions	Taxable Amount	Amount of Tax
The Home Telephone & Telegraph Company of Spokane	1200 Third Avenue	Seattle, Washington	$100,937 86	$4,251 98	$96,685 88	$2,900 58
Totals represent amounts reported on reverse side			$100,937 86	$4,251 98	$96,685 88	$2,900 58

The undersigned taxpayer declares that he has read the foregoing return and certifies it to be correct.

Dated this 4th day of June, 193 4

Firm name The Home Telephone & Telegraph Company of Spokane

By (Sd) I.F.Dix

Office or title Vice President

If Additional Space is Needed, Attach Supplementary Sheets of This Size

256

148

Mail One Copy to the Tax Commission of the State of Washington—Retain One Copy for Your Files

Form 3906

BUSINESS TAX RETURN

Chapter 191, Laws of Washington, 1933, and Amendments Thereto

MONTHLY RETURNS MUST BE MADE IF TAX LIABILITY EXCEEDS $10.00 PER MONTH

Use Only One Line

This Return for the Month of December **1933**

OR

This Return for the Quarter Ending ..... **193**...

Remittances. Make remittance payable to TAX COMMISSION and mail it with this return to the BUSINESS TAX DIVISION, TAX COMMISSION OF THE STATE OF WASHINGTON, OLYMPIA, WASHINGTON, within 15 days after the close of the period covered. The law provides penalties for failure to file returns and make payments within the time specified.

BE SURE THAT NAME AND ADDRESS ARE CORRECT

File Number

Name: The Home Telephone & Telegraph Company of Spokane,

Street No.: 1200 Third Avenue,

City and State: Seattle, Washington.

This space for department use only

Remittance checked	File checked—Cash entry
Office review	Ledger checked
Audit—Office. Date	By
Audit—Field. Date	By
Final approval. Date	By

COMPUTATION OF TAX—BUSINESS CONDUCTED IN WASHINGTON

Column 1 Taxable Activities	Column 2 Business Classification	Column 3 Gross Amount	Column 4 Deductions	Column 5 Taxable Amount	Col. 6 Rate	Column 7 Amount of Tax	Column 8 Do Not Use
Selling Tangible Property	* Retailing				.005		
	Wholesaling				.002		
Manufacturing	Manufacturing—All lines				.0025		
Extracting	Logging—Mining—Fishing				.003		
	Oil and Natural Gas				.01		
	Extracting Other Products				.003		
Public Service and Utilities	Steam Railways				.015		
	Electric Interurban and Street Railways Urban Automotive Transp't'n				.005		
	Light and Power—Water				.03		
	Telephone—Telegraph	3101,132	7134,309	15 $96,823 56	.03	$2,904 71	
	Manufactured Gas				.02		
	Express and/or Car Companies				.02		
	Highway Transportation				.015		
	Other Utilities				.015		
					.015		
Financial	Banks, Savings Assoc., etc.				.004		
	Stock Broker, Security House, Finance Co.				.02		
Amusement	Recreation and Amusement				.015		
Publishing, etc.	Outdoor Advertising				.01		
	Newspaper, Periodical Pub.				.0025		
	Radio Broadcasting				.01		
Service and Other Activities	* Professional, service and other businesses not included above				.005		

Total tax due for the period covered..... $2,904 71

* Persons, such as contractors, operators of garages, repair-shops, machine-shops and the like, engaging in business which combines the sale of tangible property with the rendition of service should report, under the line headed "Service and Other Activities," the gross income of the business, which includes gross proceeds of sales of tangible property as well as gross income from service charges, etc.

READ INSTRUCTIONS CAREFULLY

Be Sure to Complete the Back of this Form

257

149

DETAIL OF DEDUCTIONS

(From Summary shown in Column 4, reverse side).

Type of Deduction		Amount	
Trade Discounts	Trade discounts allowed and deducted by the seller		
Freight Out	Allowable to seller only, not to purchaser—Actual freight or delivery charges: (1) Paid to the carrier by the seller and invoiced to the purchaser as such, or (2) paid by the purchaser to the carrier (other than the seller) and deducted from the invoice price by the purchaser.		
Cash Discounts	Cash discounts actually allowed by the taxpayer and taken by the purchaser, if the amount thereof has been included in value of products, gross proceeds of sales or gross income reported for tax purposes.		
Motor Vehicle Fuel Tax	Amount collected by the taxpayer as an excise upon motor vehicle fuel (Gallons sold)		
	The following deductions are not allowable to persons taxable as manufacturers or extractors, measure of tax being "value of products"		
Interstate—Foreign	Proceeds of sales or income derived wholly in interstate or foreign commerce	$2,579	15
Sales to U. S. Gov't	Proceeds of sales to the United States Government, its departments or institutions	1,620	00
Sales to State	Proceeds of sales to the State of Washington, its departments or institutions. Counties, cities, school districts and the like are not state departments or institutions	110	00
TOTAL amount of deductions as reported in column 4, page 1		$4,309	15

DETAIL OF OPERATIONS—By Location

This schedule must be completed by each taxpayer whose return includes business transacted at more than one location in the state. Give details for each store, plant or location in the state, including main store or plant.

BUSINESS LOCATIONS INCLUDED IN RETURN			Gross Amount	Deductions	Taxable Amount	Amount of Tax
Name Under Which Operated	Street and No. or R. F. D.	Postoffice				
The Home Telephone & Telegraph Company of Spokane	1200 Third Avenue	Seattle, Washington	$101,132 71	$4,309 15	$96,823 56	$2,904. 71
Totals represent amounts reported on reverse side			$101,132 71	$4,309 15	$96,823 56	$2,904.71

The undersigned taxpayer declares that he has read the foregoing return and certifies it to be correct.

Dated this 4th day of June, 1934 Firm name The Home Telephone & Telegraph Company of Spokane

By (Sd) I.F.Dix

Office or title Vice President

If Additional Space is Needed, Attach Supplementary Sheets of This Size

258

150

[fol. 259] IN SUPREME COURT OF WASHINGTON

No. 25618. En Banc

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, Respondent,

v.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and T. S. Hedges and T. M. Jenner, as Members of the Tax Commission of the State of Washington, Appellants

OPINION—Filed Aug. 13, 1935

This action was brought to restrain the tax commission of this state and the members thereof from enforcing chapter 191 of the Laws of 1933. After the action was instituted, the court granted a temporary injunction from which the defendants appealed, 80 Wash. Dec. 600, and the order was affirmed. Subsequently, the defendants answered, and the trial resulted in a permanent injunction restraining the defendants from enforcing the law above mentioned, from which they appeal.

The facts are sufficiently stated in the opinion upon the former appeal, and need not be here repeated. The respondent opens its argument, in its brief answering that of appellants, with certain "preliminary observations" which we do not deem of controlling importance. The principal and controlling questions are discussed and disposed of in the recent case of the State of Washington v. Northern Pacific Railway Co., — Wash. Dec. —, and upon the authority of that case the judgment of the superior court will be reversed, with directions to proceed in accordance with the law as found in the case referred to.

Main, J.

We concur: Mitchell, J. Blake, J. Beals, J. Geraghty, J.

[fol. 260] IN SUPREME COURT OF WASHINGTON

No. 25618

DISSENTING OPINION

STEINERT, J., dissenting:

For the reasons given in State v. Northern Pacific Railway Company, ante p. —, — P. (2d) —, I dissent.

Steinert, J.

I concur: Holcomb, J.

[fol. 261] IN SUPREME COURT OF WASHINGTON

No. 25684. En Banc

THE STATE OF WASHINGTON, Appellant,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent

OPINION—Filed Aug. 13, 1935

This action was brought to recover the tax on the gross income of the defendant, imposed by chapter 191, Laws of 1933, for the months of August to December, 1933. The cause was tried to the court without a jury, and resulted in findings of fact from which the court concluded that the plaintiff was not entitled to recover. Judgment was entered dismissing the action, from which the plaintiff, the state of Washington, appeals.

The respondent owns and operates a system of railroad extending from a point on Lake Superior, Wisconsin, through Minnesota, North Dakota, Montana and Idaho, into and through a number of counties in this state, with branch lines into the state of Oregon and British Columbia. It is engaged in both intrastate and interstate commerce, carrying freight and passengers. As found by the trial court, the interstate and intrastate business in this state is inextricably commingled, and the intrastate business is conducted at a loss, and it is necessary to make up this loss from the income from interstate business.

Chapter 191 of the Laws of 1933 is entitled an act relating to taxation, and imposes taxes upon the privilege of engaging in business activities in this state. The amount of the tax is based upon the gross income. In section 2 of [fol. 262] the act, it is provided that:

"From and after the first day of August, 1933, and until the Thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows: * * * (e) Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business, as follows: * * * III. Steam railways: one and one-half per cent. * * *"

It is under this act that the tax in question was sought to be collected by the state and which was resisted by the respondent railway company, as above indicated.

The first question is whether the legislature intended to levy the tax upon the gross income of the respondent, derived from both interstate and intrastate commerce. In the portion of the act quoted, it will be observed that it is provided that the tax is levied upon every person "engaging or continuing within this state in the following businesses." This quoted expression is used, not only in referring to the tax upon steam railways, but upon the other businesses mentioned in the act which are purely of a local nature. If it was the legislative intent to levy the tax upon the gross income from interstate commerce, it would necessarily, to that extent, be unconstitutional as being repugnant to the commerce clause of the federal constitution. About this there can be no question, as it has been many times so held by the federal supreme court.

In State v. Northern Express Co., 80 Wash. 309, 141 Pac. 757, there was involved an act of the legislature which imposed upon express companies a privilege tax of five per [fol. 263] cent, based upon the gross receipts of such companies. In that case, the expression used was that the tax was imposed for the privilege of "doing business in this

state'' or on ''business done within the state of Washington.'' It was there held that the expressions used had reference to business begun and ended within this state, and that the tax, being upon intrastate commerce only, did not place a burden upon interstate commerce. It was there said:

''The phrase 'gross receipts of such express company for business done within the state of Washington,' to which the tax is alone applicable, is an expression of the legislative intent to limit this tax to business wholly within this state; that is, business begun and ended within this state.''

It will be observed that, there, the expression was business done within this state or within the state of Washington. In the case we are now considering, the expression is ''engaging or continuing within this state'' in business. It is probably true that the expression used, which was involved in the case cited, more clearly indicates a legislative intent not to impose the tax upon interstate commerce than does the expression used in chapter 191, Laws of 1933. However this may be, when we read the expression used in that chapter, not only as applied to a business which is both interstate and intrastate, but its repeated application to businesses which are purely local, it would seem that the legislative intent was reasonably plain, and that the purpose was not to impose the tax upon interstate business, but upon intrastate or local business only. If it be that the expression used leaves the matter in the zone of doubt, then that doubt should be resolved in favor of the constitutionality of the law. In such a case, the construction will be adopted which will harmonize the statute with the constitution and avoid a conflict therewith. Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327.

[fol. 264] That a state, through its legislature, has no power to levy a tax which would be a direct burden upon interstate commerce is well known and understood by all lawyers and many laymen. For the court to hold that the legislature, in enacting chapter 191, intended to impose the excise tax therein provided for for the privilege of doing interstate business in this state, would be too great a reflection upon the intelligence of the members of a coordinate branch of the state government. The act, as we view

it, was only intended to apply to local or intrastate business.

The next and, as we view it, the important and difficult question is whether the tax may be collected, even though the railway company, the respondent, may not be able to retire from its intrastate business without also discontinuing its interstate. In this connection, it will be assumed (a) that the respondent cannot, as a matter of law, retire from its intrastate business; (b) that it is impractical, as a matter of fact, for it to retire from its intrastate business without also retiring from its interstate; and (c) that the intrastate or local business is conducted at a loss which is taken care of by the receipts from the interstate business. Giving effect to these assumptions, inquiry must be directed then to whether the tax is valid, even though the railway company may not be able to retire from its intrastate business without retiring from its interstate, and that the intrastate business is conducted at a loss.

In the case of Sprout v. City of South Bend, 277 U. S. 163, the court had before it an ordinance of the city, in the state of Indiana, which prescribed license fees varying in amount depending upon the seating capacity of a bus, the bus company being engaged in both intrastate and inter- [fol. 265] state business and it was there held that "the ordinance is void because of the imposition of the license fee." In the course of the opinion, it was said that a state may, by appropriate legislation, require the payment of an occupation tax from one engaged in both intrastate and interstate commerce, but, in order that the fee or tax may be valid,

"• • • it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

It will be observed that one of the conditions there placed upon the right of a state to impose the tax is that the person or corporation taxed "could discontinue the intrastate business without withdrawing also from the interstate busi-

ness." This last quoted expression, so far as we are informed, was first used in the case of Pullman v. Adams, 189 U. S. 420, where the tax involved was in a specific amount, levied upon "each sleeping and palace-car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad-track over which the company runs its cars."

In the case of Cooney v. Mountain States Telephone & Telegraph Co., Vol. 79, No. 9, United States Supreme Court Law ed. Advance Opinions, page 498, there was involved a statute of the state of Montana prescribing a tax "for each telephone instrument used in the conduct of the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana." There, the telephone company, as is the railroad company here, engaged in both intrastate and interstate business, and it was [fol. 266] held that a privilege or occupation tax which a state imposes with reference to both kinds of business, through an indiscriminate "application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid."

It will be observed that in none of the three cases mentioned was the tax based upon the gross income of the intrastate business. There is a difference between a tax imposed as a license to do business or upon the instrumentality and a tax based upon the gross income. If the tax be a license tax or one upon the instrumentality, it necessarily inheres in the interstate as well as the intrastate business. Where the tax is upon the gross income, the income from the interstate business may be segregated from the intrastate and be held valid.

In the case of Bowman v. Continental Oil Co., 256 U. S. 642, the state of New Mexico had imposed an excise tax of two cents for each gallon of gasoline sold or used, and an annual license tax of fifty dollars for each distributing station or place of business. The oil company was engaged in both interstate and intrastate business. It was held that the two cents tax per gallon could be sustained because the income ffom the intrastate business could be segregated from the interstate, but that the fifty dollar tax was void because no sueh segregation could be made. It was there said:

"The applicable rule is that laid down in Ratterman v. Western Union Telegraph Co., 127 U. S. 411, where, in response to a question whether a single tax, assessed by a state upon the receipts of a telegraph company derived partly from interstate commerce and partly from commerce within the State, but returned and assessed in gross and without separation or apportionment, was wholly invalid or invalid only in proportion and to the extent that the receipts were derived from interstate commerce, this court unanimously answered that so far as levied upon receipts derived from interstate commerce the tax was void, but so [fol. 267] far as levied upon receipts from commerce wholly within the State it was valid. This case has been cited repeatedly with approval and its principle accepted. Western Union Telegraph v. Alabama, 132 U. S. 472, 476-477; Lehigh Valley R. R. Co. v. Pennsylvania, 145 U. S. 192, 200-201; Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 697; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 31.

"But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void under the authority of Leloup v. Port of Mobile, 127 U. S. 640, 647; Crutcher v. Kentucky, 141 U. S. 47, 58-59; Williams v. Talladega, 226 U. S. 404, 419; and other cases of that character."

In the case of Cooney v. Mountain States Telephone & Telegraph Co., supra, it was distinctly pointed out that the tax there involved was "not laid on revenue derived from monthly rates as distinguished from toll charges. It is not imposed with respect either to the nature of the revenue, or to the character of the service from which the revenue is derived, or to the manner in which the charges for the services are fixed." From what is there said it would appear to be a reasonable inference that, if the tax were of the character described in the quotation just made from the opinion, the result might be different.

In East Ohio Gas Co. v. Tax Commission, 283, U. S. 465, the state of Ohio imposed upon every corporation engaged in the business of supplying consumers within the state with natural gas for light, heat or power a tax based upon

the gross receipts, and the law was sustained. The East Ohio Gas Company which resisted the tax was engaged both in interstate and intrastate business. It brought gas from the states of West Virginia and Pennsylvania over high pressure pipes, and, as stated in the opinion, this was interstate commerce until it reached the distributing pipes which supplied the consumers, and after that it became intrastate and was subject to the tax. In the course of [fol. 268] the opinion in that case, we find the same statement with reference to the conditions precedent to the right of a state to impose a tax upon a person or corporation engaged in both intrastate and interstate business, as appears in the quotation from the case of Sprout v. City of South Bend, supra. In the Ohio Gas Company case, however, the court did not apply the provision that the gas company could not retire from its intrastate business without withdrawing from its interstate business. The facts, as they appear in the opinion, make it plain that, if the gas company had withdrawn from its intrastate business, it would have completely destroyed its interstate business. The tax there involved was not one upon the instrumentality or a license tax, but was an excise or a tax upon the privilege of doing business. The result of the holding in that case, as we view it, would sustain a holding in the case now before us that the tax upon the gross income of the intrastate business was valid, even though the railway company could not withdraw from that business without also withdrawing from its interstate business. We do not look upon cases which involve either a tax upon instrumentalities or a license tax as applicable to the law now in question which imposes, as already indicated, an excise or tax on the privilege of engaging or continuing in business.

It must be remembered that chapter 191 of the Laws of 1933 applies to every person engaging or continuing in business within this state, with a comparatively few exceptions. The law may be said to be a general one and applies to all businesses within the state. In this respect, it is somewhat analogous to a property tax which all persons, with comparatively few exceptions provided for in the statute, are required to pay upon the property owned [fol. 269] by them. The state has the authority to tax property which is used in interstate commerce and which is regularly and permanently located within its limits, where

the ascertainment of the amount assessed is dependent upon the value of the property within the state, as the property of other citizens is taxed. Leloup v. Port of Mobile, 127 U. S. 640; Western Union Telegraph Co. v. Kansas, 216 U. S. 1.

Even though the respondent in this case cannot retire from its intrastate business without also retiring from its interstate business, we think that the excise tax imposed upon the gross income from the intrastate business is not such a direct burden upon interstate commerce as to require that the tax be held void.

Attention at this point should be called to chapter 4 of the Laws of 1933, which was Initiative Measure 64, and generally referred to as the "40-mill tax limit for taxation" law. In that act, it was provided that the aggregate of all taxes upon real and personal property in the state should not exceed in any one year forty mills on the dollar of assessment valuation, which should be based upon fifty per cent of the true and fair value of the property in money, with some exceptions which are not here material. The respondent, by reason of this law, has been relieved from paying a very large sum of money as taxes upon the property which it owns in this state and which was subject to taxation, even though devoted to interstate commerce. It is a matter of common knowledge that under the 40-mill tax limit law property is now paying about half of what it paid for general taxes prior to the passage of that law; in other words, that by reason of the law limiting the amount to forty mills, the tax burden upon both real and personal property of the state has been reduced approxi- [fol. 270] mately one-half. Having thus provided for a reduction of taxes upon real and personal property, it was necessary for the legislature to find other sources of revenue, and chapter 191 was undoubtedly passed for this reason.

So far as we are informed, the federal supreme court has at no time distinctly held that an excise tax, such as that of this state, which is imposed upon all businesses, is such a direct burden upon interstate commerce as to render the act of the legislature unconstitutional.

But it is said that the intrastate business is being conducted at a loss, and this loss must be borne by the interstate business and therefore is a burden upon interstate

commerce. There is an expression in the case of Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252, that would appear to support this contention, even though the question was not necessarily involved in that case; and further, in that case there was not involved an excise tax based upon gross income, as here.

In this state, if the respondent's intrastate business is conducted at a loss, the legislature has provided a remedy, first, by application to the department of public service, with the right of review by the superior court and an appeal to this court. From the findings, it appears that an application has been made and denied by the department and that another application is pending. It does not appear, however, that the respondent has exhausted the relief granted by the statute and until it does so, it cannot be said that, even though the intrastate business is being conducted at a loss, it is such a burden upon interstate commerce as would justify holding the law unconstitutional.

The facts in the case of Postal Telegraph-Cable Co. v. [fol. 271] Fremont, 255 U. S. 124, presented a similar question, and it was there held that, where the state law affords a means to prevent the tax from burdening interstate commerce, through an application to increase intrastate rates, the tax will not be held void, in the absence of a showing that the company had exhausted the remedy afforded by an increase of the rates on intrastate business. We see no just or legal reason why the respondent should not comply with chapter 191, as all other businesses in this state are required to do.

So far as the opinion in the case of Great Northern Railway Co. v. State, 147 Wash. 630, 267 Pac. 506, is out of harmony with the holding in this case, it will be disapproved.

The trial court in Finding No. 4 specifically found the gross revenue from the respondents' intrastate business and the tax thereon for the period covered by this action. The appellant is entitled to a judgment for the amount as indicated in the finding.

The judgment appealed from will be reversed and the cause remanded, with directions to the superior court to enter a judgment as herein indicated.

We concur: Mitchell, J. Tolman, J. Blake, J. Main, J. Beals, J. Geraghty, J.

[fol. 272] IN SUPREME COURT OF WASHINGTON

No. 25684

DISSENTING OPINION

STEINERT, J., dissenting:

I do not agree with the majority upon what is said to be the principal question in the case. Having conceded (a) that the respondent cannot, as a matter of law, retire from its intrastate business, (b) that it is impracticable, as a matter of fact, to so retire without also retiring from its interstate business, and (c) that the intrastate, or local, business is conducted at a loss which is taken care of by the receipts from the interstate business, the majority arrives at a conclusion which I think is incorrect and untenable.

The authorities cited in the prevailing opinion establish beyond question, as I view it, that the state may not impose a tax, no matter what its nature or variety may be, that has the effect of burdening or interfering with interstate commerce.

In Bowman v. Continental Oil Co., 256 U. S. 642, the court said:

"No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute, that is to say, without authority of law. Hence, it cannot be enforced at all."

In East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, the court said:

[fol. 273] "And while a state may require payment of an occupation tax by one engaged in both intrastate and inter-

state commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business."

In Cooney v. Mountain States Tel. & Tel. Co., — U. S. —, 55 S. Ct. Rep. 477, 482, the court through Chief Justice Hughes, said:

"Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. Sprout v. South Bend, Ind., 277 U. S. 163, 171, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45; East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 470, 51 S. Ct. 499; 75 L. Ed. 1171."

The other cases cited in the prevailing opinion are either directly, or argumentatively, to the same effect. Under these cases, one of the essentials to the validity of a tax is that the one who is taxed could discontinue its intrastate business without also withdrawing from its interstate business.

The majority seek to make a distinction between a tax imposed as a license to do business or one upon the instrumentalities used, and a tax on gross income. They concede that a license tax to do business or a tax upon the instrumentality inheres in the interstate as well as in the intrastate business, but they hold that "where the tax is upon the gross income, the income from the interstate business may be segregated from the intrastate and be held valid." The distinction is without substance when the result in a given instance is to burden or interfere with interstate commerce. The federal government having created a field within its exclusive regulatory jurisdiction, the state may [fol. 274] not invade it, nor by any act, direct or indirect, interfere with it.

We have before us four cases, including the instant one, involving the same question. The other three are State v. Great Northern Ry. Co., post p. —, —, P. (2d) —, Pacific Tel. & Tel. Co. v. Tax Commission, post p. —, — P. 2d) —, and Home Tel. & Tel. Co. v. Tax Commission, post p. —, —, P. (2d) —. The questions being identical in all four, the same barrier exists in each against the state's right to tax. That the action of the state will interfere with interstate commerce is, to me, very apparent. If the railroad companies or the telephone companies should be permitted or be compelled to withdraw from their intrastate business, how many trains would continue to run, and how many telephones would remain in place, in this state, merely for the purpose of enabling their users to do an interstate business? Not only would all local service be discontinued, but, with the exception, possibly, of one or two large cities, the people of the state would be without interstate service as well.

If, as a matter of law, the companies may not withdraw from intrastate business, or if, as a matter of fact, it is wholly impracticable for them to do so, then such intrastate business must continue to be operated at the expense of their interstate business. If one state be permitted to impose burdens upon interstate commerce through the medium of taxation, then all states in which the companies operate may do likewise, and the accumulated burdens thus imposed would in the end result in complete strangulation of all their interstate commerce. The sum and substance of it all is that the tax imposed on intrastate business must be borne by the proceeds from interstate business.

[fol. 275] It is therefore, a burden upon, and interference with interstate commerce, and for that reason is invalid.

I therefore dissent.

Steinert, J.

[fol. 276] IN SUPREME COURT OF WASHINGTON

No. 25684

DISSENTING OPINION

HOLCOMB, J., dissenting:

I concur in the views stated by Judge Steinert in the above entitled case and as to all the other like cases now pending in this court.

I wish to add, however, that I particularly deplore the indefinite, unnecessary and summary disposition of the case of Great Northern Railway Co. v. State, 147 Wash. 630, 267 Pac. 506. It leaves that case like Mahomet's coffin, suspended midway between Heaven and earth; and, as Mr. Justice Holmes once said in one of his famous dissenting opinions, henceforth, neither bench nor bar can tell whether certain cases alluded to in the majority opinion therein, in much the same way as is the above cited case in the prevailing opinion in these cases, "are to be listed in the *index expurgatorius*" or, are in the category of cases to be used in the future at pleasure.

The above cited case was the deliberate judgment of this court en banc and concurred in by all but two of the then judges of this bench, including the writer of the opinion in the instant case. It followed the decisions of the Federal Supreme Court therein cited. It was based upon the sound principle that a public utility, such as the railway company, the telephone company and the like, is compelled by law to serve and cannot withdraw. To the same effect is Northern Pacific Railway Co. v. State, 84 Wash. 510, 147 Pac. 45.

It is manifest that these utilities cannot separate the receipts of their intrastate from their interstate business. If that be true, then it is indubitably true that the taxes in question are burdens upon interstate commerce, contravening the commerce clause and the Fourteenth Amendment of the Federal Constitution to which we are fully bound by oath to conform.

Holcomb, J.

[fol. 277] IN SUPREME COURT OF WASHINGTON

No. 25618. En Banc

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Respondent,

v.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and T. S. HEDGES and T. M. JENNER, as members of the Tax Commission of the State of Washington, Appellants.

ORDER CORRECTING OPINION—Filed Aug 28, 1935.

Per CURIAM:

Our attention has been called to an error in the concluding part of this opinion. The order there given is for reversal with direction to proceed in accordance with the law as found in the case referred to, when it should have been an order for reversal with direction to dismiss the action. Therefore, the last sentence in the opinion which reads:

"The principal and controlling questions are discussed and disposed of in the recent case of the State of Washington v. Northern Pacific Railway Co.,—Wash. Dec—, and upon the authority of that case the judgment of the superior court will be reversed, with directions to proceed in accordance with the law as found in the case referred to;"

will be stricken therefrom and held for naught, and there is hereby substituted in its place this:

"The principal and controlling questions are discussed and disposed of in the recent case of the State of Washington v. Northern Pacific Railway Co., — Wash. Dec. —, and upon the authority of that case the judgment will be reversed and the cause remanded, with direction to the superior court to dismiss the action."

(Here follows 1 photolithograph, folio 278.)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

May SESSION A. D. 1935

BE IT REMEMBERED, That at a regular session of the Supreme Court of the State of Washington begun and holden at Olympia on the second Monday of May, A. D. 19 35, it being the thirteenth day of said month, among other, the following was had and done, to-wit:

Monday, August 31st, 1935

Recorded In Vol. 34 page 36

JUDGMENT

No. 25618

The Pacific Telephone and Telegraph Company, a corporation,

Respondent

vs.

The Tax Commission of the State of Washington, and T.S.Hedges and T.M.Jenner, as members of the Tax Commission of the State of Washington,

Appellants.

Thurston County No. 15282

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 31st day of August, A. D. 19 35, on motion of G.W.Hamilton, Attorney General, and R.G.Sharpe, Assistant Attorney General, of counsel for appellants,

considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby reversed with costs; and the cause remanded, with directions to the Superior Court to dismiss the action, and that the said Tax Commission of the State of Washington, and T.S.Hedges and T.M.Jenner, as members thereof,

have and recover of and from the said Pacific Telephone and Telegraph Company,

the costs of this action taxed and allowed at Two Hundred Fourteen and 50/100 ($214.50) Dollars, and that execution issue therefor.

278

166A

[fol. 279] [File endorsement omitted.]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted.]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON TO THE SUPREME COURT OF THE UNITED STATES—Filed Aug. 31, 1935

To the Chief Justice of the Supreme Court of the State of Washington:

The Pacific Telephone and Telegraph Company, a California corporation, your petitioner, respectfully shows:

I

Your petitioner is the appellant in the above entitled cause.

II

Your petitioner filed an amended complaint in the Superior Court of the State of Washington, for Thurston County, on the 28th day of May, 1934, asking for an injunction against the appellees above named, restraining them from enforcing, as against this petitioner, Chapter 191 of the Laws of Washington, passed at the 23rd regular session in 1933, upon the ground that said Chapter 191 was violative of the Constitution of the United States and of the Acts of Congress regulating interstate commerce. The grounds on which said Chapter 191 of the Session Laws of Washington of 1933 is claimed to be invalid by this petitioner are all more particularly set forth in paragraph [fol. 280] XIII of the said amended complaint.

III

The appellees appeared in the said Superior Court and filed an answer. That thereafter, to-wit, on January 9, 1935, a trial was had in said Superior Court upon the issues made by said amended complaint and the answer thereto. That on the 11th day of March, 1935, the Honorable D. F. Wright, one of the judges of said Superior Court, signed a decree declaring that the tax imposed upon your

petitioner by said Chapter 191 of the Session Laws of Washington of 1933 was in violation of Article I, Section 8, of the Constitution of the United States, and of the Fourteenth Amendment to the Constitution of the United States, and permanently enjoining the appellees above named from enforcing against your petitioner any of the provisions of said Chapter 191 of the Session Laws of Washington of 1933. That the appellees, at the time of the entry of said decree on March 11, 1935, gave notice in open court that they, and each of them, appealed from said decree, and the whole thereof, to the Supreme Court of the State of Washington. That on August 13, 1935, the Supreme Court of the State of Washington rendered an opinion reversing the said Superior Court of Thurston County and holding valid, as to your petitioner, the provisions of said Chapter 191 of the Session Laws of Washington of 1933. That thereafter, to-wit, on the 28th day of August, 1935, the Supreme Court of the State of Washington filed an opinion directing that the suit brought by your petitioner as aforesaid in the Superior Court of the State of Washington, for Thurston County, be dismissed. That on the 31st day of August, 1935, final judgment of the said Supreme Court of the State of Washington directing the dismissal of the suit brought [fol. 281] as aforesaid by your petitioner in the Superior Court for Thurston County was entered.

IV

That the said Supreme Court of the State of Washington is the highest court of said state in which a decision can be had upon the matters alleged by your petitioner in this suit.

V

That in said cause there is drawn in question the validity of a statute of the State of Washington, being Chapter 191 of the Session Laws of Washington of 1933, on the ground that the said statute is repugnant to the Constitution and Laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that the said statute violates Article I, Section 8, of the Constitution of the United States, the due process clause of the Fourteenth Amendment to the Constitution of the United States, and the acts of Congress regulating interstate commerce.

VI

That, therefore, in accordance with the Judicial Code, Section 237(a) (U. S. C., Title 28, Section 344), and in accordance with the Rules of the Supreme Court of the United States (Rule 46, Par. 2), your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928 (45 stat. 54), was passed, to-wit, under Section 237(a) of the Judicial Code (U. S. C., Title 28, Section 344), a review could be had in the Supreme Court of the United States on writ of error, as a matter of right.

[fol. 282] VII

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors filed herewith pursuant to Rules 9 and 46 of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of the State of Washington, the highest court of said state in which a decision can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of Washington may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the clerk of the Supreme Court of the State of Washington under his hand and the seal of the said court, may be sent to the Supreme Court of the United States, as provided by law, and that said appeal may operate as a supersedeas, and that an order be made touching the security to be required of the petitioner, and that the supersedeas bond tendered by the petitioner be approved.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys for Petitioner, 657-671 Colman Building, Seattle, Washington.

[fol. 283] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Aug. 31, 1935

Statement

The pleadings admit that the petitioner owns and operates a telephone and telegraph system in the State of Washington and in the states of California, Oregon, and a part of Idaho, and that petitioner furnishes to the public therein telephone exchange service and both intrastate and interstate telephone toll service and telegraph service. The Supreme Court of the State of Washington found that petitioner "cannot, as a matter of law, retire from its intrastate business." That court also found that "it is impractical, as a matter of fact, for it (the petitioner) to retire from its intrastate business without also retiring from its interstate business."

Assignment of Errors

The petitioner, The Pacific Telephone and Telegraph Company, a corporation, assigns the following errors in the records and proceedings in this cause:

[fol. 284] 1. It being an admitted fact that petitioner is engaged in both intrastate and interstate commerce, and the Supreme Court of the State of Washington having held that your petitioner "cannot, as a matter of law, retire from its intrastate business," while continuing its interstate business, that court erred in holding that Chapter 191 of the Laws of Washington of 1933, in so far as it seeks to impose a privilege tax upon an interstate carrier on account of local business, does not violate the commerce clause, viz., Article I, Section 8, of the Constitution of the United States.

2. The Supreme Court of the State of Washington having determined that your petitioner "cannot, as a matter of law, retire from its intrastate business," that court erred in refusing to hold that Chapter 191 of the Laws of Wash-

ington of 1933, in attempting to impose a "privilege tax" on intrastate business which your petitioner is not free to renounce, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of the State of Washington having found that petitioner's interstate and intrastate business in Washington is inextricably commingled, and that, as a matter of fact and as a practical matter, petitioner cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of Washington of 1933, does not violate the commerce clause, viz., Article I, Section 8, of the Constitution of the United States.

[fol. 285] Wherefore, on account of the errors hereinbefore assigned, petitioner prays that the said judgment of the Supreme Court of the State of Washington, dated the 31st day of August, 1935, in the above entitled cause, be reversed and judgment rendered in favor of this appellant.

Dated this 31st day of August, 1935.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Counsel for Appellant, 657-671 Colman Building, Seattle, Washington.

[fol. 286] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed Aug. 31, 1935

The petition of The Pacific Telephone and Telegraph Company, the appellant in the above entitled action, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington, having been presented herein, accompanied by assignments of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered;

It is hereby ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the

final judgment of the Supreme Court of the State of Washington on August 31st, 1935, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Washington shall, within sixty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of the court, a true copy of the [fol. 287] material parts of the record herein, which shall be designated by a præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellant shall give a good and sufficient supersedeas bond, in the sum of Twenty-five Thousand Dollars ($25,000.00), that said appellant shall prosecute said appeal to effect, and answer all damages and costs if it fails to make its plea good; and that said supersedeas bond, when filed and approved, shall stay the sending down to the Superior Court of the remittitur herein and of all proceedings in this cause, and the enforcement of Chapter 191 of the Session Laws of Washington of 1933, or any part thereof, against appellant, until the final disposition of this cause by the Supreme Court of the United States.

Done in open court this 31st day of August, 1935.

John F. Main, Acting Chief Justice of the Supreme Court of the State of Washington.

[fols. 288-290] Supersedeas bond on appeal for $25,000, approved and filed Aug. 31, 1935, omitted in printing.

[fols. 291 & 292] Citation, in usual form, showing service on G. W. Hamilton et al., filed Aug. 31, 1935, omitted in printing.

[fol. 293] In Supreme Court of Washington

[Title omitted]

Præcipe for Transcript on Appeal—Filed Sept. 25, 1935

To the Clerk of the Above Entitled Court:

Please prepare a transcript of record on appeal of the above entitled cause to the Supreme Court of the United

States, including therein the following papers and documents:

1. Amended Complaint.
2. Answer.
3. Temporary Injunction.
4. Decree.
5. Trial Court's Memorandum, showing Notice of Appeal in open court by the Tax Commission.
6. Statement of Facts and all Exhibits.
7. Opinion of Supreme Court of Washington and dissenting opinions.
8. Opinion of Supreme Court of Washington and dissenting opinions in companion case of State v. Northern Pacific R. Co., No. 25684.
9. Memorandum Opinion dismissing suit.
10. Judgment and Decree of Supreme Court of Washington.
11. Petition for Appeal.
12. Assignments of Error and Prayer for Reversal.
13. Statement as to Jurisdiction of Supreme Court of the United States.
14. Order Allowing Appeal and fixing Supersedeas.

[fol. 294] 15. Cost and Supersedeas Bond.

16. Citation.
17. Acknowledgment of Service of Papers and Notice as provided by Rule 12 of United States Supreme Court.
18. Præcipe for Transcript on Appeal.
19. Clerk's Certificate.

Maurice McMicken, A. J. Schweppe, Otto B. Rupp, H. J. Ramsey, Attorneys for Respondent.

Service of the foregoing Præcipe, by receipt of a copy thereof, is acknowledged this 25th day of September, 1935.

G. W. Hamilton, Attorney General of the State of Washington; R. G. Sharpe, Assistant Attorney General of the State of Washington, Attorneys for Appellants.

[File endorsement omitted.]

[fol. 295] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 296] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED (Pursuant to Rule 13 (9)—Filed Oct. 25, 1935

Comes now the above named appellant and adopts its assignments of error as its statement of the points to be relied upon.

Appellant further states that only the following parts of the record as filed in this court are deemed necessary to be printed for the consideration of the points set forth above, viz.:

1. Amended Complaint.
2. Answer.
3. Temporary Injunction.
4. Decree.
5. Trial Court's Memorandum, showing Notice of Appeal in open court by the Tax Commission.
6. Opinion of Supreme Court of Washington and dissenting opinions.

[fol. 297] 7. Opinion of Supreme Court of Washington and dissenting opinions in companion case of State v. Northern Pacific R. Co., No. 25684.

8. Memorandum Opinion dismissing suit.
9. Judgment and Decree of Supreme Court of Washington.
10. Petition for Appeal.
11. Assignments of Error and Prayer for Reversal.
12. Statement as to Jurisdiction of Supreme Court of the United States.
13. Order Allowing Appeal and fixing Supersedeas.
14. Cost and Supersedeas Bond.
15. Citation.
16. Acknowledgment of Service of Papers and Notice as Provided by Rule 12 of United States Supreme Court.
17. Præcipe for Transcript on Appeal.
18. Clerk's Certificate.
19. The following portions of the Statement of Facts:

Line 1 on page 3 to line 24 on page 6;
Line 29 on page 6 to end of page 7;
Line 25 on page 20 to end of page 20;
Line 15 on page 21 to line 5 on page 22;
Line 9 on page 23 to line 14 on page 23;
Line 12 on page 26 to line 26 on page 26;

Line 1 on page 38 to line 14 on page 38;
Line 1 on page 40 to line 5 on page 47;
Line 29 on page 48 to line 16 on page 49;
Line 10 on page 51 to line 25 on page 53;
Line 19 on page 54 to line 8 on page 80;
Line 13 on page 81 to line 20 on page 83;
Line 23 on page 89 to line 4 on page 90;
Line 8 on page 90 to line 27 on page 95;
Line 30 on page 96 to line 4 on page 99;
[fol. 298] Line 15 on page 102 to line 7 on page 131;
Second word line 3 on page 132 to line 2 on page 158;
Line 14 on page 159 to end of Statement of Facts.

And the following Exhibits attached to said statement of Facts:

Plaintiff's Exhibit No. 1;
Plaintiff's Exhibit No. 5;
Plaintiff's Exhibit No. 6;
Plaintiff's Exhibit No. 11;
Plaintiff's Exhibit No. 12;
Plaintiff's Exhibit No. 15;
Plaintiff's Exhibit No. 16;
Plaintiff's Exhibit No. 17;
Plaintiff's Exhibit No. 22;
Defendants' Exhibit No. 19;
Defendants' Exhibit No. 20;
Defendants' Exhibit No. 21.

Dated September 25th, 1935.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Counsel for Appellant.

Service of the foregoing Statement of Points and designation of parts of record to be printed, by receipt of a copy thereof, is acknowledged this 25th day of September, 1935.

G. W. Hamilton, Attorney General of the State of Washington, and R. G. Sharpe, Assistant Attorney General of the State of Washington, Counsel for Appellees.

[fol. 299] [File endorsement omitted.]

Endorsed on cover: File No. 40,098. Washington Supreme Court. Term No. 544. The Pacific Telephone and Telegraph Company, appellant, vs. The Tax Commission of the State of Washington et al. Filed October 25, 1935. Term No. 544, O. T., 1935.

FILE COPY

FILED
OCT 25 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 544

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION.

MAURICE MCMICKEN,
H. J. RAMSEY,
OTTO B. RUPP,
ALFRED J. SCHWEPPE,
Counsel for Appellant.

INDEX.

SUBJECT INDEX.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Statute of the State, the validity of which is involved	2
Date of judgment and date of application for appeal	5
The nature of the case and the rulings below	6
Cases believed to sustain the jurisdiction	11

TABLE OF CASES CITED.

Bowman v. Continental Oil Co., 256 U. S. 642	12
Cooney v. Mountain States Tel. & Tel. Co., 55 Sup. Ct. Rep. 477	11
Great Northern Ry. Co. v. Minnesota, 278 U. S. 503	2
Interstate Busses v. Holyoke Street Ry., 273 U. S. 45	12
King Manufacturing Co. v. City Council of Augusta, 277 U. S. 100	11
Larson v. South Dakota, 278 U. S. 429	2
Missouri & Kansas Interurban Ry. Co. v. Olathe, 222 U. S. 185	5
Mountain States Tel. & Tel. Co. v. Cooney, 7 Fed. Supp. 12, 55 Sup. Ct. Rep. 477	12
Nashville, etc., Ry. v. White, 278 U. S. 456	2
Pacific Telephone and Telegraph Co. v. Tax Commission of the State of Washington et al., 42 P. (2d) 420	
Puget Sound Power & Light Co. v. King County, 264 U. S. 22	5
Pullman Co. v. Adams, 189 U. S. 420	12
Sprout v. South Bend, 277 U. S. 163	11

STATUTES CITED.

Act of January 31, 1928, as amended by the Act of April 26, 1928; 45 Stat. 54; 45 Stat. 466 (28 U. S. C. 861a, 861b)	2
Constitution of the State of Washington, Article XII, Section 13	8
Section 14	8
Section 15	8
Section 19	8
Constitution of the United States, Article I, Section 8	9, 11
14th Amendment	9, 11
Judicial Code, Section 237a, as amended by the Act of February 13, 1925 (28 U. S. C. 344)	2, 12
Laws of 1911 of the State of Washington, Chapter 117 (Public Service Commission Law)	8
Post Roads Act (14 Stat. 221)	7
Session Laws of Washington of 1933, Chapter 191, Section 1 (6)	3
Section 2 (2)	3, 7
Section 2 (2) (e)	4, 7
Section 2 (2) (e) (VI)	4, 7
Section 3	4
Section 5	7
Section 6	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 544

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION,

Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, AND T. S. HEDGES AND T. M. JENNER, AS MEMBERS OF THE TAX COMMISSION OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is

Judicial Code, § 237 (a) (28 U. S. Code § 344), reading, to the extent relevant here, as follows:

> "Section 237. (a) A final judgment or decree in any suit in the highest court of a state in which a decision could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error * * *"

The remedy by writ of error under the foregoing section has been abolished and an appeal substituted.

Act of January 31, 1928, as amended by the Act of April 26, 1928; 45 Stat. 54; 45 Stat. 466 (28 U. S. Code, §§ 861 a, 861 b);

Nashville, etc. Ry. v. *White,* 278 U. S. 456, 460;

Great Northern Ry. Co. v. *Minnesota,* 278 U. S. 503, 506;

Larson v. *South Dakota,* 278 U. S. 429, 432.

B.

Statute of the State the Validity of Which is Involved.

The statute of the State of Washington, the validity of which has been sustained by the Supreme Court of the State of Washington, the highest court of said state, as not being violative of or repugnant to the provisions of the Constitution and Laws of the United States, is Chapter 191, Session Laws of 1933, State of Washington. The pertinent provisions thereof are:

"Chapter 191

(S. H. B. 92).

Occupation Tax..

An Act relating to taxation; imposing taxes upon the privilege of engaging in business activities and providing for the ascertainment, assessment, collection and distribution thereof; providing for the administration and enforcement of this act; providing penalties, making appropriations; and declaring that this act shall take effect immediately.

Be it enacted by the Legislature of the State of Washington:

Section 1. For the purposes of this act unless otherwise required by the context:

* * * * * * *

(6) The term 'gross income' means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without any deduction on account of losses; *Provided,* The term 'gross income' shall not include any payments received on accounts or notes outstanding at the time this act goes into effect.

* * * * * * *

Sec. 2. (2) From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in busi-

ness activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows:

* * * * * * *

(e) Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business as follows:

* * * * * * *

VI. Telephone and telegraph companies: three per cent.

* * * * * * *

Sec. 3. If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function.

* * * * * * *

Sec. 6. The taxes imposed hereunder shall be due and payable in monthly installments on or before the fifteenth day of the month next succeeding the month in which the tax accrued. The taxpayer, on or before said fifteenth day of the month, shall make out a return, upon such forms and setting forth such information as the tax commission may require, showing his estimate of the amount of the tax for which he is liable for the preceding month, sign and transmit the same to the tax commission, together with a remittance for said amount in the form required by section 20 of this act. Whenever the total tax for which any per-

son is liable under this act does not exceed the sum of ten dollars ($10.00) for any month, a quarter-yearly return and remittance in lieu of the monthly return may be made on or before the fifteenth day of the month next succeeding the end of the quarter-year for which the tax is due. Whenever the total tax for which any person is liable under this act does not exceed the sum of ten dollars ($10.00) for any quarter-year an annual return and remittance in lieu of the quarterly return may be made as provided in section 7 of this act. The tax commission, for good cause shown, may extend the time for making and filing any monthly or quarterly return as required under this section, and may grant such reasonable additional time within which to make and file such return as it may deem proper; but the time for making and filing such return shall not be extended beyond the fifteenth day of the month next succeeding the regular date of the return.

C.

Date of Judgment and Date of Application for Appeal.

The date of the final judgment of the Supreme Court of the State of Washington sought to be reviewed is August 31, 1935.

The judgment of the Supreme Court of the State of Washington, which was a judgment reversing the decision of the trial court holding the aforesaid Chapter 191 unconstitutional, and directing the dismissal of the suit brought by the appellant, is a final judgment within the meaning of Judicial Code, § 237.

Missouri & Kansas Interurban Ry. Co. v. *Olathe,* 222 U. S. 185.

The time for taking the appeal began to run on the date of such final judgment, to-wit, August 31, 1935. (See *Puget Sound Power & Light Co.* v. *King County,* 264 U. S. 22, where the time for appealing from the judgments of the

Supreme Court of the State of Washington is considered.)

The date on which the application for appeal was presented and the appeal allowed is August 31, 1935.

D.

The Nature of the Case and the Rulings Below.

The nature of the case and the rulings below which are deemed to bring the case within the jurisdictional provision relied on are as follows:

The appellant, The Pacific Telephone and Telegraph Company, commenced this suit in the Superior Court of the State of Washington for Thurston County to enjoin the appellees from collecting of the appellant the tax upon gross income prescribed by Chapter 191 of the Session Laws of Washington of 1933, and to restrain any attempt by the said appellees to enforce said statute and its penalties against the appellant.

The appellant filed its amended complaint in the above entitled cause, alleging the following material facts:

That appellant is a corporation duly organized under the laws of the State of California and duly licensed to do business in the State of Washington. (Paragraph I.)

That T. S. Hedges and T. M. Jenner were the members of the Tax Commission of the State of Washington, a continuing board composed of three members, of which only the two above named had been appointed and qualified at the time of the filing of the amended complaint. (Paragraph II.)

That appellant owns and operates a public telephone and telegraph system in the State of Washington and in the States of California, Oregon and a portion of Idaho, furnishing to the public therein telephone exchange service and

both intrastate and interstate telephone and toll service and telegraph service; that it had, prior to 1933, filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations required by the Post Roads Act (14 Stat. 221), and is subject to the Acts of Congress regulating interstate commerce. (Paragraph III.)

That Chapter 191 of the Laws of Washington of 1933 (p. 871) provides in Section 2 (2) that "from and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person (and corporation) an annual tax or excise for the privilege of engaging in business activities" in the State of Washington, measured by a percentage of gross income of certain business activities described in said Section 2, and by said Section 2 (2) (e) (VI.) (p. 873) a tax of three per cent of said gross income is imposed on telephone and telegraph companies, including the appellant in this court, for the privilege of engaging in such business activities in the State of Washington. By Section 5 of Chapter 191 of the Laws of Washington of 1933 (p. 879) there is excepted from taxable gross income so much as is received from the United States, the State of Washington, "or from business which the State of Washington is prohibited from taxing under the Constitution of this State or the Constitution or laws of the United States." That in the trial court the appellees construed said act as not applying to the gross income from interstate business, but contended that the same applies to the gross income from appellant's intrastate business, and that appellant owes and must pay said three per cent of gross income for the privilege of doing intrastate business in the State of Washington. (Paragraph V.)

That appellant constructed and equipped its telephone and telegraph business in the State of Washington many

years prior to the enactment of said Chapter 191, and has expended therefor more than $60,000,000 to provide adequate facilities for both interstate and intrastate telephone and telegraph service. (Paragraph VIII.)

That appellant is subject to Chapter 117 of the Laws of 1911 of the State of Washington, known as the "Public Service Commission Law," and thereby and by the Constitution of the State of Washington, Article XII, Sections 13, 14, 15 and 19, there is imposed upon appellant an obligation to devote its properties to the service of the people in the State of Washington in the furnishing of telephone and telegraph service, from which appellant cannot withdraw while continuing to carry on its interstate business. (Paragraph IX.)

That the tax of three per cent on the gross income, imposed by said Chapter 191 of the Laws of 1933, is not a property tax nor in lieu of a property tax, but is an excise tax imposed solely for the privilege of doing intrastate business, and appellant cannot escape said tax by abandoning its intrastate business while continuing in its interstate business. (Paragraph X.)

That appellant has paid all taxes of any and every kind levied either by the State of Washington or any subdivision of said State against all of its property and due at the time of the filing of the amended complaint, the real property taxes amounting to $115,681.34, and one-half of the personal property taxes amounting to $582,309.17; that the remaining one-half of the personal property taxes could be paid without penalty on or before November 30, 1933. (Paragraph XI.)

That appellant's interstate and intrastate business is inseparable, commingled and mutually dependent; that both classes of business are done by appellant over the same telephone and telegraph lines, through the same exchanges,

operated by the same employes and with the same facilities, and that it is not possible, practically or economically, or at all, to conduct separately intrastate and interstate business by different lines, through different exchanges or by means of different instrumentalities or employes; that appellant's gross operating revenue in the State of Washington for the year 1932 from the conduct of its entire business, both intrastate and interstate, was a large sum of money, aggregating $11,295,788.86, and of said sum a very large portion was derived from interstate telephone and telegraph business originating in or coming to the State of Washington. (Paragraph XII.)

That if appellant could and should abandon its intrastate telephone and telegraph business, the entire burden of maintaining its intrastate system of telephone and telegraph service, equipped to handle both classes of business, would fall entirely on interstate business and would necessitate an increase of rates greater than the same could bear as a practical matter or at all, and would result in the destruction of an essential instrument of interstate commerce and of the value of appellant's property in an amount of many millions of dollars. That the tax imposed by said Chapter 191, Laws of Washington of 1933, on the pretext of a tax or fee for the privilege of doing intrastate business in the State of Washington, is in reality a tax or burden upon interstate commerce and upon the gross revenues received by appellant therefrom and is a tax upon appellant's business done and upon income earned in other states and upon property located outside the State of Washington, and is in violation of the commerce clause of the Constitution of the United States, being Article I, Section 8, thereof, and of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and of the Acts of Congress regulating interstate commerce. (Paragraph XIII.)

That by various sections of Chapter 191 penalties are provided for failure on the part of the taxpayer to make monthly and annual returns, or for the making of incorrect returns, and for the non-payment of said tax of three per cent on gross income; that no provision is made by said sections, or otherwise in the act, for refund of taxes paid, if said Chapter 191 should be held unconstitutional as to appellant; that appellant has refused to make any return and refuses to pay any tax; that the appellees threaten to and will, unless restrained, invoke the penal provisions of said Chapter 191, and also will, unless restrained, issue a warrant directed to the sheriff, commanding him to sell the real and personal property of the appellant within any county in the State of Washington, thus clouding the title to appellant's property and depriving appellant of its use, and, in addition, appellant will be prosecuted as for a gross misdemeanor; that appellant has no adequate remedy at law for said wrongs and injuries, because, if it makes the monthly payment provided for by the act, it will be necessary to bring repeated actions at law to recover said payments, and there is no provision made in the act for the satisfaction of any judgment which appellant might obtain. (Paragraphs XIV, XV, XVI and XVII.)

A temporary injunction, in conformity with the prayer of the amended complaint of appellant, was issued by the Superior Court of the State of Washington for Thurston County, and on appeal to the Supreme Court of the State of Washington said court affirmed the action of said Superior Court in granting a temporary injunction pending the hearing of the case. (42 P. (2d) 420.)

The appellees answered on July 20, 1934, and trial was had before said Superior Court for Thurston County on January 9, 1935. On March 11, 1935, the Honorable D. F. Wright, one of the judges of said Superior Court, signed a decree declaring that the tax imposed upon appellant by

said Chapter 191 of the Session Laws of Washington of 1933, was in violation of Article I, Section 8, of the Constitution of the United States, and of the Fourteenth Amendment to the Constitution of the United States, and said decree permanently enjoined the appellees from enforcing against appellant any of the provisions of said Chapter 191 of the Session Laws of Washington of 1933.

Thereafter an appeal was prosecuted by said appellees from said decree to the Supreme Court of the State of Washington, and upon the said appeal the decree of the Superior Court for Thurston County was reversed, in an opinion filed on August 13, 1935, on the ground that said Chapter 191 of the Session Laws of Washington of 1933 did not violate Article I, Section 8, of the Constitution of the United States or the Fourteenth Amendment to the Constitution of the United States, and that said act was in all respects valid as to this appellant.

Thereafter, on the 28th day of August, 1935, the Supreme Court of the State of Washington filed a per curiam opinion, directing that the suit brought by this appellant, as aforesaid, in the Superior Court of the State of Washington for Thurston County, be dismissed; and on the 31st day of August, 1935, final judgment of the said Supreme Court of the State of Washington, directing dismissal of said action, was entered.

E.

Cases believed to sustain the jurisdiction of this Court.

The following cases are believed to sustain the jurisdiction of this Court:

King Manufacturing Co. v. *City Council of Augusta*, 277 U. S. 100;

Sprout v. *South Bend*, 277 U. S. 163, 171;

Cooney v. *Mountain States Tel. & Tel. Co.*, 55 Sup. Ct. 477, 481, 482;

Mountain States Tel. & Tel. Co. v. *Cooney*, 7 F. Supp. 12 (three-judge court); Affirmed 55 Sup. Ct. 477;
Pullman Co. v. *Adams*, 189 U. S. 420;
Bowman v. *Continental Oil Co.*, 256 U. S. 642, 648;
Interstate Busses v. *Holyoke Street Ry.*, 273 U. S. 45, 51.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Section 344).

Respectfully submitted,

MAURICE MCMICKEN,
H. J. RAMSEY,
OTTO B. RUPP,
ALFRED J. SCHWEPPE,
Counsel for Appellant.

(7045-C)

FILE COPY

Office Supreme Court
FILED
NOV 14
CHARLES ELMORE

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER 1935 TERM

No. 544

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, *Appellant,*

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and T. S. HEDGES and T. M. JENNER, as Members of the Tax Commission of the State of Washington, *Appellees.*

No.....

GREAT NORTHERN RAILWAY COMPANY, *Appellant.*

vs.

STATE OF WASHINGTON, *Appellee.*

No. 529

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant.*

vs.

STATE OF WASHINGTON, *Appellee.*

Appeals From the Supreme Court of the State of Washington

APPELLEES' MOTION TO ADVANCE CASES ON CALENDAR

G. W. HAMILTON, and R. G. SHARPE,
Attorneys for Appellees in Each of Above Appeals.
Post Office Address: Temple of Justice, Olympia, Wash.

THOMAS BALMER, EDWIN C. MATTHIAS and F. G. DORETY,
Attorneys for Appellant, Great Northern Railway Company.
Post Office Address: Great Northern Bldg., Seattle, Wash.

D. F. LYONS, L. B. DAPONTE and ROBERT S. MACFARLANE,
Attorneys for Appellant, Northern Pacific Railway Company.
Post Office Address: 909 Smith Tower, Seattle, Wash.

MCMICKEN, RAMSEY, RUPP & SCHWEPPE,
Attorneys for Appellant, Pacific Telephone and Telegraph Company.
Post Office Address: 657 Colman Bldg., Seattle, Wash.

STATE PRINTING PLANT, OLYMPIA, WASH.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER 1935 TERM

No. 544

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, *Appellant*,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and T. S. HEDGES and T. M. JENNER, as Members of the Tax Commission of the State of Washington, *Appellees*,

No.....

GREAT NORTHERN RAILWAY COMPANY, *Appellant*,

vs.

STATE OF WASHINGTON, *Appellee*,

No. 529

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*,

vs.

STATE OF WASHINGTON, *Appellee*.

Appeals From the Supreme Court of the State of Washington

APPELLEES' MOTION TO ADVANCE CASES ON CALENDAR

G. W. HAMILTON, and R. G. SHARPE,
Attorneys for Appellees in Each of Above Appeals.
Post Office Address: Temple of Justice, Olympia, Wash.

THOMAS BALMER, EDWIN C. MATTHIAS and F. G. DORETY,
Attorneys for Appellant, Great Northern Railway Company.
Post Office Address: Great Northern Bldg., Seattle, Wash.

D. F. LYONS, L. B. DAPONTE and ROBERT S. MACFARLANE,
Attorneys for Appellant, Northern Pacific Railway Company.
Post Office Address: 909 Smith Tower, Seattle, Wash.

MCMICKEN, RAMSEY, RUPP & SCHWEPPE,
Attorneys for Appellant, Pacific Telephone and Telegraph Company.
Post Office Address: 657 Colman Bldg., Seattle, Wash.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER, 1935 TERM

No. 544

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, *Appellant,*

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and T. S. HEDGES and T. M. JENNER, as Members of the Tax Commission of the State of Washington, *Appellees,*

No.....

GREAT NORTHERN RAILWAY COMPANY, *Appellant,*

vs.

STATE OF WASHINGTON, *Appellee,*

No. 529

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant,*

vs.

STATE OF WASHINGTON, *Appellee.*

APPELLEES' MOTION TO ADVANCE CASES ON CALENDAR

Come now the Appellees in each of the above appeals and move the court for an order advancing the date of argument of each such appeal to the first available date after the record therein will have been printed and in the hands of both parties for a period of thirty days, and that said appeals be heard *seriatum.*

This motion is based upon the files and records in the above causes and upon the affidavit and stipulation hereto attached.

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,

Attorneys for Appellees in each of above appeals.

SUPPORTING AFFIDAVIT

STATE OF WASHINGTON, }
County of Thurston. } ss

R. G. SHARPE, being first duly sworn, on oath, deposes and says: That affiant is one of the assistants of the attorney general of the state of Washington, and as such is now, and at all times since their inception has been, one of the attorneys for the appellees in each of the above entitled cases. That the decisions by this court of these three appeals will be determinative of the validity of Chapter 191, Laws of Washington for 1933, and of Chapter 180, Laws of Washington for 1935, imposing an occupational tax measured by percentages of gross intrastate income, in so far as the same apply to interstate railroad and telephone companies, and that the amount of such disputed taxes which have already accrued now exceeds a million dollars, and such accruals are increasing by approximately $50,000.00 per month, and that said decisions will likewise have an important bearing upon the validity of said Revenue Acts in so far as the same affect other taxpayers thereunder. That no part of said disputed taxes have been paid, and it is therefore of vital importance to the state of Washington that each and all of said appeals be set down for argument at the earliest date possible. That the transcript of the record in each of said appeals is now on file with the clerk of this court, and the portions of the record to be printed have been duly designated by both parties to each such appeal. That said appeals involve substantially the same questions of law, and should be argued *seriatum*.

R. G. SHARPE,

SUBSCRIBED AND SWORN TO before me this 7th day of November, 1935.

JENNIE M. TATTERSALL,
Notary Public in and for the State of Washington, residing at Olympia.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties to the above entitled appeals that the date of argument of each such appeal may be advanced to the first available date after the record in each such appeal will have been printed and in the hands of both parties thereto for a period of thirty days.

Dated this 8th day of November, 1935.

THOMAS BALMER, EDWIN C. MATTHIAS and F. G. DORETY,
Attorneys for Appellant, Great Northern Railway Company.

D. F. LYONS, L. B. DAPONTE and ROBERT S. MACFARLANE,
Attorneys for Appellant, Northern Pacific Railway Company.

MCMICKEN, RAMSEY, RUPP & SCHWEPPE,
Attorneys for Appellant, Pacific Telephone and Telegraph Company.

G. W. HAMILTON, and R. G. SHARPE,
Attorneys for Appellees in Each of Above Appeals.

Due and timely of the within motion by receipt of a true copy thereof, acknowledged this 8th day of November, 1935.

THOMAS BALMER, EDWIN C. MATTHIAS and F. G. DORETY,
Attorneys for Appellant, Great Northern Railway Company.

D. F. LYONS, L. B. DAPONTE and ROBERT S. MACFARLANE,
Attorneys for Appellant, Northern Pacific Railway Company.

MCMICKEN, RAMSEY, RUPP & SCHWEPPE,
Attorneys for Appellant, Pacific Telephone and Telegraph Company.

FILE COPY

DEC 31

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 544

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant*,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and T. S. HEDGES and T. M. JENNER, as members of the Tax Commission of the State of Washington, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

MAURICE MCMICKEN,
H. J. RAMSEY,
OTTO B. RUPP,
ALFRED J. SCHWEPPE,
Attorneys for Appellant.

ALFRED SUTRO,
Of Counsel.

657-671 Colman Building, Seattle, Washington.

THE ARGUS PRESS, SEATTLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 544

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant*,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and T. S. HEDGES and T. M. JENNER, as members of the Tax Commission of the State of Washington, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

MAURICE MCMICKEN,
H. J. RAMSEY,
OTTO B. RUPP,
ALFRED J. SCHWEPPE,
Attorneys for Appellant.

ALFRED SUTRO,
Of Counsel.

657-671 Colman Building, Seattle, Washington.

THE ARGUS PRESS, SEATTLE

SUBJECT INDEX

	Page
Statement of the Case	1
Specification of Errors	12
Summary of Argument	13
Argument	13
Appellant cannot withdraw from its intrastate business while continuing its interstate business.	

CASES CITED

Allen v. Pullman Co., 191 U. S. 171	13
Barrett v. New York, 232 U. S. 14	13
Bowman v. Continental Oil Co., 256 U. S. 642	14
Colorado v. United States, 271 U. S. 153	14
Cooney v. Mountain States Telephone Co., 55 Sup. Ct. Rep. 477	18, 22, 23
Crutcher v. Kentucky, 141 U. S. 47	13, 26
Dept. of Public Works ex rel. Seattle v. Pacific Tel. & Tel. Co., P. U. R. 1923D, 118	7
East Ohio Gas Co. v. Tax Commission, 235 U. S. 465	17, 19, 21, 22
Great Northern Ry. Co. v. State, 147 Wash. 630	11
International Textbook Co. v. Pigg, 217 U. S. 91	26
Interstate Busses v. Holyoke Street Ry. Co., 273 U. S. 45	14, 26
Lindheimer v. Illinois Telephone Co., 292 U. S. 151	9
Mountain States Tel. Co. v. Cooney, 7 F. Supp. 12	19
Pacific Tel. & Tel. Co. v. Tax Commission, 180 Wash. 673	4
Pullman Co. v. Adams, 189 U. S. 420	13
R. R. Commission v. C. B. & Q. R. Co., 257 U. S. 563	14
Sprout v. South Bend, 277 U. S. 163	17, 18, 19, 21

Page

State v. Northern Express Co., 76 Wash. 636..... 11

State v. Northern Pacific Ry. Co., 83 Wash. Dec. 52.....1, 5, 6

Western Union Telegraph Co. v. Kansas, 216 U. S. 1 27

Western Union Telegraph Co. v. Pendleton, 122 U. S. 347 .....13, 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant*,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and T. S. HEDGES and T. M. JENNER, as members of the Tax Commission of the State of Washington, *Appellees*.

No. 544

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

STATEMENT

This is an appeal from the decision of the Supreme Court of the State of Washington, rendered August 13, 1935, holding valid as to the appellant a statute of that state (Chapter 191 of the Laws of 1933), which statute sought to impose upon the appellant a tax of three per cent of its gross intrastate revenues ostensibly for the privilege of doing an intrastate telephone and telegraph business (83 Wash. Dec. 52; 48 Pac. (2d) 938; R. 151).

The provisions of the act, so far as here material, are as follows:

"Section 2(2). From and after the first day of August, 1933, and until the thirty-first day of

July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows: * * *

"Section 2(2)(e). Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business, as follows:

"VI. Telephone and telegraph companies: three per cent;"

Incidentally it may be said that three per cent is the highest rate imposed by the act upon any business.

"Section 3. If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

Other provisions of the act relate to the making of returns to the State Tax Commission of Washing-

ton, penalties for failure to make such return or to pay the tax, the collection of the tax by levy upon and sale of real and personal property by summary proceedings, and the subjection of the non-complying taxpayer to imprisonment.

Shortly after the act became effective a number of railroad companies instituted suits to test the validity of the act as applied to such companies, the act imposing upon railroad companies a tax of one and one-half per cent of their gross intrastate revenues.

As the questions involved in those cases were, with one exception, identical with the questions which would be involved if this appellant instituted suit, no action was taken by this appellant until November, 1933, at which time it, together with The Home Telephone and Telegraph Company of Spokane (hereinafter called the Home Company), then a subsidiary of The Pacific Telephone and Telegraph Company, brought, as they had a right to do under the laws of the State of Washington, separate suits to enjoin the enforcement of the act.

No returns were filed by this appellant until June, 1934. On May 29, 1934, the Tax Commission addressed a letter to the counsel for both this appellant and the Home Company, in which it was stated that, unless returns were made by such companies for the months of August, 1933, to March, 1934, the Commission would proceed to assess the tax against such companies, and the companies failing to pay the same, their real and personal property would be sold by the sheriffs of the various counties of the State of Washington, in accordance with the provisions of the act.

Thereupon both the appellant and the Home Company filed returns, under protest (Exhibit 22, R. 129).

On July 12, 1934, temporary injunctions against the enforcement of the act were granted by the trial court (R. 14). The Tax Commission appealed from the decrees granting such temporary injunctions to the Supreme Court of the State of Washington. The decrees were affirmed (180 Wash. 673, 698). In the opinion in the case of appellant it is said:

> "As appears from the complaint, the respondent owns and operates a telephone and telegraph system in the states of Washington, Oregon, California and Idaho, furnishing to the public telephone exchange service, both interstate and intrastate. It is alleged that the interstate and intrastate business are inseparable, commingled and mutually dependent, and that both classes of business are done over the same telephone and telegraph lines through the same exchanges, operated by the same employees and with the same facilities.
>
> * * * * * *
>
> "In the case now before us, as appears from the allegations in the complaint, there are grave and difficult questions of law and fact to be ultimately determined, one of which is whether the respondent can, either as a matter of fact or law, withdraw from its intrastate business without also withdrawing from its interstate business; and this presents a Federal question which can only be determined with finality when the United

States Supreme Court speaks thereon." (180 Wash. 673, 676)

The two cases were tried together, resulting in decrees permanently enjoining the enforcement of the act. Appeals were promptly taken by the Tax Commission to the State Supreme Court, which reversed the trial court, two judges dissenting (83 Wash. Dec. 67; 48 Pac. (2d) 938; R. 151).

A few days after the rendition of the first opinion a supplemental opinion was filed, directing the trial court to dismiss the action brought by this appellant (83 Wash. Dec. 308; 48 Pac. (2d) 938; R. 165).

By stipulation, the case of the Home Company abides the result of this appeal, and there has been eliminated from the record in this case, so far as possible, the exhibits and testimony relating to the Home Company.

An extended statement of the undisputed evidence adduced at the trial would serve no useful purpose, as in the opinion of the court below it was said that the appellant could not "as a matter of law retire from its intrastate business [and] that it [was] impracticable, as a matter of fact, to so retire without also retiring from its interstate business." 83 Wash. Dec. 62. True, this particular statement was made in the opinion in the *Northern Pacific Railway Company* case (Case No. 529 in this court). The *Northern Pacific* case and the *Great Northern Railway Company* case, also on appeal to this court, and the cases of this appellant and the Home Company were all argued on the same day in the State Supreme Court. The only opinion of any length written

relative to the four cases was the opinion in the *Northern Pacific Railway Company* case. In the case at bar the court contented itself with saying that "the facts are sufficiently stated in the opinion upon the former appeal and need not be here repeated." The facts stated in the opinion upon the former appeal have been herein quoted on page 4 of this brief. Continuing, the court said:

> "The principal and *controlling* questions are discussed and disposed of in the recent case of *State v. Northern Pacific Railway Co., ante* p. 52, and upon the authority of that case the judgment of the Superior Court will be reversed, with directions to proceed in accordance with the law as found in the case referred to."

In view of this declaration of the court below, only a very brief summary of the evidence is here made.

The appellant is a California corporation, furnishing to the public in the states of California, Oregon, Washington and a portion of Idaho interstate and intrastate telephone and telegraph service. In the year 1932, 673,000 interstate telephone messages originated in Washington (R. 97).

As shown by the books of the appellant, the cost of its plant and equipment at the end of the year 1933, plus the average working assets employed by the appellant during that year, was $57,675,835 (Exhibit 1, R. 102). The company's property had been valued by the Department of Public Works of the State of Washington, the regulatory body of that state, as of June 30, 1922. That body found that the value of the company's property in the State of Washington

at that time was $28,216,654 (Exhibit 4, R. 103). In the opinion of the Department at that time the *value* of the property of a public utility company was *identical with the cost* of its plant and equipment plus the average working assets. P.U.R. 1923D, 118. If there is added to this base figure the net additions to plant and equipment made during each of the years since June 30, 1922, plus the average working assets for the year 1933, it will be found that the cost of the property, as determined by the Department of Public Works, at the end of the year 1933 is $56,976,743 (Exhibit 5, R. 103).

The gross operating revenues for the State of Washington in the year 1933 were $10,154,294.21, of which $9,230,873.58 were intrastate revenues and $923,420.63 were interstate revenues. The total operating expenses other than taxes, intrastate, were $7,909,241.85, and interstate $640,692.04. The taxes actually paid by the company in the year 1933 in Washington were $1,604,796.14 (Exhibit 12, R. 106).

It will readily be seen, however, that the gross interstate revenue for the year 1933 was $672,371.40 *less* than the taxes actually paid by the appellant and attributable to Washington operations in the year 1933 (1,604,796.14 — 932,424.74 = 672,371.40).

The evidence in the case, however, conclusively shows that if the appellant furnished no intrastate service at all, it nevertheless would be compelled in order to render interstate service only to retain in service more than ninety per cent of the plant and equipment then employed by the appellant in render-

ing both interstate and intrastate service (Exhibit 17, R. 111).

The telephone plant and equipment of appellant in Washington was "designed to handle both classes of service [intrastate and interstate] simultaneously or at different times over the same facilities operated by the same employees through the same exchanges" (R. 51). "The same outside facilities, the same exchanges, and the same central office equipment installed in the exchange buildings are used in the transmission of messages, whether intrastate or interstate, and are operated by the same employees, using the same facilities, whether it is interstate or intrastate. The intrastate business cannot be separated from the interstate business" (R. 39). For instance, by the use of the carrier equipment there may be transmitted simultaneously over one pair of wires three telephone conversations and twelve telegraph messages, or two telephone conversations and twenty-four telegraph messages, or one telephone conversation and thirty-six telegraph messages. In the case where three of the channels are used at that particular time for telephone conversation and the remaining channel for telegraph messages the three telephone conversations may be wholly intrastate or wholly interstate, or one of them intrastate and the other two interstate. The twelve telegraph messages may also be wholly intrastate, wholly interstate, or some intrastate and the remainder interstate (R. 37).

It follows, of course, that the various parts of appellant's telephone plant and equipment in Wash-

ington are "inseparable, commingled and mutually dependent" (R. 39).

It is difficult, of course, in view of these facts, to make a correct segregation of the property, revenues and expenses of a large telephone and telegraph company. The *only* way in which this segregation can be made is on a *time use* basis, which method has been approved by this court. *Lindheimer v. Illinois Tel. Co.*, 292 U. S. 151, 155. Using that method, a segregation of the property was made in this case, which resulted in finding that, as hereinbefore stated, over ninety per cent of the property would have to be retained if interstate service only was furnished.

Now it is obvious that if, in order to render interstate service only, ninety per cent of the plant and equipment would have to be retained, that property would be subject to a tax burden one and one-half times as great as the total gross amount received by the appellant in the rendition of its interstate telephone and telegraph service. Not only so, but the property would have to be maintained, and, even if maintained, would depreciate. In addition, the appellant would have to employ and pay operators, superintendents, accountants, agents and officers, and purchase power to operate the plant.

The result is graphically stated in the testimony of Mr. Mastick, at one time chief engineer for the appellant in Washington and Oregon and now general staff engineer for the appellant in the State of Washington and that portion of Idaho in which it operates. He said:

"In the first place, if we abandoned the intra-

state business for solely interstate business, we would have to retain nearly 90% of the property to do it. The revenues received from the interstate business, $1,123,536.49 [for the year 1932] is approximately one-tenth of the total gross revenues received from the combined intrastate and interstate business. Now, it is obvious, even from the standpoint of taxes alone, that if we had to retain 90% of the property to do interstate business, the taxes alone would wipe out the gross interstate revenue, to say nothing of the maintenance to be paid for on the 90% of the plant retained, the depreciation on the property and other expenses that goes with the operation of the property. As I see it, to do solely interstate business and retain 90% of the property, we would go broke." (R. 49).

In answer to the question as to whether the appellant could "efficiently and economically conduct an interstate business over one system and an intrastate business over another system," he said:

"Your Honor, I have been in this business twenty-eight years and as chief engineer of this company in this area of the states of Washington, Idaho and Oregon, I designed and prepared estimates for more than $40,000,000 gross plant additions in those three states and know you could not economically or practically separate the property to carry on interstate and intrastate business. I do not know of any place in the world where a purely interstate telephone plant is built

and purely interstate business is conducted." (R. 49).

Now, Mr. Mastick was the only witness called by either side on this branch of the case. His testimony was wholly unchallenged, and cannot be challenged.

Moreover, as a matter of law, the appellant cannot withdraw from its intrastate business without also abandoning its interstate business. Long prior to the passage of the law here under attack, the court of last resort of the State of Washington had held that a common carrier engaged in both intrastate and interstate business could not renounce local business while continuing its interstate business. *State v. Northern Express Co.*, 76 Wash. 636; *Great Northern Ry. Co. v. State*, 147 Wash. 630. Telephone companies are, along with railroad companies, by Article XII, Section 19, of the Washington State Constitution, and by the Public Service Commission Act, Chapter 117, Laws of 1911, as amended, declared to be common carriers. The court below still adheres to that ruling. It did not decide this case upon the theory that the appellant could, either as a matter of fact or as a matter of law, retire from its intrastate business. It said:

> "In this connection it will be assumed (a) that the respondent cannot, as a matter of *law*, retire from its intrastate business, (b) that it is impracticable, as a matter of *fact*, to so retire without also retiring from its interstate business, * * *." (R. 155)

The case presented here, then, is a case in which it appears, beyond all possible dispute, that the appel-

lant cannot withdraw from its intrastate business without discontinuing its interstate business.

SPECIFICATION OF ERRORS

1. It being an admitted fact that appellant is engaged in both intrastate and interstate commerce, and the Supreme Court of the State of Washington having held that the appellant "cannot, as a matter of law, retire from its intrastate business," while continuing its interstate business, that court erred in holding that Chapter 191 of the Laws of Washington of 1933, in so far as it seeks to impose a privilege tax upon an interstate carrier on account of local business, does not violate the commerce clause, *viz.*, Article I, Section 8, of the Constitution of the United States.

2. The Supreme Court of the State of Washington, having found that appellant's interstate and intrastate business in Washington is inextricably commingled, and that, as a matter of fact and as a practical matter, appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of Washington of 1933, does not violate the commerce clause, *viz.*, Article I, Section 8, of the Constitution of the United States.

SUMMARY OF ARGUMENT

Chapter 191, Laws of 1933 of the State of Washington, violates Article I, Section 8, of the Federal Constitution, for the reason that appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business.

It follows that the tax sought to be imposed by the act, while ostensibly levied for the privilege of doing an intrastate business only, is in effect a tax for the privilege of doing both kinds of business.

ARGUMENT

In the brief of the Northern Pacific Railway Company in *Northern Pacific Railway Co. v. State of Washington*, No. 529, is a historical review of many cases decided by this court dealing with the taxation by a state or its subordinate agencies of companies engaged in both intrastate and interstate business, and, in particular, of companies which, like the appellant, cannot abandon their local business while continuing their interstate business. That review being satisfactory, it would but unduly add to the labor of this court to traverse again the same ground.

The following cases are, therefore, only cited.

Pullman Co. v. Adams, 189 U. S. 420;

Crutcher v. Kentucky, 141 U. S. 47;

Allen v. Pullman Co., 191 U. S. 171;

Western Union Tel. Co. v. Kansas, 216 U. S. 1;

Barrett v. New York, 232 U. S. 14;

Bowman v. Continental Oil Co., 256 U. S. 642;

R. R. Commission v. C. B. & Q. R. Co., 257 U. S. 563;

Colorado v. United States, 271 U. S. 153.

Discussion will be confined to four cases, all of which were decided by this court in the last eight years.

In *Interstate Busses v. Holyoke Street Ry. Co.*, 273 U. S. 45, it was contended that a statute of Massachusetts was invalid as applied to a bus company which operated a line of busses from a point in Connecticut to a point or points in Massachusetts, but which also carried passengers whose journeys began and ended in Massachusetts. The statute provided for the obtaining of a license from appropriate public officers, and also contained a provision that no motor vehicles should be operated under said license unless the owner thereof should obtain from the Massachusetts Department of Public Utilities a certificate that public convenience and necessity required such operation. "Neither license nor certificate [was] required in respect to such carriage as [might] be exclusively interstate."

Answering the contention of appellant in that case, that the act contravened the commerce clause, this court said:

> "The burden is upon appellant to show that enforcement of the act operates to prejudice interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying in-

trastate passengers without license over that part of its route which is parallel to the street railway. Its right to use the highways between Springfield and Hartford is not in controversy. While it appears that in Massachusetts both classes of passengers are carried in the same vehicles, it is not shown what part of the total number are intrastate or interstate. The record contains no information as to the number of persons, if any, traveling in interstate commerce on appellant's busses over the part of the route competing with the street railway. It is *not* shown that the two classes of business are so commingled that the separation of one from the other is not *reasonably practicable* or that appellant's interstate passengers may not be carried *efficiently* and *economically* in busses used *exclusively* for that purpose, *or* that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the act by the mere linking of its intrastate transportation to its interstate or by the *unnecessary* transportation of both classes by means of the same instrumentalities and employes."

Now, in the case at bar it will not be even contended by the State that the appellant's intrastate business is "merely linked" to its interstate business, or that the transmission by the appellant of both classes of messages by means of the same instrumentalities and employes is *unnecessary*. On the contrary, "it is shown," by evidence undisputed and indisputable, (a) that "the two classes of business are so commingled

that the separation of one from the other is not reasonably practicable," (b) that appellant's "interstate [messages] may not be carried efficiently and economically [over lines and by instrumentalities] used exclusively for that purpose," and (c) that appellant's "interstate business is dependent" upon its local business to the extent that without such local business no interstate business could be done at all, for the reason that, local business being absent, the charges for interstate messages would be prohibitive of interstate business. True, in the case just referred to, the state statute was upheld by this court, but the clear inference from and the plain import of the language in the opinion is that if the evidence in that case had been like the evidence in this case, the statute would have been condemned.

If the statement just made correctly states the view of this court, then it would seem clear that the court below was in error in denying the relief sought by this appellant. Compliance with the provisions of the Massachusetts statute was made a condition to the right of a carrier to do an intrastate business. In effect, this court held that the *right to do business* could not be so conditioned in the case of one who was engaged in both intrastate and interstate business, if the two classes of business were so commingled that the separation of one from the other was not reasonably practicable. In the case at bar the Washington statute, like the Massachusetts statute, on its face purports to condition only the right to do an intrastate business, but in effect it conditions the right to do *both* classes of business, because "the

intrastate business cannot be separated from the interstate business."

In *Sprout v. South Bend*, 277 U. S. 163, it appears that Sprout was engaged in both interstate and intrastate commerce. The city of South Bend, Indiana, by ordinance forbade the operation of motor busses in the city streets unless licensed by the city. The issuance of a license was conditioned upon the payment of a fee based upon the seating capacity of the bus. This court held the ordinance void, saying:

> "A state may by appropriate legislation require payment of an occupation tax from one engaged in both intrastate and interstate commerce. * * * But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person *taxed could discontinue the intrastate business without withdrawing also from the interstate business.*"

In *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 470, this court again states the rule as follows:

> "While a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction, in order to be valid, must be imposed solely on account of the intrastate business, without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate

business would not be subject to the imposition, *and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business.*"

In *Cooney v. Mountain States Telephone Co.*, 55 Sup. Ct. Rep. 477, this court dealt with a Montana statute imposing a tax of $2.00 on each telephone instrument controlled and operated in the conduct of the business. At the trial of the case the evidence was that "the same telephones, the same signaling apparatus, the same wires, land, buildings, central office equipment, and operating organization are used in common for all services, interstate as well as intrastate" and that plaintiff in that case "could not discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business" (55 Sup. Ct. Rep. 481, 480). The three-judge court made findings in accordance with this evidence and, despite the challenge of these findings by the Montana state officials, this court approved these findings.

In view of this evidence the statutory court of three judges held the statute invalid. After referring to the principles laid down in the *Sprout* case (277 U.S. 163), and observing that the first three tests or requirements necessary to the validity of the tax under the *Sprout* case had been satisfied, the three-judge court pointed out that the fourth and last requirement was not satisfied. In so holding it said:

"Nevertheless it fails in respect to the fourth of them. For in this day and age it is clear

separate statewide systems for intrastate and interstate phones are not feasible, hardly possible, and to deny the proprietor of the latter the right to also operate the former would so heavily handicap and burden him, it would virtually destroy his business, burden and destroy interstate communication or commerce. Even as in the *Adams* and *Continental* cases, herein separation is impracticable, combination is necessary; and citing those cases to his conditions, by his fourth thereof, Mr. Justice Brandeis evidently means that withdrawal to escape the tax must be practicable and combination not necessary, or the tax is invalid." (7 Fed. Supp. 12, 13)

This court did not deem it necessary to decide that case on that precise ground, a somewhat narrower ground being deemed sufficient to dispose of the case. But surely such a disposition of that controversy without more is no indication whatsoever that this court intended to depart in the slightest from the doctrine enunciated in the *Sprout* and *East Ohio Gas Company* cases. Not only does the opinion in the *Cooney* case contain no hint of such departure, on the contrary it would seem that it negatives any such view, because it reiterates without variation the rule applicable, not to all companies engaged in intrastate and interstate business, but only to those companies so engaged which cannot "discontinue their intrastate business without also withdrawing from their interstate business."

The Supreme Court of the State of Washington, in its opinion in the *Northern Pacific* case discussed the three cases last cited. It made no mention even

of the *Holyoke* case, though that decision was pressed upon its attention. Despite the positive statement of this court that, though a state may require payment of an occupation tax from one engaged in both intrastate and interstate business, yet, in order that the fee or tax shall be valid, it must appear that the person taxed may discontinue the intrastate business without withdrawing also from the interstate business, the Washington Supreme Court held the statute valid as to this appellant, on the ground that the tax sought to be imposed was measured by gross intrastate revenue and was not a flat or graduated license fee or a tax measured by the number of instrumentalities employed in carrying on the business. But what warrant is there for such distinction in the decisions of this court? This court, in the *Sprout* case, said that an occupation tax sought to be levied upon one engaged in both intrastate and interstate business must, in order to be valid, satisfy four distinct requirements, and that *each* and *all* of these requirements must be satisfied. Satisfying some of them, you said, would not be sufficient; they must *all be satisfied.*

Now, one of these requirements is that the tax must be imposed solely on account of the intrastate business. The Washington act under attack does measure the tax by gross receipts from intrastate business only. The act, therefore, does satisfy the first requirement, also the second and third. But it *does not satisfy* the fourth requirement, namely, that the person taxed can discontinue intrastate business without withdrawing also from interstate business.

There is not even a hint in the *Sprout* case that if the tax imposed upon intrastate business solely is measured by gross intrastate receipts, then the fourth requirement is not essential to the validity of the act. If ability to withdraw from intrastate business without withdrawing also from interstate business is absolutely essential to the validity of an occupation tax sought to be levied upon one engaged in both classes of business, what possible difference can it make how the tax sought to be collected is measured or determined? Inability to withdraw from one class of business without also withdrawing from the other class of business depends either upon the law or upon the facts, or, as here, upon both the law and facts. The amount of the fee or tax and the method by which it is determined or measured has nothing to do with the question of inability.

Emphasis for these views, if any is needed, is found in the *East Ohio Gas Company* case. The Ohio act, like the Washington act, imposed a tax of a prescribed percentage on gross *intrastate* receipts from the sale of natural gas. It was imposed for the privilege of carrying on intrastate business. This court's reiteration of the rule announced in the *Sprout* case related, therefore, to a tax on gross intrastate receipts only. Now, if the view of the court below is correct, there was no need of reiterating in the *Ohio Gas Company* case the rule announced in the *Sprout* case; and this court is convicted of doing not only a useless thing but also of introducing confusion into the law. This must be true, because if, as the court below decided, the doctrine of inability to withdraw

has no application to a tax on gross intrastate receipts, but relates only to a flat or graduated license fee or a tax measured by the number of instrumentalities, then there was no need to mention that doctrine in the *Ohio* case at all. True, the Ohio tax statute was upheld, but solely upon the theory that "the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of *purely local concern* exclusively within the jurisdiction of the State." The *Ohio Gas Company* case, in view of this announcement, did no interstate business and derived no revenue from such business. All its business was intrastate business. And the tax sought to be collected was a tax on the *only* business in which the company was engaged.

The court below attached great significance to the following language in the opinion in the *Cooney* case:

> "But the tax is not laid on revenues. It is not laid on revenue derived from monthly rates as distinguished from toll charges. It is not imposed with respect either to the nature of the revenue, or to the character of the service from which the revenue is derived, or to the manner in which the charges for the service are fixed."

In view of this language, they deduced the curious conclusion that "if the tax were of the character described in the quotation just made from the opinion, the result might be different."

But the statement just quoted from the *Cooney* opinion constituted a reply to an argument presented by the State of Montana. It had insisted that the Montana legislature intended to levy a license tax only upon the domestic or intrastate business of the Mountain States Telephone Company and that such intention was shown by the fact that the statute imposed the tax only upon certain telephone instruments, and that the ones to be taxed were determined by certain specific flat monthly rates charged. In substance, the state argued that as a flat charge was made for local service, while toll charges varied as to the length of time and haul, and that as the tax was laid only upon residence telephones where the rate was $2.00 a month and business telephones where the rate was $3.00 a month, that fact showed that it was not the intention of the Montana legislature to tax the interstate business of the Mountain States Company. It was in reply, as we have said, to that argument that this court made the statement it did. "The question is," as this court said, "not as to the instruments that are not taxed, but as to those which are taxed." The instruments taxed were used for both intra and interstate purposes, and that fact having been shown by the evidence, this court held the Montana statute invalid.

In the court below the appellees sought to make some point out of another statement made in the decision in the *Cooney* case. That statement is that

> "There are 'sufficient modes' in which the local business may be taxed without the impo-

sition of a tax 'which covers the entire operations'."

In view of the fact that the appellant in 1933 paid the State of Washington and its various subordinate agencies over 15½% of its total gross intrastate and interstate revenues, it would seem that "sufficient modes" of taxing the appellant had been employed. Among the modes employed is the imposition of an annual license fee 'for the *privilege* of doing an *intrastate* business" (Chapter 227, Laws of 1927, Section 5), and the imposition of another license or regulatory fee of one-tenth of one per cent of its gross operating revenues, as provided by Chapter 107, Laws of 1929.

One further statement of the Washington Supreme Court may be briefly considered. For some inscrutable reason, that court mentioned the fact that the *people* of the state, employing the power of the *initiative*, enacted what is commonly called the 40-mill tax limit act, saying:

> "It is a matter of common knowledge that, under the 40-mill tax limit law, property is now paying about half of what it paid for general taxes prior to the passage of that law; in other words, that, by reason of the law limiting the amount to forty mills, the tax burden upon both real and personal property of the state has been reduced approximately one-half. Having thus provided for a reduction of taxes upon real and personal property, it was necessary for the legislature to find other sources of revenue, and

chapter 191 was undoubtedly passed for this reason."

It may be freely conceded that the 40-mill act did reduce the tax burden of the general property owner. That act, however, has not reduced the tax burden of this appellant, but, on the contrary, has actually increased it, because the various taxing bodies in the state have imposed upon the appellant new modes of taxation, exclusive of the exaction here under attack. But wholly irrespective of that fact, it surely is not a commendable argument for the state to make that, simply because "it needs the money," an act which is in violation of the Federal Constitution thereby becomes a valid law. On that theory many criminals would go unwhipped of justice and this appellant need not comply with the act in question, because it also needs money, its earnings on the cost of its property in the State of Washington in the year 1933 having been only 1.55 per cent (Exhibit 12; R. 106).

The opinion of the court below, therefore, is based upon insubstantial distinctions and makeweights.

Its fundamental error is that, despite many decisions of this court to the contrary, it considered only form, not substance, name, not reality. The appellant has not the option of abandoning its local business while continuing to do an interstate business.

> "For in this day and age it is clear separate statewide systems for intrastate and interstate phones are not feasible, hardly possible, and to deny the proprietor of the latter the right to also operate the former would so heavily handicap and burden him, it would virtually destroy

his business, burden and destroy interstate communication or commerce." (7 Fed. Supp. 12)

The substance and reality, then, is that to condition the appellant's right to do an intrastate business is also to condition its right to do an interstate business, and that last right is just as much conditioned if the condition be a tax measured by gross intrastate revenues as if the condition was a tax measured by the number of wagons or cars or telephone instruments.

And surely a tax amounting to $112,251 for a *five* months period (Exhibit 22, R. 131-140) is a greater burden on interstate commerce, a harsher condition to the right to do such a business, than the mere obtaining of a license, without the payment of any fee, as in the *Holyoke* case (273 U. S. 45), or the payment of a flat fee of $10.00 annually, as in *Crutcher v. Kentucky*, 141 U. S. 47, or the compulsion to file a financial statement, list of stockholders, etc., as in *International Textbook Co. v. Pigg*, 217 U. S. 91, or the requirement that telegraph messages be sent in the order received and delivered by messengers within one mile of the office. *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347.

The language of Judge Steinert, one of the dissenting judges below, is apposite. He said:

> "The majority seek to make a distinction between a tax imposed as a license to do business or one upon the instrumentalities used, and a tax on gross income. They concede that a license tax to do business or a tax upon the instrumental-

ity inheres in the interstate as well as in the intrastate business, but they hold that, 'where the tax is upon the gross income, the income from the interstate business may be segregated from the intrastate and be held valid.' The distinction is *without substance* when the result in a given instance is to burden or interfere with interstate commerce. The Federal government having created a field within its exclusive regulatory jurisdiction, the state may not invade it, nor by any act, direct or indirect, interfere with it."

Apposite also is the pronouncement of Mr. Justice Harlan, speaking for this court, in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 26.

"The authorities cited show that this court has guarded with both diligence and firmness the freedom of interstate commerce against hostile state or local action, as such action has been manifested by regulations operating, in some instances, directly, in others indirectly, upon the means or instruments employed in that commerce. This has been done without violating the principle that an interstate carrier, entering a State for purposes of its business, is subject to local regulations that in their essence and purpose only incidentally affect interstate commerce, but are established in good faith for the protection, safety, comfort and convenience of the people, are not in themselves in any real, just sense an obstruction to or in conflict with the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the

State, and to be respected until Congress covers the subject by legislation. *Cooley v. Port Wardens*, 12 How. 299, 320; *Sherlock v. Alling*, 93 U. S. 99, 104; *Morgan's Louisiana & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 463; *Smith v. Alabama*, 124 U. S. 465; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 100; *N. Y. & N. H. & H. R. R. Co. v. New York*, 165 U. S. 628, 631, 632; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 626; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 297. We are aware of no decision by this court holding that a State may, by any device or in any way, whether by a license tax, in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another State, although the State may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 'dependent *in fact* on the value of its property *situated within the State.*' *Postal Telegraph Co. v. Adams*, 155 U. S. 688, 696; *Leloup v. Mobile*, 127 U. S. 640, 649. On the contrary, it is to be deduced from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of its interstate business, and without lia-

bility to taxation there, *on account of such business.*

"But it is said that none of the authorities cited are pertinent to the present case, because the State expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the Telegraph Company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown but its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

The Washington State Supreme Court found the facts in favor of this appellant. It found the law to be as declared by this court. But it refused to apply the law to the facts.

Appellant respectfully submits that the decree of the Supreme Court of the State of Washington is erroneous, and prays that it be reversed.

Respectfully submitted,

MAURICE MCMICKEN,
H. J. RAMSEY,
OTTO B. RUPP,
ALFRED J. SCHWEPPE,
Attorneys for Appellant.

ALFRED SUTRO,
Of Counsel.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, *Appellant*, vs. STATE OF WASHINGTON, *Appellee*.	No. 529
GREAT NORTHERN RAILWAY COMPANY, a Corporation, *Appellant*, vs. STATE OF WASHINGTON, *Appellee*,	No. 573
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, *Appellant*, vs. THE TAX COMMISSION OF THE STATE OF WASHINGTON and T. S. HEDGES and T. M. JENNER, as Members of the Tax Commission of the State of Washington, *Appellees*.	No. 544

APPEALS FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,

Attorneys for Appellees.

STATE PRINTING PLANT

SUBJECT INDEX

Page

Abbreviations 2

Statement 2–5

1933 Occupational Tax Act 5–6

State and U. S. District Court decisions sustaining 6–7

Decisions sustaining similar excises as to interstate public service companies—

Washington decisions 7

United States Supreme Court decisions 7–19

Decisions relating to domestic corporations, pertinent to foreign corporations 19

Interstate commerce not unlawfully burdened, where Appellants' total tax, property and excise, not greater than might be lawfully imposed on an ad valorem basis 19–21

Determination of method of distributing tax burden, left to States 21–22

State revenue laws must be examined collectively to discover whether Appellants' interstate business is unlawfully burdened by offending tax 22–28

State's New Tax Plan 28–30

Evidence shows that Appellant Railroads' aggregate tax burden substantially reduced by State's New Tax Plan 30–33

Appellant Railroads' criticisms answered 33–35

Effect of New Tax Plan on Appellant Telephone Company 35–37

P. T. has not sought rate increase to meet tax, though tax may be passed on to patrons 35–37

Appellants' objections to Occupational Tax Act enumerated 37–38

Trial Court's Findings in Railroad actions not adopted by State supreme courts 38–41

Proper disposition of appeals, if State court's assumptions invalidate tax 41–42

Trial Court's Findings in Railroad actions not adopted by State supreme court 38–41

If findings found material, Court should either review evidence, or remand causes for review of evidence by State supreme court 42–43

Evidence fails to show that either appellant railroad conducted intrastate business at loss in 1933 ... 44–45, 93–178

Page

Answer to contention that Appellant Railroads did intrastate business at loss in 1933 46–51

Answer to Appellants' contention that tax violative of commerce clause if appellants restrained by law from renouncing intrastate while continuing interstate operations 51–56

State supreme court has not so construed State statutes and constitution 56–63

Tax Act itself permits such withdrawal 57–59

Since Federal regulations control, no longer in State's power to deny Appellant Railroads right to discontinue intrastate operations 63–64

But Federal regulation does not prevent State taxation 64–68

State likewise without power to prevent Appellant Telephone Company from renouncing its intrastate operations 68–69

State cannot lawfully condition Public Service Company's right to do interstate business, on its continuing to do local business 69–74

Appellants may withdraw from local business if not making a fair return thereon 74–78

Public utility company subject to privilege tax though franchise requires continuation of service 78–81

Answer to contention that tax invalid as to Appellants because their intra and interstate instrumentalities and operations inseparable 81–87

Answer to contention that Appellants would be required to retain present equipment for interstate operations alone 81, 181–7

If contention sound, no state tax or regulatory measure sustainable 82

Similar taxes uniformly sustained where instrumentalities and operations no less commingled 83–87

Cases relied on by Appellants distinguished 87–92

Evidence failed to show that Appellant Railroads' 1933 intrastate business conducted at a loss—

Character of proof offered 93–97

Operating ratio (freight)—comparison of interstate and intrastate 146–7

1934 revenues and expenses—comparison with 1932 and 1933 148–151

No attempt to increase rates to cover occupational tax ... 47–51

Mileage prorate not adequate apportionment to Washington of interstate freight revenue 111–118

Page

N. P. CASE—Inadmissibility of evidence received 98–111, 131–3, 143–5

Court's error in finding that N. P.'s method of apportioning expenses to intrastate traffic correct. 102–5

Mail and express revenue should all be credted to interstate 105–7

Passenger service expense, how properly apportionable to intrastate 108–111

Taxes, proper amount of, and how properly apportionable to intrastate operations 119–124

"Pensions" not properly chargeable as operating expense 125–7

Court's error in finding intrastate freight revenue other than as reported to D. P. W. 127–131

"Traffic expense"—how properly apportionable to intrastate operations 133–4

Propriety of using 3-year average of maintenance of way and car repairs expense 135–6

Joint facility rent income—if used, how apportionable to intrastate 136–7

N. P.'s duplication of operating expenses 138–140

N. P.'s intrastate income for 1933, if properly computed 140–1

N. P.'s evidence showed substantial profit on 1933 local freight business, but loss on local passenger business 141–3

Inadmissibility of evidence that special study understated N. P.'s intrastate expense 143–5

G. N. CASE—Error of court in finding that accuracy of reports as to intrastate revenue not heretofore matter of importance 152–4

Inadmissibility of evidence, and court's error in finding that intrastate revenue was other than as reported to D. P. W. 154–162

Joint facility rents paid—not properly chargeable as operating expense 165–171

G. N.'s duplication of operating expenses 171–2

Taxes—amount of, apportionable to intrastate 172

Joint facility rents paid—how apportionable to intrastate, if proper expense item 173–4

G. N.'s intrastate income, if properly computed 174–6

G. N.'s evidence showed substantial profit on 1933 local freight business, but loss on local passenger business 176–8

TABLE OF CASES

Page

Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211 68
Alabama v. U. S., 283 U. S. 776 63
Allen v. Pullman Co., 191 U. S. 171 ..... 9, 66, 85
American Expr. Co. v. Michigan, 177 U. S. 404 ..... 36, 50
Atlantic Coast Line v. Daughton, 262 U. S. 413 ..... 24, 167–170
Baker v. Druesedow, 263 U. S. 137 ..... 22, 32
Barrett v. New York, 232 U. S. 14 ..... 84, 90
Behre v. Anchor Ins. Co., 297 Fed. 986 130
Binderup v. Pathe Exchange, 263 U. S. 291 68
Boston & Maine R. Co. v. Armburg, 285 U. S. 234 83
Bowman v. Continental Oil Co., 256 U. S. 642 ..... 53, 86, 90
Buck Stove and Range Co. v. Vickers, 226 U. S. 205 69
Buck v. Kuykendall, 267 U. S. 307 70
Cascade Tel. Co. v. State Tax Commission, 176 Wash. 616 ... 6
Case Threshing Machine Co. v. Wiley, 89 Wash. 301 160
Cascade Telephone Co. v. State Tax Commission, 176 Wash. 616 36
Central Pacific R. R. v. California, 162 U. S. 91 67
Chassanoil v. Greenwood, 166 Miss. 848, 148 So. 781 66
Chicago, M., St. P. & P. R. Co. v. Hedges, 5 Fed. Supp. 752 ..... 6–7, 19, 31, 50, 73
Clark v. Williard, 292 U. S. 113 41
Cleveland v. Cleveland City Ry. Co., 194 U. S. 517 79
Colorado v. U. S., 271 U. S. 153 ..... 63, 74
Columbus Ry. & Power Co. v. Columbus, 249 U. S. 399 78
Cooney v. Mountain States Tel. & Tel. Co., — U. S. —, 79 L. ed. 498, 55 Sup. Crt. 477 ..... 12, 52, 54, 91
Crutcher v. Kentucky, 141 U. S. 47 ..... 54, 70, 72
Cudahy Packing Co. v. Minnesota, 246 U. S. 450 24
Culliton v. Chase, 174 Wash. 393 ..... 29, 32
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 70
Day v. T. R. & R. Co., 80 Wash. 161 56
Deficit Status of U. S. & Canada R. R., 76 I. C. C. 455 117
Eastern Air Transport v. Tax Commission, 285 U. S. 147 27
East Ohio Gas Co. v. Tax Commission, 283 U. S. 465 54
Edelman v. Boeing Air Transport, 289 U. S. 249 27
Erie Railroad Co. v. Pennsylvania, 21 Wall. 492 79

Page

Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17 65
Flint v. Stone Tracy Co., 220 U. S. 107 67
Galveston, Harrisburg, etc. Ry. Co. v. Texas, 210 U. S. 217 16, 19, 51, 83
Georgia Public Service Com. v. U. S., 283 U. S. 765 63
Georgia Ry. v. R. R. Com., 262 U. S. 625 51
Gibbs v. Baltimore Gas Co., 130 U. S. 396 79
Grand Trunk Western Ry. Co. v. South Bend, 227 U. S. 544 78
Greene v. Louisville & L. R. Co., 244 U. S. 499 32
Gregg Dyeing Co. v. Query, 286 U. S. 472 23, 32
Great Northern Ry. Co. v. State, 147 Wash. 630 60–2
Heisen v. Kentucky, 279 U. S. 245 26, 27
Henderson Water Co. v. Corporation Com., 269 U. S. 278 79
Hoptowit v. Brown, 115 Wash. 661 160
Interstate Busses v. Holyoke Street Ry., 273 U. S. 45 87
I. C. C. v. Oregon-Wash. R. Co., 288 U. S. 14 77
International Textbook Co. v. Pigg, 217 U. S. 91 70
Investigation of Advances in Rates on Grain, 21 I. C. C. 22 116
Johnson v. Wells, Fargo & Co., 239 U. S. 234 25
Kansas etc. R. Co. v. Bodkin, 240 U. S. 227 18
Kehrer v. Stewart, 197 U. S. 60 66
Kennedy v. Canadian Pac. R. Co., 87 Wash. 134 160
Lake Shore & M. S. Ry. Co. v. Felton, 103 Fed. 227 130
Lawrence v. State Tax Commission, 286 U. S. 276 21
Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192 15, 53, 85
LeLoup v. Port of Mobile, 127 U. S. 640 7, 20, 53, 89
Louisville v. Cumberland Tel. Co., 224 U. S. 649 78
Louisville & N. R. R. Coal and Coke Rates, 26 I. C. C. 20 117
Memphis Gas Light Co. v. Shelby County, 109 U. S. 398 79
Michigan Commission v. Duke, 266 U. S. 570 70
Minnesota Rate Cases, 230 U. S. 352 25, 44, 121, 144
Munn v. Illinois, 94 U. S. 113 60
Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249 27
New Jersey Bell Tel. Co. v. State Board, 280 U. S. 338 12
Northern Ohio Traction & Light Co. v. Ohio, 245 U. S. 574 78
Northern Pacific Ry. Co. v. Gifford, 27 Ida. 667, 151 Pac. 909 58
Northern Pacific Ry. Co. v. Gifford, 25 Ida. 196, 136 Pac. 1131 58
Ohio River & W. R. Co. v. Dittey, 232 U. S. 576 17, 18, 19, 74, 85
Ohio Tax Cases, 232 U. S. 576 17, 18, 19, 74, 85
Old Colony Trust Co. v. Omaha, 230 U. S. 100 78

Page
Opelika v. Opelika Sewer Co., 265 U. S. 215 72
Osborne v. Florida, 164 U. S. 650 ..... 8, 9, 33, 65, 72, 84
Osborne v. Mobile, 16 Wall. 479 7
Owensboro v. Cumberland Telephone Co., 230 U. S. 58 78
Pacific Express Co. v. Seibert, 142 U. S. 339 ..... 7, 84
Pacific Tel. & Tel. Co. v. Seattle, 172 Wash. 649 (aff.: 291 U. S. 300) 7
Pacific Tel. & Tel. Co. v. State Tax Commission, 83 Wash. Dec. 67, 48 Pac. (2d) 938 41
People ex rel. Cornell Steamboat Co. v. Sohmer, 235 U. S. 549 .. 17, 86
Philippine Sugar etc. Co. v. Philippine Islands, 247 U. S. 385 43
Pine-Coffin v. Erie R. Co., 69 N. Y. S. 333 130
Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692 .. 11, 53, 85
Postal Tel.-Cable Co. v. Fremont, 255 U. S. 124 .... 9, 36, 50, 55, 85
Postal Tel.-Cable Co. v. Richmond, 249 U. S. 252 .. 10, 36, 50, 85, 90
Puget Sound P. & L. Co. v. Seattle, 172 Wash. 668 (aff.: 291 U. S. 619) 7
Puget Sound P. & L. Co. v. Seattle, 291 U. S. 619 79
Pullman Co. v. Adams, 78 Miss. 814, 30 So. 757 (aff.: 189 U. S. 420) 75, 71
Pullman Co. v. Adams, 189 U. S. 420 ..... 9, 52, 59, 60, 71, 85
Pullman Co. v. Richardson, 261 U. S. 330 ..... 23, 24
Railroad Commission v. C. B. & Q. R. Co., 257 U. S. 563 63
Railroad Commission v. Eastern Texas R. R., 264 U. S. 79 .. 45, 76, 77
Railroad Retirement Board v. Alton R. Co., — U. S. —, 55 Sup. Ct. 758 126
Railway Co. v. Philadelphia, 101 U. S. 528 79
Ratterman v. Western Union Telegraph Co., 127 U. S. 411 ..... 11, 16, 53, 85
Reading R. Co. v. Pennsylvania, 15 Wall. 232 14
Reading R. Co. v. Pennsylvania, 15 Wall. 284 ..... 15, 83
Russell v. Sebastina, 233 U. S. 195 79
St. Cloud Public Service Co. v. St. Cloud, 265 U. S. 352 79
St. Louis v. United Railways Co., 210 U. S. 266 79
St. Louis Southwestern Ry. Co. v. Arkansas ex rel. Norwood, 235 U. S. 350 ..... 16, 85
Seid Chee v. Sanitary Fish Co, 103 Wash. 345 160
Shaffer v. Carter, 252 U. S. 37 24
Southern Ry. Co. v. Greene, 216 U. S. 400 19
Southern Ry. Co. v. Watts, 260 U. S. 519 28
Spokane International R. Co. v. State, 162 Wash. 395 7

Page

Sprout v. South Bend, 277 U. S. 163 ..... 51, 54
Stafford v. Wallace, 258 U. S. 495 ..... 63, 68
State ex rel. Stiner v. Yelle, 174 Wash. 402 ..... 6, 35, 49
State of Maine v. Grand Trunk Ry. Co., 142 U. S. 217 ..... 15, 83
State v. G. N. Ry. Co., 83 Wash. Dec. 66, 48 Pac. (2d) 938 .. 40
State v. Northern Express Co., 80 Wash. 309 .... 7, 33, 59, 60, 73, 76
State v. N. P. Ry. Co., 83 Wash. Dec. 52, 48 Pac (2d) 931 ..... 6, 10, 39, 40, 46, 51, 63
Superior Oil Co. v. Mississippi, 280 U. S. 390 66
Supply Laundry Co. v. Jenner, 178 Wash. 72 6
Swift & Co. v. U. S., 196 U. S. 375 68
Tacoma v. State Tax Commission, 177 Wash. 604 ..... 6, 34, 36, 80
Telegraph Company v. Texas, 105 U. S. 460 ..... 11, 85
Terral v. Burke Const. Co., 257 U. S. 529 70
Texas v. U. S., 292 U. S. 522 64
Thomas v. Railroad Co., 101 U. S. 71 79
Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 24
Union Tank Line Co. v. Wright, 249 U. S. 275 24
U. S. Express Co. v. Minnesota, 223 U. S. 335 24
U. S. v. Louisiana, 290 U. S. 70 63
United States Glue Co. v. Oak Creek, 247 U. S. 321 24
Wells, Fargo & Co. v. Nevada, 248 U. S. 165 24
Western Union Telegraph Co. v. Alabama, 132 U. S. 472 .. 10, 53, 85
Western Union Tel. Co. v. Kansas, 216 U. S. 1 ..... 20, 53, 90
Western Union Tel. Co. v. Texas, 105 U. S. 460 65
Williams v. Mayor, 289 U. S. 36 77
Williams v. Talladega, 26 U. S. 404 ..... 12, 50, 54
Wiloil Corporation v. Pennsylvania, — U. S. —, 79 L. Ed. 382 27

TABLE OF CONSTITUTIONAL PROVISIONS AND STATUTES CITED

	Page
Constitution of Idaho:	
Art. 11, Sec. 5	57
Constitution of Mississippi:	
Art. 7, Sec. 195	71
Constitution of Washington:	
Art. IV, Sec. 2	40
Art. VII	34
Art. XII, Sec. 13	56, 57, 81
Secs. 14 and 15	56
Sec. 19	56, 57, 81
Mississippi Statutes:	
Code 1892, Sec. 3378	71
Washington Statutes:	
Laws 1911, ch. 117	56
Laws 1933, ch. 4, p. 47	20
Ch. 5, Sec. 1	29
Ch. 191, Sec. 2(2)(e) XI	48
Sec. 3	57, 75
Sec. 16	76
Sec. 17	57
Laws 1935, ch. 180	35
United States Statutes:	
Transportation Act of 1920	63
USCA, Title 47, ch. 5, Sec. 221(b)	69

TEXT BOOKS CITED

	Page
12 Corpus Juris, 13, 50	83
22 Corpus Juris, 1017	160
32 Corpus Juris, 354, 357	130
51 Corpus Juris, 25	51

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, *Appellant*, vs. STATE OF WASHINGTON, *Appellee*.	No. 529
GREAT NORTHERN RAILWAY COMPANY, a Corporation, *Appellant*, vs. STATE OF WASHINGTON, *Appellee*,	No. 573
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, *Appellant*, vs. THE TAX COMMISSION OF THE STATE OF WASHINGTON and T. S. HEDGES and T. M. JENNER, as Members of the Tax Commission of the State of Washington, *Appellees*.	No. 544

APPEALS FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,

Attorneys for Appellees.

STATEMENT

These appeals having been assigned for argument on the same day, and substantially all of the legal questions involved being common to all, the appellees, to avoid needless repetition, have interposed but one brief in the three appeals.

Abbreviations:

For convenience and brevity, the appellant, Northern Pacific Railway Company, will be herein referred to as the "N. P.;" the appellant, Great Northern Railway Company, as the "G. N.;" the appellant, Pacific Telephone & Telegraph Company, as the "P. T.;" the tax commission of the state of Washington, as the "tax commission;" the state of Washington, as the "State;" the Interstate Commerce Commission, as the "I. C. C.;" and the Department of Public Works of the State of Washington, as the "D. P. W."

Unless otherwise qualified, the word "intrastate" means the traffic or business of the particular appellant, both beginning and ending in the state of Washington.

The N. P. and G. N. Cases:

These are appeals from judgments of the State supreme court reversing judgments for defendant in separate actions brought by the State in the superior court for Thurston county, Washington, against these companies to recover the occupational tax measured by 1½% of the intrastate gross income imposed on steam railroads by Chapter 191, Laws of Washington of 1933, for the last five months of 1933. The N. P. is a Wisconsin corpora-

tion, and the G. N., a Minnesota corporation, each owning and operating lines of steam railway in Washington and other states.

The complaint in each case alleges non-payment of the tax, and prays judgment for the amount. (NP Rec. 1-6; GN Rec. 1-6.)

The answers while admitting the amount of the disputed tax to be substantially as alleged by the State, and that the same is unpaid, deny liability therefor on the grounds:

(1) That under the State laws and constitution the defendant is not allowed to withdraw from its local business while continuing to carry on its interstate business;

(2) That it conducted its intrastate business at a loss in 1932 and 1933; and

(3) That its intra and interstate traffic is hauled over the same rails, in the same trains, and by the same employes, and is inseparably commingled and mutually dependent, and that abandonment of its local business, even if possible, would result in the loss of its local revenues with no considerable reduction in its expenses, and would require an increase in interstate tariffs higher than the traffic would bear. (NP Rec. 7-13; GN Rec. 7-20.)

The State replied, denying the material allegations of the railroads' answers, and alleging affirmatively (1) that defendant had never applied to the D. P. W. for permission to increase its tariffs by reason of the occupational tax; and (2) that as a result of the adoption in 1932 and 1933 by the people and state legislature of the

New Tax Plan including the 40-mill limit act and occupational tax act, the tax burden of defendants and other railroads had been greatly reduced as compared with the *ad valorem* taxes which would have been collectible from said companies under the old tax plan. (NP Rec. 17-32; GN Rec. 29-44.)

The cases were tried by the court without a jury resulting in each case in a judgment for defendant (NP Rec. 54; GN Rec. 77-8), from which judgments, appeals were taken to the State supreme court (NP Rec. 252; GN Rec. 253), where, in each case, the judgment was reversed with directions to the lower court to enter judgment for the State for the amount of the tax. (NP Rec. 67; GN Rec. 97.) Each company has appealed to this court.

The P. T. Case:

This is an appeal from the judgment of the state supreme court reversing a decree in an injunction suit instituted by the P. T., a California corporation, in the superior court for Thurston county, Washington, permanently enjoining the defendant, tax commissioners, from enforcing as against the P. T. the provisions of said chapter 191, Laws of 1933, in so far as it imposes an occupational tax on the P. T., an interstate telephone and telegraph company, equal to 3% of its intrastate gross receipts. (Ab. 4, 13.)

In its amended complaint, the P. T. assails the tax on substantially the same grounds urged by the railroad companies, save that it does not allege that it is losing money on its intrastate business, but alleges, on the contrary, that it is earning a return of at least 1.75%

on the fair value of its operating property. (PT Rec. 4.)

The defendant, tax commissioners, answered putting in issue the material allegations of the amended complaint, and setting up as an affirmative defense that the P. T. had never applied either to the D. P. W. or to any other state department for permission either to renounce its intrastate business, or to increase its tariffs because of the offending occupational tax. (PT Rec. 13.) These defenses stand admitted since no reply was interposed thereto. (Rem. Comp. Stat., Sec. 297.)

The trial resulted in a decree permanently enjoining the defendant tax commissioners from enforcing the provisions of said Occupational Tax Act of 1933 as against the P. T. (PT Rec. 15-17.) From such decree, such commissioners appealed to the state supreme court, which reversed the decree of the lower court with instructions to dismiss the suit. The P. T. has appealed to this Court.

THE 1933 STATE OCCUPATIONAL TAX ACT:

By the law here assailed, an occupational tax is imposed for the two-year period ending July 31, 1935, upon those engaged in various business activities in the state, measured by the gross proceeds derived from mining, manufacturing, wholesaling or jobbing, retail distributing, and performing of services. The rates imposed vary with the different activities. Thus, on the gross income of stock brokers, the rate is 2%; on steam railways and highway transportation companies, 1½%; and on light and power companies, water companies and telephone and telegraph companies, 3%. (Laws 1933, Ch. 191, Sec. 2, pp. 870-5.)

The tax is imposed on municipal corporations operating utilities and conducting businesses, the same as upon private enterprises (Sec. 2-e), and has been sustained as such. See *Tacoma v. State Tax Commission*, 177 Wash. 604.

Other states imposing similar excises are shown in the footnote.*

It is conceded, as above noted, that as to interstate public service companies the tax commission construes the Act as not applying to the gross income from interstate business, but to the gross income from intrastate business only.

The tax has been repeatedly sustained by the State supreme court as against attacks made on its constitutionality by various classes of taxpayers. See *State ex rel. Stiner v. Yelle*, 174 Wash. 402; *Cascade Tel. Co. v. State Tax Commission*, 176 Wash. 616; *Tacoma v. State Tax Commission*, 177 Wash. 604; *Supply Laundry Co. v. Jenner*, 178 Wash. 72; *State v. N. P. Ry. Co.*, 83 Wash. Dec., 52, 48 Pac. (2d) 931, NP Rec. 54.

Indeed, the tax was sustained by a three-judge federal district court, in an attack on its constitutionality by five interstate railroads including the two railroad appellants here, made upon the same grounds as urged on these appeals. See *Chicago, M., St. P. & P.*

---

*Arizona: ch. 77, Laws 1935; Indiana: ch. 50, Acts, 1933; Kentucky: ch. 25, Laws 1934; Mississippi: ch. 119, Laws 1934; New Mexico: ch. 73, Laws 1935; New York City: Local Law No. 21, 1934, amended by Local Law No. 2, 1935; North Dakota: ch. 276, Laws 1935; Oklahoma: Laws 1935, p. 131, ch. 33, art. 6; Ohio: Laws 1933-4, Pt. 2, p. 321; West Virginia: ch. 33, p. 219, Ex. Sess. 1933.

R. Co. v. Hedges, 5 Fed. Supp. 752, to which we will later refer.

The State supreme court has heretofore sustained excise taxes similar to the 1933 Occupational Tax Act as applied to interstate public service companies. *State v. Northern Express Co.,* 80 Wash. 309; *Pacific Tel. & Tel. Co. v. Seattle,* 172 Wash. 649 (affirmed: 291 U. S. 300); *Puget Sound P. & L. Co. v. Seattle,* 172 Wash. 668 (affirmed: 291 U. S. 619). And see: *Spokane International R. Co. v. State,* 162 Wash. 395.

UNITED STATES SUPREME COURT DECISIONS SUSTAINING EXCISE TAXES EXACTED OF INTERSTATE PUBLIC SERVICE COMPANIES.

Express Companies:

In *Osborne v. Mobile,* 16 Wall. 479, the court upheld a city ordinance fixing the annual license fees for express companies doing business within its limits as follows: if doing an interstate business, $500; if doing intrastate business only, $100; and if doing intra-city business only, $50. The attack was made by a corporation doing an interstate business.

This case, however, was later disapproved in *Leloup v. Port of Mobile,* 127 U. S. 640, 645, as not in harmony with the court's later decisions.

In *Pacific Express Co. v. Seibert,* 142 U. S. 339, a state statute imposing a privilege tax of 2% of the company's intrastate gross receipts in addition to the *ad valorem* tax paid on the company's tangible property, and providing for a penalty of $100 a day for delinquency in making its report and paying the tax, and prohibiting the company from carrying on intrastate business while such tax was delinquent, was upheld as not violative of the commerce clause.

Osborne v. Florida, 164 U. S. 650, involved the validity of an occupation or license tax imposed by cities upon those pursuing divers occupations and professions, in so far as it affected express companies who were required to pay a tax of from $10 to $200 a year depending on the size of the city. As to express companies the state court had construed the act as applying only to intrastate and not to interstate business. As so construed, the supreme court held the act not violative of the federal constitution. In so holding, the court said:

"It has never been held, however, that when the business of the company which is wholly within the State, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute. * * * The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the state whatever unless upon the payment of the fee or tax. It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State." (P. 655.)

Sleeping Car Companies:

By the Mississippi Code of 1892, a tax was imposed "on each sleeping and palace car company carrying

passengers from one point to another within the state, one hundred dollars, and twenty-five cents per mile for each mile of railroad track (in the state) over which the company runs its cars." The state constitution declared sleeping car companies to be common carriers. In *Pullman Co. v. Adams,* 189 U. S. 420, the supreme court, following its former decision of *Osborne v. Florida, supra,* held the tax valid.

Again, in *Allen v. Pullman Co.,* 191 U. S. 171, it was held that a tax law of Tennessee requiring sleeping car companies to pay a tax of $3,000 per annum in lieu of all other except *ad valorem* taxes for one or more passengers taken up at one point within the state and delivered at another and transported wholly within the state and which did not refer to or affect the interstate business of the companies, would not be regarded as disguised attempt to tax the privilege of engaging in interstate commerce, where under the laws of the taxing state, it was not compulsory for a corporation engaged in interstate commerce to carry on that part of its business which was wholly within the state, and was therefore not repugnant to the commerce clause of the federal constitution. In so holding the court followed its former rulings in *Osborne v. Florida, supra,* and *Pullman Co. v. Adams, supra.*

Telegraph Companies:

In *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124, it was held that a license tax of $60 a year imposed by a city on a telegraph company for the privilege of doing intrastate business, could not be declared an unconstitutional burden on its interstate business merely because the local business was unprofitable, where the tax ordi-

nance was in force when the company entered the place and the tax was paid without objection for a series of years, the circumstances thus repelling any intent to invade interstate commerce in levying it, and where the state law afforded means to prevent the tax from burdening the interstate business through an application to increase intrastate rates, of which the company had not sought to avail itself.

And in *Postal Tel.-Cable Co. v. Richmond,* 249 U. S. 252, a license tax imposed on intrastate business was upheld as against the objection that it imposed a burden on the company's interstate business because the net receipts from its intrastate business were insufficient to pay the tax, and the payment would therefore have to be made from interstate receipts.

In *Western Union Tel. Co. v. Alabama,* 132 U. S. 472, it appeared that a statute of Alabama imposed a tax "on the gross amount of the receipts by any and every telegraph company derived from the business done by it in this state." The company reported to the board of assessors only its gross receipts received from business wholly transacted within the state. The board required a further return by the company of gross receipts from messages carried partly within and partly without the state. The company made such further return, and the tax was imposed on the gross receipts as shown by the two returns. In holding that the tax imposed on the messages comprised in the second return was unconstitutional, the court said:

"The principle is, in regard to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866 (Rev. Stat. Sec. 5263 to Sec. 5268), that they shall not be taxed by the authorities of a state

for any messages, or receipts arising from messages, from points within the state to points without, or from points without the state to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this principle is that messages of the former class are elements of commerce between the states and not subject to legislative control of the states, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the state, and, therefore, subject to its taxing power." (p. 473.)

In *Telegraph Company v. Texas,* 105 U. S. 460, it was held that state laws, so far as they impose upon telegraph companies a specific tax on each message transmitted beyond the state, are unconstitutional; but it was said that "any tax which the state may put on messages by private parties, and not by agents of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States."

In *Postal Tel.-Cable Co. v. Charleston,* 153 U. S. 692, it was held that a city ordinance imposing a license tax of $500 upon a telegraph company upon business done exclusively within the city was a valid exercise of the police power and was not an interference with interstate commerce.

In *Ratterman v. Western Union Tel. Co.,* 127 U. S. 411, the court, after an exhaustive review of its earlier decisions, held that a single tax of 5% of the gross receipts assessed under an Ohio law upon receipts of a telegraph company derived partly from interstate, and partly from intrastate commerce, but which were capable of separation, was invalid in proportion to the extent such receipts were derived from interstate commerce, but was otherwise valid.

In *Williams v. Talladega*, 226 U. S. 404, it was held that a municipal license tax on an interstate telegraph company's right to do local business within the state could not be deemed an unconstitutional burden on interstate business because a test for eleven months showed that the company did its intrastate business at that point at a net loss of 86 cents. The tax measure, however, was adjudged invalid because of not excepting from its application messages transmitted for the federal government.

Telephone Companies:

New Jersey Bell Tel. Co. v. State Board, 280 U. S. 338, involved the validity of an occupational tax measured by the state's proportion of the company's entire gross receipts, both intra and interstate. *The company paid without protest the tax based on local receipts.* The court condemned the tax in so far as measured by interstate receipts, Justices Holmes and Brandeis, however, dissenting.

The supreme court's most recent expression on the right of a state to impose an occupational or business tax on public service companies doing both an intra and interstate business, is found in *Cooney v. Mountain States Tel. & Tel. Co.*, —— U. S. ——, 79 L. ed. 498, 55 Sup. Crt. 477, where the court refused to sustain an excise tax imposed on an interstate telephone company and measured by a certain imposition on each telephone instrument used in its business, varying from 20 cents to $2 per year, depending on the number of phones and the rates charged. The offending state law provided that every corporation "engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana * * * shall pay

* * * a license tax * * * for each telephone instrument used, controlled and operated by it in the conduct of such business.'' The court held that by this language the tax was clearly intended to be imposed on telephone instruments used not only in intrastate but in interstate business and was therefore void.

In considering the following excerpt from the opinion (79 L. ed. 502), the Court will bear in mind that there the tax was on an instrumentality used by the company in carrying on both its intra and interstate activities, while here the tax is measured by intrastate gross income only:

''The business is the maintaining of telephone lines and the furnishing of telephone service in the state. No distinction is made between interstate and intrastate service. The tax is then stated to be 'for each telephone instrument used, controlled and operated.' Again, there is no limitation as to use, control or operation in intrastate business. The tax is 'based upon the number of telephone instruments owned, controlled and operated' during all or any part of the calendar year. A 'telephone instrument' is defined in section two of the act as 'a transmitter and receiver capable of use in the transmitting and receiving of telephone communications.' The tax is thus laid simply by reason of the fact that the company is furnishing telephone service and is based upon the number of telephone instruments used in that service without regard to its character whether intrastate or interstate. * * * All the telephone instruments, not excepted, whether they are used in intrastate or interstate commerce and however the service is paid for, are left subject to the tax. * * * But the tax is not laid on revenues. It is not laid on revenue derived from monthly rates as distinguished from toll charges. It is not imposed with respect either to the nature of the revenue, or to the character of the service from which the revenue is derived, or to the manner in which the charges for the service are fixed.

''The evidence supports the finding that these tele-

phone instruments are available for interstate and foreign communications. * * * It appears that in the operation of this unified system, the telephone instruments are the means by which the customers command at their pleasure the service they desire whether intrastate or interstate. And, so far as the instruments are not excepted, the tax is laid indiscriminately with respect to each of these facilities, regardless of the nature of their use.

"There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce." (Italics ours.)

In a footnote the court here cites a large number of authorities including all those heretofore reviewed, and then continues:

"But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup v. Mobile,* 127 U. S. 640, 32 L. ed. 311, 8 S. Ct. 1380, 2 Inters. Com. Rep. 134. *There are 'sufficient modes' in which the local business may be taxed without the imposition of a tax 'which covers the entire operations.'* Id., p. 647. See *Williams v. Talladega,* 226 U. S. 404, 419, 57 L. ed. 275, 281, 33 S. Ct. 116." (Italics ours.)

In using the last expression quoted, the court unquestionably had in mind the imposition of a tax measured by intrastate revenues—excises which, as heretofore shown, it had so often theretofore sustained.

Railroad Companies:

Reading R. Co. v. Pennsylvania, 15 Wall. 232, involved the validity of a Pennsylvania statute imposing a tax of two to five cents on every ton of freight transported by any railroad or canal in that state. The tax was held valid as to commerce wholly within the state, but void as to freight hauled in interstate commerce. As

to the tax imposed on intrastate freight, the court said (p. 282):

"But while holding this, we recognize fully the power of each state to tax at its discretion its own internal commerce, and the franchises, property, or business of its own corporations, so that interstate intercourse, trade, or commerce, be not embarrassed or restricted. That must remain free."

But in *Reading R. Co. v. Pennsylvania,* 15 Wall. 284, a state statute imposing an excise tax of three-fourths of 1% on both the intra and interstate gross receipts of domestic railroad corporations, was upheld as not violative of the commerce clause of the constitution, three justices dissenting.

And in *State of Maine v. Grand Trunk Ry. Co.,* 142 U. S. 217, the court sustained as to a foreign corporation, and as not violative of the commerce clause, a state statute requiring every railroad corporation operating in the state to pay "an annual excise tax for the privilege of exercising its franchise," the amount of the tax being determined according to a sliding scale proportioned to the average gross earnings per mile within the state for the preceding year. Four justices dissented.

In *Lehigh Valley R. Co. v. Pennsylvania,* 145 U. S. 192, it was held that a state gross receipts tax of 8/10ths of 1% against a domestic railroad corporation on account of transportation between points in the same state, but passing, during transportation, without the state, was not a tax upon interstate commerce, and did not infringe the provisions of the federal constitution. The court said:

"Taxation is undoubtedly one of the forms of regulation, but the power of each state to tax its own internal commerce, and the franchise, property or business of its

own corporations engaged in such commerce, has always been recognized, and the particular mode of taxation in this instance is conceded to be in itself not open to objection. And while interstate commerce cannot be regulated by a state by the laying of taxes thereon, in any form, yet when the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect that arising upon commerce solely within its own territory. *Ratterman v. West. Union Tel. Co.,* 127 U. S. 411, 424."

But in the later case of *Galveston, Harrisburg, etc. Ry. Co. v. Texas,* 210 U. S. 217, the court held, in a five-to-four decision that a Texas statute imposing a tax upon domestic railroad companies equal to 1% of their gross receipts was, as to those companies whose revenue included receipts from interstate business, a burden on interstate commerce and, as such, violative of the commerce clause of the federal constitution, thus, to the extent that interstate receipts were taxed, reversing by a bare majority, its earlier decisions in this regard.

Never, however, has this court in even a minority opinion questioned the right of the states to impose an excise tax on the intrastate gross receipts of either domestic or foreign public service corporations, doing both intra and interstate business, whatever the character of the service rendered.

In *St. Louis Southwestern Ry. Co. v. Arkansas ex rel. Norwood,* 235 U. S. 350, it was held that the annual franchise tax imposed by an Arkansas statute upon a railroad corporation "for the privilege of exercising its franchise in this state" of a specified percentage of the corporation's outstanding capital stock represented by

property owned and used in business transacted in the state was not repugnant to the commerce clause of the federal constitution, as applied to a foreign railway company doing both interstate and intrastate business, where, as construed by the state court, such tax was upon the right to exercise the privilege to transact intrastate business in corporate form, the amount of the tax being fixed solely by reference to the property of the corporation that was within the state and used in business transacted within the state, excluding any imposition upon, or interference with, interstate commerce.

In *People ex rel. Cornell Steamboat Co. v. Sohmer,* 235 U. S. 549, the court held a state excise tax or license fee equal to 5/10th of 1% upon intrastate gross earnings imposed on transportation and transmission corporations and associations for the privilege of doing business in the state in corporate form not to be an invalid regulation of commerce as applied to a navigation company engaged in the business of towing upon the Hudson river.

We come now to the outstanding case of *Ohio River & W. R. Co. v. Dittey,* 232 U. S. 576,—the *"Ohio Tax Cases."* By an act of 1911, the Ohio legislature prescribed various taxes, some upon property and others upon franchises and privileges with sundry provisions, penal and otherwise, for their collection. The tax there in question was limited in its operation to certain public utilities, including railroads. Each railroad doing business in the state was required to pay an excise tax of 4% of its entire gross earnings from business done

within the state except business done for the federal government.

In sustaining such tax as to railroads, the court held among other things:

That the tax was not void as confiscatory or violative of the due process clause because the complaining roads were not earning a fair return from their local business on the value of their operating property, devoted thereto, and one of which roads was operating at a loss;

That such roads were not arbitrarily discriminated against, contrary to the equal protections clause, because the tax was not exacted of all public utilities, or because the public utilities included, were not all taxed at the same rate; and

That the tax was not void for lack of uniformity because imposed in addition to an ad valorem tax, as being double taxation.

Counsel for the various appellants waive aside the *Ohio Tax Cases, supra,* with the statement that there "the tax was for the privilege of exercising the corporate franchise granted by the state to a domestic corporation," and liken it to *Kansas etc. R. Co. v. Bodkin*, 240 U. S. 227. (NP Brief, p. 33.)

True, in the *Bodkin* case the tax sustained was "on the primary corporate franchise granted by the State" (240 U. S. 232), but this was not true of the *Ohio Tax Cases.* In the latter case the imposition was stated in the statute to be "in the nature of an excise tax, for the privilege of carrying on its intrastate business," and *was imposed equally and alike on corporations, part-*

nerships, and individuals. (232 U. S. 580.) Indeed, appellants' counsel there conceded that the offending tax was not "upon corporate franchises or privileges, as such." (232 U. S. 581.) And in its opinion the court speaks of the tax as one "with respect to the privilege or *occupation.*" (232 U. S. 594.)

The fact that in the *Ohio Tax Cases, supra,* the objecting taxpayers were domestic corporations does not detract from the controlling force of the decision. *Galveston, etc. Ry. Co. v. Texas,* 210 U. S. 217, 228; *Southern Ry. Co. v. Greene,* 216 U. S. 400, 417-8; *Chicago, M., St. P. & P. R. Co. v. Hedges,* 5 Fed. Supp. 752, 760.

In the case last cited Judge Cushman, after reviewing the *Ohio Tax Cases,* said with respect to counsel's attempted distinction:

"There is no reason for contending that the interstate commerce carriage by a domestic corporation can be burdened as the result of a state law, and that carried by foreign corporations cannot. Northern Securities Co. v. United States, 193 U. S. 197."

INTERSTATE COMMERCE NOT UNLAWFULLY BURDENED, WHERE APPELLANTS' TOTAL TAX, PROPERTY AND EXCISE, NOT GREATER THAN MIGHT BE LAWFULLY IMPOSED ON AN AD VALOREM BASIS ALONE.

In this connection, we quote the following from the decision of the state supreme court (*State v. N. P. Ry. Co.,* 83 Wash. Dec. 52, 59-61, 48 Pac. (2d) 931, 935; NP Rec. 61-2):

"It must be remembered that chapter 191 of the Laws of 1933 applies to every person engaging or continuing in business within this state, with a comparatively few exceptions. The law may be said to be a general one and applies to all businesses within the state. In this respect, it is somewhat analgous to a property tax which all persons, with comparatively few exceptions provided for in the statute, are required to pay upon

the property owned by them. The state has the authority to tax property which is used in interstate commerce and which is regularly and permanently located within its limits, where the ascertainment of the amount assessed is dependent upon the value of the property within the state, as the property of other citizens is taxed. *Leloup v. Port of Mobile*, 127 U. S. 640, 8 S. Ct. 1380; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 S. Ct. 190.

"Even though the respondent in this case cannot retire from its intrastate business without also retiring from its interstate business, we think that the excise tax imposed upon the gross income from the intrastate business is not such a direct burden upon interstate commerce as to require that the tax be held void.

"Attention at this point should be called to chapter 4 of the Laws of 1933, p. 47, Rem. 1933 Sup. § 11238-1 [P. C. § 6882-77a], which was initiative measure 64, and generally referred to as the '40-mill tax limit for taxation' law. In that act, it was provided that the aggregate of all taxes upon real and personal property in the state should not exceed in any one year forty mills on the dollar of assessment valuation, which should be based upon fifty per cent of the true and fair value of the property in money, with some exceptions which are not here material. The respondent, by reason of this law, has been relieved from paying a very large sum of money as taxes upon the property which it owns in this state and which was subject to taxation, even though devoted to interstate commerce. It is a matter of common knowledge that, under the 40-mill tax limit law, property is now paying about half of what it paid for general taxes prior to the passage of that law; in other words, that, by reason of the law limiting the amount to forty mills, the tax burden upon both real and personal property of the state has been reduced approximately one-half. Having thus provided for a reduction of taxes upon real and personal property, it was necessary for the legislature to find other sources of revenue, and chapter 191 was undoubtedly passed for this reason.

"So far as we are informed, the Federal supreme court has at no time distinctly held that an excise tax, such as that of this state, which is imposed upon all businesses, is such a direct burden upon interstate com-

merce as to render the act of the legislature unconstitutional."

In amplification of what was said by the State supreme court in this connection, may we here set forth the appellees' position in the court below. It was contended: (1) that the State's revenue laws must be considered collectively to determine whether the tax complained of unlawfully burdens appellants' interstate business; (2) that were appellants' physical properties and franchises taxed as in 1932 and prior years to cover the entire cost of state government, such tax could not be deemed an unlawful burden on appellants' interstate business; and (3) that the undisputed evidence shows that under the present state revenue laws, each appellant railroad's entire tax burden is materially less than its *ad valorem* taxes alone would have been, were the State's necessary revenues raised by property taxation alone.

DETERMINATION OF METHOD OF DISTRIBUTING TAX BURDEN IS LEFT TO THE STATES.

This was thus recognized in *Lawrence v. State Tax Commission,* 286 U. S. 276, 279-280, where Your Honors said in sustaining, as not violative of the due process clause, a Mississippi law imposing a tax on the net income of its residents derived wholly from activities carried on by them outside of the state:

"The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its law, are inseparable from the responsibility for sharing the costs of government. See *Fidelity & Columbia Trust*

Co. v. Louisville, 245 U. S. 54, 58; *Maguire v. Trefry,* 253 U. S. 12, 14, 17; *Kirtland v. Hotchkiss,* 100 U. S. 491, 498; *Shaffer v. Carter,* 252 U. S. 37, 50. The Federal Constitution imposes on the states no particular modes of taxation, and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment. * * * *

"It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship."

STATE REVENUE LAWS MUST BE EXAMINED COLLECTIVELY TO DISCOVER WHETHER APPELLANTS' INTERSTATE BUSINESS IS UNLAWFULLY BURDENED BY TAXES IMPOSED.

In *Baker v. Druesedow,* 263 U. S. 137, 142, the court said:

"Where illegal discrimination was practiced, it is immaterial whether it was effected by a single assessing board or through the action of two independent boards. *Greene v. Louisville & Interurban R. R. Co.,* 244 U. S. 499, 513; *Southern Ry. Co. v. Watts,* 260 U. S. 519, 526."

The converse, we submit, must be true. If the operation of the state's revenue statutes as an entirety do not result in an invasion of any of appellants' constitu-

tional rights or burden their interstate commerce, appellants cannot be heard to complain.

The principle is thus clearly announced in *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 479-80:

"The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the state imposing a tax upon the sale and use of gasoline within the state. The state court said that the act in question 'taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred acts all users are taxed.' But appellants question the right to invoke other statutes to support the validity of the act assailed. To stand the test of constitutionality, they say, the act must be constitutional 'within its four corners,' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power. When the Supreme Court of the state has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves. *Hebert v. Louisiana*, 272 U. S. 312, 317. See *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 73."

True, a State can neither tax the act of engaging in interstate commerce nor lay a tax on the gross receipts therefrom. (*Pullman Co. v. Richardson*, 261 U. S. 330, 338.)

But on the other hand, it has been held by this Court many times that an apportionment of the cost of State government to an interstate utility company according to the relative value of the property of such company

permanently located or commonly used by it within the state in such interstate commerce is not violative of the commerce clause. (*Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 453; *Wells, Fargo & Co. v. Nevada*, 248 U. S. 165, 167; *Union Tank Line Co. v. Wright*, 249 U. S. 275, 282; *Pullman Co. v. Richardson*, 261 U. S. 330, 338.)

It has also been frequently held that an apportionment of the expense of state government to an interstate utility company according to its net income including that earned in its interstate activities does not violate the commerce clause. (*United States Glue Co. v. Oak Creek*, 247 U. S. 321; *Shaffer v. Carter*, 252 U. S. 37, 57; *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113; *Atlantic Coast Line v. Daughton*, 262 U. S. 413, 416.)

And the rule is likewise established by this court that a tax measured by an interstate utility company's gross income including a mileage proportion of that earned in interstate commerce imposed in lieu of property taxes, will be sustained as not violative of the commerce clause, if such exaction does not exceed that which could lawfully have been imposed on an *ad valorem* property tax basis. *U. S. Express Co. v. Minnesota*, 223 U. S. 335; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450; *Pullman Co. v. Richardson*, 261 U. S. 330.

In *U. S. Express Co. v. Minnesota*, 223 U. S. 335, 344-5, it was said:

"The right of the State to tax property, although it is used in interstate commerce, is thoroughly well settled. *Postal Telegraph Co. v. Adams*, 155 U. S. 688; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Ficklen v. Shelby County*, 145 U. S. 1, 22. * * *

" 'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon prop-

erty or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution.' *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 697."

These lieu taxes of Minnesota and other states, it must be remembered, were not sustained or sustainable on the theory that gross receipts is a proper criterion of property values. Such a holding would have been entirely out of harmony with *Johnson v. Wells Fargo & Co.*, 239 U. S. 234, holding invalid the valuation of the property of an interstate utility company by giving controlling effect to the gross income derived therefrom, and with the Minnesota Rate Cases, 230 U. S. 352, 458, condemning the apportionment of the value of the property of an interstate railroad used in its intrastate and interstate operations according to the gross income received from the two activities.

Such lieu taxes were sustainable, therefore, only on the theory that the tax imposed on gross income was no greater than that which would have been imposed, had the expense of state government been apportioned to these interstate utilities on an *ad valorem* tax basis.

By its New Tax Plan, the State of Washington has seen fit to distribute a part of the governmental costs to appellants and all other property owners on an *ad valorem* property tax basis, and to apportion the remainder of such costs of government according to the gross income received from practically all business activities, including the intrastate receipts of interstate utility companies.

And we respectfully submit that in determining whether appellants' interstate commerce has been unlawfully burdened by Washington's New Tax Plan, the

same test should be applied as in the cases sustaining a tax on interstate companies measured by gross income in lieu of a property tax, and that in the absence of a showing that the total tax burden thus imposed, property and excise, is not greater than that which would have been imposed had the State chosen to apportion the entire cost of government according to the relative value of the taxpayers' properties, it cannot be said that the excise thus exacted in lieu of taxes which might otherwise have been lawfully imposed as an added burden on property, is violative of the commerce clause.

It is of course apparent that a tax levied on an interstate carrier's tangible property and franchises is no less a burden on its interstate business than is a privilege tax measured by its intrastate gross income.

In this connection, may we note the language of Mr. Justice Stone, with Justices Holmes and Brandeis concurring, in *Helson v. Kentucky,* 279 U. S. 245, 252, wherein the majority held a tax on gasoline used in an interstate ferry to be void as violative of the commerce clause:

"I cannot yield assent to the reasoning by which the present forbidden tax on the use of property in interstate commerce is distinguished from a permissible tax on property, measured by its use or use value in interstate commerce. * * * (citing authorities) * * * Nor can I find any practical justification for this distinction or for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, which is neither aimed at nor discriminates against interstate commerce. 'It affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in

no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed.' *Deleware Railroad Tax,* 18 Wall. 206, 232."

That this view is not out of harmony with that now taken by this court is evidenced by the later cases of *Eastern Air Transport v. Tax Commission,* 285 U. S. 147, *Nashville, C. & St. L. Ry. v. Wallace,* 288 U. S. 249, and *Edelman v. Boeing Air Transport,* 289 U. S. 249, holding that a state non-discriminatory use tax may constitutionally be imposed on gasoline imported and stored by an interstate carrier for use in generating motive power for instrumentalities of interstate transportation.

Distinguishing *Helson v. Kentucky,* 279 U. S. 245, Your Honors said in the *Wallace* case:

"But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged." (288 U. S. 267.)

That no distinction is to be made between property taxes and excises with respect to the taxation of the subjects, as distinguished from the instrumentalities, of interstate commerce, was held in *Wiloil Corporation v. Pennsylvania,* — U. S. —, 79 L. Ed. 382, where a non-discriminatory sales or use tax on liquid fuels was sustained as to gasoline sold within, but delivered from without, the taxing state.

"It is not material," said Your Honors there, "whether the tax is upon the sale and delivery or upon the property." (79 L. ed. 384.)

It must follow that if, as a result of the State's present scheme of taxation, "taken in its totality," the interstate carrier's total tax burden is not increased,

but *actually lightened* as compared with the tax burden which might legitimately be imposed by the taxing state, such interstate carrier cannot be heard to complain that its interstate business is unduly burdened.

In *Southern Ry. Co. v. Watts,* 260 U. S. 519, 530, the court said:

"It is argued that this franchise tax is an additional property tax which is not imposed on others, and that, consequently, it violates the uniformity clause of the state constitution and the equal protection clause of the Federal Constitution. It is true that the franchise tax is measured by the value of property already subjected to the *ad valorem* tax. But a privilege tax is not converted into a property tax because it is measured by the value of property (compare *Clark v. Titusville,* 184 U. S. 329, 333, 334); nor by the fact that in this measure is included property not used in the transportation service. Railroads differ in so many respects from other properties that they may, as a class, be taxed differently or additionally, if that is not inconsistent with the constitution of the state.

"Nor is there any basis for the claim that the franchise tax act violates the commerce clause. The tax appears to be upon the privilege of doing an intrastate business. Compare *Armour Packing Co. v. Lacy,* 200 U. S. 226. It is not of the character which is held a burden upon interstate commerce. *St. Louis Southwestern Ry. Co. v. Arkansas,* 235 U. S. 350; *Underwood Typewriter Co. v. Chamberlain,* 254 U .S. 113, 119, 120; *St. Louis-San Francisco Ry. Co. v. Middlekamp,* 256 U. S. 226. Payment of the tax is not made a condition precedent to granting a railroad permission to do interstate business. Compare *Leloup v. Mobile,* 127 U. S. 640. *Underwood Typewriter Co. v. Chamberlain,* 254 U. S. 113, 119. *And there is no basis for the contention that the aggregate burden imposed by the property tax, the franchise tax, and the income tax, operates to obstruct interstate commerce.*" (Italics ours.)

STATE'S NEW TAX PLAN:

Prior to 1932 practically the entire cost of government, state, county and municipal, was raised by *ad*

valorem taxes imposed on real and personal property including that of interstate carriers. By measures adopted by the people themselves at the general election of November, 1932, and by the people's representatives at the legislative session of 1933, this scheme of taxation was changed by shifting a substantial part of this burden of governmental expense from property to various kinds of businesses and occupations. Thus, by an initiative measure (Chap. 4, Laws of 1933) it was provided that thereafter (except when authorized by special elections) no more than 40 mills should be thereafter levied on the assessed valuation (50% of the actual value) of real and personal property, such millage being limited to 5 mills for the state, 10 mills for counties, 10 mills for school districts and 15 mills for cities or towns.

At the same election, the people, by direct vote, enacted a state income tax law (Chap. 5, Laws 1933) providing for a tax of certain percentages of all net incomes of individuals and corporations in excess of certain stated amounts. Although this income tax measure was later adjudged unconstitutional (see *Culliton v. Chase,* 174 Wash. 363), the court may nevertheless refer to its recitals to discover the people's purpose in adopting both the 40-mill and income tax measures. To quote:

"Existing methods of taxation, primarily based on property holdings, are inadequate, inequitable and economically unsound. Present conditions point the need of a new subject matter for taxation, which should be based on the ability to pay. Earnings for a given period are a fair measure of such ability.

"The people of the State of Washington, therefore, exercising herein their supreme power and fundamental right, declare their purpose hereby to tax all annual incomes within the state as such, and not as property." (Laws 1933, ch. 5, sec. 1.)

These two acts were initiative measures. At the following legislative session Chapter 28, Laws of 1933, was enacted, Section 4 of which limits the levy for the current school fund (a state fund theretofore unlimited) to five mills. The same session enacted Chapter 191, Laws of 1933 (the law here assailed), imposing an occupational tax on those engaged in various business activities, thereby largely shifting the expense of government from tangible property to such businesses and occupations.

REDUCTION IN RAILROADS' TAXES BY STATE'S NEW TAX PLAN:

At the trial of the railroad cases, appellee introduced exhibits for the purpose of comparing the total taxes, *ad valorem* and occupational, payable by the four large interstate railroads of the state for each of the years 1933 and 1934 (assuming such occupational tax to have been collectible for all of 1933, instead of only for the last five months), with the taxes which would have been payable by such railroads for such years under the revenue laws in effect prior to November, 1932. (Plff's Exs. "43" and "44," NP Rec. 224-226; Plff's Exs. "32" and "33," GN Rec. 241-244), which exhibits are explained by State's witness, Manschreck. (NP Rec. 194-6; GN Rec. 208-211.)

These exhibits are, we believe, self-explanatory, and show that as a result of the New Tax Plan the total taxes payable by the four roads (including the occupational tax) were $597,770 less in 1933 and $549,034 less in 1934 than they would have been under the old tax plan (see lines "A" to "H"), and that such companies' state taxes alone, plus the occupational tax, were $738,248 less in 1933, and $826,343 less in 1934 than such state taxes

alone would have been for those years under the old tax plan. (See lines "I" to "M.")

Had the 40-mill tax limit act been combined with the occupational tax measure it is clear that in determining whether such single tax measure imposed an undue and unlawful burden on appellents' interstate operations, the Court's first inquiry would necessarily have been as to the net results of the operation of such law in increasing or reducing such carriers' aggregate tax burden.

Suppose that, instead of the 40-mill act, the people or their legislature had adopted a measure freeing property from ALL *ad valorem* taxes, shifting the entire burden to businesses and occupations, and thereby substantially reducing the total taxes payable by the appellant railroads. Could these carriers then, while accepting such exemption features, be heard to urge that they should likewise escape the occupational tax and thus avoid any contribution whatever to the support of government? We submit not.

Our position is supported by *Chicago, M. St. P. & P. R. Co. v. Hedges*, 5 Fed. Supp. 752, 756, *et seq.*, where Judge Neterer said:

"To change its taxing system, the electors of the state, by initiation, adopted chapters 4 and 5, pp. 47, 49, Laws of Washington 1933 (40-mill levy limit on real estate and the income tax measure), and the Legislature, the act in issue, an 'emergency measure,' as a new taxing system. The preamble to chapter 5, p. 49, Laws of 1933, exposes the state of mind as follows:

" 'Existing methods of taxation, primarily based on property holdings, are inadequate, inequitable and economically unsound. Present conditions point the need of a new subject matter for taxation, which should be

based on the ability to pay. Earnings for a given period are a fair measure of such ability.

" 'The people of the State of Washington, therefore, exercising herein their supreme power and fundamental right, declare their purpose hereby to tax all annual incomes within the state as such, and not as property.' Laws 1933, ch. 5, p. 49, Sec. 1.

"The Supreme Court of the state held this Income Tax Law unconstitutional [(*Culliton v. Chase, McKale's Inc. v. Chase*), 25 P. (2d) 81], and thus deprived the state of a portion of its revised system, and further disorganized the revenue situation. The 40-mill limit tax on real property authorized by chapter 4, p. 47, Laws of 1933, is grossly inadequate and the need of the 'emergency measure', and the act in issue, chapter 191, p. 869, Laws of 1933, effective from August 1, 1933, to July 31, 1935, became vital; and, in considering this issue, chapter 166, p. 613, Laws of 1933, should be noted. * * *

"Consideration of the new system to supersede the old, and the status of the litigants under the old system, and the traffic rates approved by the rate-making body, the Interstate Commerce Commission, which must be presumed as sufficient for interstate commerce, is enlightening. May it be said that any burden has been placed on interstate commerce by the challenged act, when, as later particularized, the new system, including the excise law (term used merely for designation) in issue, commerce, intra and inter state, has been relieved of $737,825 taxes?

"The principle that these laws must be considered together is approved in *Baker v. Druesedow*, 263 U. S. 137, 44 S. Ct. 40, 68 L. Ed. 212, and cited cases; *Greene v. Louisville & I. R. Co.*, 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280; *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 52 S. Ct. 631, 76 L. Ed. 1232, 84 A. L. R. 831. If the state has not by all of its taxation legislation, burdened interstate commerce, it may not be criticized. *Hebert v. Louisiana*, 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270, 48 A. L. R. 1102; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160. * * *

"The plaintiffs are receiving all of the revenue they received prior to the act in issue, with no added burden on interstate commerce, or at all. No burden could be

placed upon interstate commerce by the changed taxing system, if the tax has been lessened and no reduction of tariff rates made, as in this case.

* * * * * * * *

"* * * Obviously complainants 'suffer no harm from the provisions of the statute.' *Osborne v. Florida,* 164 U. S. 650, 17 S. Ct. 214, 216, 41 L. Ed. 586. The net saving to the complainants, under the new system, including the excise tax, is $737,825. The excise tax is in no event a direct charge against interstate commerce, and, if it indirectly affects it, it is not forbidden. *Oliver Iron Co. v. Lord,* 262 U. S. 172, 43 S. Ct. 526, 67 L. Ed. 929; *State v. Express Co.,* 80 Wash. 309, 141 Pac. 757.

"This does not take cognizance of benefits to the complainants of the Motor Truck Act (chapter 166, p. 613, Laws 1933), curtailing truck competition and increasing the traffic revenues for the complainants' roads. Instead of taking from other states and contributing to the state of Washington, as contended by complainant in argument, there is actually taken from the taxpayer and patrons of the complainants' roads in the state of Washington $737,825 to apply in other states. Assuredly, complainants may not invoke the Fourteenth Amendment. *Gant v. Oklahoma City,* 289 U. S. 98, 53 S. Ct. 530, 77 L. Ed. 1058. * * *."

"But," appellants argue, "we are required to pay the same *ad valorem* taxes as are imposed on all other property, and on top of that, an excise not exacted of other tax payers."

But this argument, we submit, is patently fallacious. Let us consider, for instance, the total revenue received by the State under its New Tax Plan from the valuable business properties in its larger cities. It receives, first, the *ad valorem* tax exacted of the owner, and in addition, the business or occupational tax exacted of every business enterprise conducted on such business property. From such properties as public stages, trucks, ferries, etc. it first exacts an *ad valorem* tax on the vehicles themselves and on the owners' franchises, and in addi-

tion, an occupational tax measured by the intrastate gross receipts from such activities.

And in this connection we would call particular attention to the fact that although the property of municipal corporations is expressly exempted from *ad valorem* taxation by Article VII of the State constitution, the offending occupational tax is imposed on municipalities operating public utilities and conducting businesses, the same as upon private enterprises (Laws 1933, ch. 191, Sec. 2-e), which provisions have been sustained by the State court. See *Tacoma v. State Tax Commission,* 177 Wash. 604. Needless to say, no small part of the burden of taxation is thus shifted from appellants' property to municipally owned street railways, and water, light and power plants not otherwise taxable.

That the total burden of taxation thus imposed has, as a necessary result of the State's New Tax Plan, been shifted from the appellant companies to these municipalities and to the business carried on in connection with the other general taxable property of the State, is, we submit, conclusively demonstrated by the fact that such appellants' entire tax burden, *ad valorem* and excise, is now materially less than it would have been under the former method of requiring taxable property to bear the entire load.

Counsel profess concern that if the 1933 tax be sustained, the state legislature may raise the rate to 10, 25 or even 50%.

The answer is three-fold: (a) it cannot be presumed that the State will attempt to tax these roads out of existence; (b) appellants' patrons who must ultimately pay the tax would not tolerate an unreasonable

exaction; and (c) should counsel's fears be realized, the courts will on application, promptly declare such an unreasonable and discriminatory imposition invalid as violative of the constitutional provisions which appellants now seek to invoke.

Since the 1933 measure was adopted, the sorely pressed State legislature has twice convened, but has not raised the rate as to railroads beyond that originally imposed on several other utilities including telephone companies, but instead, has exacted of the State's citizens a 2% retail sales tax to meet the emergency. (Laws 1935, Ch. 180.)

EFFECT OF NEW TAX PLAN ON APPELLANT, TELEPHONE COMPANY:

This company has received all the benefits of a tax reduction on its property, without necessarily suffering from the imposition of the occupational tax. It concedes that it is making at least some net returns on the fair value of its property used in its intrastate operations. (PT Rec. 4.) There are no competitive companies in the field which it occupies. (PT Rec. 68.) It neither alleged nor proved that its rates could not be so increased as to cover the excise exacted without loss of patronage. Yet it also concedes that it has made no application to any regulatory body, state or federal, for an increase of its rates for the purpose of meeting the tax. (PT Rec. 100.)

There is nothing in the Occupational Tax Act which prevents it from passing the tax on to its patrons.

Not only does the State court in effect so hold in the cases before us, but in *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 410, it was said:

"Moreover, the farmer cannot pass the tax to the

ultimate consumer, while all those later dealing with his products, like all others engaged in commercial pursuits, may and probably will very largely do so."

And in *Cascade Telephone Co. v. State Tax Commission*, 176 Wash. 616, the court, if it did not squarely so hold, at least strongly implied that the fact that the Governor vetoed the section of the Act *requiring* the taxpayer to pass the tax along to the ultimate consumer, did not prevent the taxpayer from doing so if he chose. A similar suggestion is found in *Tacoma v. State Tax Com.*, 177 Wash. 604, 611.

Indeed, none of the appellants even suggest that there is anything in the Act even impliedly forbidding that the tax be passed along to appellants' customers.

"To add by implication" said Your Honors in *American Express Co. v. Michigan*, 177 U. S. 404, 412, "such a provision to a tax law would be contrary to its intent, and be in conflict with the general object which a law levying taxes is naturally presumed to effectuate."

If on application to the proper authority, the P. T. is allowed (and we have no reason to doubt but that such permission would be granted) to increase its rates to the extent of the tax exacted, obviously that company would be in the position, not of a taxpayer, but of a mere tax collector, and neither its intrastate nor interstate operations would be burdened thereby.

For the reasons so clearly set forth in *Postal Tel.-Cable Co. v. Fremont*, 255 U. S. 124, 217-8, and *Postal Tel.-Cable Co. v. Richmond*, 249 U. S. 252, 258, we submit that so far as the P. T. is concerned, the tax is an invasion of neither the due process nor the commerce clause of the federal constitution.

In *Postal Tel.-Cable Co. v. Fremont*, 255 U. S. 124,

it was contended, as here, that the complaining company was required by State law not only to continue to engage in intrastate business, but at designated rates, but the court said:

"The company, as we have seen, cites Sec. 7408 as a compulsion upon it to engage in intrastate business and at designated rates. From the rigor of the requirement Sec. 7409 provides a mode of relief, and until it is denied the company cannot complain under the circumstances presented by this record. In other words, if Sec. 7408 is imperative upon the company to continue intrastate business, Sec. 7409 affords a means of obtaining relief from burdensome obedience. The sections are counterparts. If submission to Sec. 7408 results in insufficient revenue and a burden upon interstate commerce, it is made the duty of the Railway Commission by Sec. 7409 upon complaint of the Postal Company to raise the intrastate rate 'fixed' in Sec. 7408. No attempt to secure relief under Sec. 7409 appears to have been made."

DISCUSSION OF APPELLANTS' SPECIFIC OBJECTIONS TO 1933 OCCUPATIONAL TAX ACT:

The N. P.'s and G. N.'s assignments of error are substantially identical and are to the following effect:

(1) That having held as a matter of law that appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, the State court erred in holding said tax not to be violative of the commerce clause;

(2) That having held that as a practical matter appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, said court erred in holding said tax not to be violative of the commerce clause;

(3) That having found that the appellant's intrastate business is conducted at a loss which must be borne by its income from interstate business, said court erred

in holding said tax not to be violative of the commerce clause and due process clause.

(4) That having found that the appellant's intrastate business is conducted at a loss which must be borne by its income from interstate business, said court erred in holding that the tax was not violative of the commerce clause for the stated reason that the appellant had not exhauted its remedy (by writ of review) to obtain intrastate rate increases, for the reason that such circumstance is immaterial, and not supported by, but contrary to the facts found by the trial court.

The P. T.'s assignments of error are the same as the first two above set forth, to which it has added the following:

(5) That having found that the P. T. cannot, as a matter of law, retire from its intrastate business while continuing its interstate business, the court erred in holding the tax not to be violative of the due process clause.

THE TRIAL COURT'S FINDINGS IN THE N. P. AND G. N. CASES WERE NOT ADOPTED BY STATE SUPREME COURT:

At the outset it is important to note that appellants' various assignments of error are based upon wholly erroneous assumptions. The state supreme court did not hold as to any of the appellants, that it could not, as a matter of law, retire from its intrastate business without also retiring from its interstate business. Neither did it find from the evidence as to any of the appellants that, as a practical matter, such appellant could not retire from its intrastate business without also retiring from its interstate business, or that either railroad com-

pany was conducting its intrastate business at a loss. On the contrary, without passing upon the merits of any of these contentions, the court, for the purpose of argument, merely *assumed* them to be well-taken, and then proceeded to hold each and all of them immaterial and to sustain the tax. This is obvious from the following language of the court:

"The next and, as we view it, the important and difficult question is whether the tax may be collected, even though the railway company, the respondent, may not be able to retire from its intrastate business without also discontinuing its interstate. In this connection, *it will be assumed* (a) that the respondent cannot, as a matter of law, retire from its intrastate business; (b) that it is impractical, as a matter of fact, for it to retire from its intrastate business without also retiring from its interstate; and (c) that the intrastate or local business is conducted at a loss which is taken care of by the receipts from the interstate business. Giving effect to these *assumptions,* inquiry must be directed then to whether the tax is valid, even though the railway company may not be able to retire from its intrastate business without retiring from its interstate, and that the intrastate business is conducted at a loss." (Italics ours.) *State v. N. P. Ry. Co.*, 83 Wash. Dec. 52, 55, 48 Pac. (2d) 931, NP Rec. 57.

But counsel for appellant railroads would have Your Honors believe that the State supreme court adopted the findings of the trial court as its own, such contention being based, apparently, upon the court's following statement in its opinion in the N. P. case:

"As found by the trial court, the interstate and intrastate business in this state is inextricably commingled, and the intrastate business is conducted at a loss, and it is necessary to make up this loss from the income

from interstate business." *State v. N. P. Ry. Co.*, 83 Wash. Dec. 52, 53, 48 Pac. (2d) 931, NP Rec. 55.

But it is perfectly apparent that in using this language the court was merely reciting what the trial court had found. Surely, where the State supreme court reached the conclusion that the offending tax was valid without regard to the trial court's findings, this court cannot assume that, by the above recitals, the State supreme court intended to adopt the trial court findings on these hotly contested issues. It must be remembered that the State had assigned numerous errors based on the trial court's findings on these issues and on the admissibility of the evidence upon which they were seemingly based. (Post, pp. 93-180.) The State court could not, we submit, have intended to overrule all of these numerous assignments without making any reference to them whatever.

Section 2, Article IV, of the State Constitution provides:

"In the determination of causes, all decisions of the court shall be given in writing, and the grounds of the decision shall be stated."

Surely, it should require the most positive and unequivocal language, to persuade Your Honors that the State supreme court had so grievously violated its plain constitutional duty.

Again, we find no such recital in the court's opinion in the G. N. case. See *State v. G. N. Ry. Co.*, 83 Wash. Dec. 66, 48 Pac. (2d) 938, GN Rec. 84.

Moreover, in the P. T. case, an equity cause, in which the lower court made no findings, and in which the complaint expressly alleged that the P. T. was making

a net profit on its intrastate business (PT Rec. 4), we find the State supreme court basing its decision upon its opinion in the N. P. case (*Pac. Tel. & Tel. Co. v. State Tax Commission,* 83 Wash. Dec. 67, 48 Pac. (2d) 938, PT Rec. 151), with no reference whatever to the trial court's findings.

In view of fact, then, that in reaching its conclusions on the law, the State supreme court merely *assumed* that it was impractical for the N. P. to withdraw from its intrastate business, and that it was conducting such intrastate business at a loss, the court's opinion, must, we submit, be construed as a mere recital, but without endorsement, of the trial court's findings. Nothing more.

Disposition of appeals if assumptions found material.

What disposition, then, should be made of these appeals should Your Honors conclude that the tax would be invalid on the basis of an assumption that the appellants cannot, as a matter of law, retire from their intrastate business without also retiring from their interstate business?

The correctness of this assumption necessarily involves purely a construction of the local constitution and statutes, as to which the State supreme court's decision is controlling. Consequently, if the correctness of this assumption is found to be material, it would seem that Your Honors should not attempt to decide this question of local law, but should make such disposition of the appeals as to permit the State supreme court to exercise its undoubted prerogative in this regard. *Clark v. Williard,* 292 U. S. 113, 128-9.

But if, as we contend, the Washington constitution and statutes would themselves be violative of the com-

merce clause if given the assumed construction, then obviously this assumption of the State court should be wholly disregarded, since it would be wholly useless and ineffectual for the State court to reach a conclusion which would in and of itself, wholly vitiate such state statutes and constitutional provisions.

APPELLEE'S OBJECTIONS TO TRIAL COURT'S FINDINGS AND RULINGS ON ADMISSIBILITY OF EVIDENCE IN N. P. AND G. N. CASES.

In its appeals to the State supreme court in each of these cases, the appellee here, as appellant there, assigned numerous errors both as to the propriety of the trial court's findings, and as to the admission of evidence received in support of the same. May we note that in its designation of additional portions of the record to be printed in the N. P. and G. N. cases (NP Rec. 325-6; GN Rec. 293-4), the appellee requested that the clerk print those portions of its State court briefs setting forth its assignments of error. While these assignments are printed in the G. N. transcript (GN Rec. 79-83), we fail to find them in the N. P. transcript, but since they appear in the unprinted record and are set forth herein, we assume that this court will notice them.

Under the Washington practice, the complaining party may base error upon adverse findings without the necessity of taking exceptions thereto in the trial court. (NP Rec. 77; GN Rec. 108) But in the appellant's brief, each error relied upon must be clearly pointed out and separately discussed. (NP Rec. 76; GN Rec. 108)

Appellee's purpose in requesting that such assignments be certified to this Court was to show that it had assigned error in the State supreme court based on these various adverse findings and rulings of the trial court,

which assignments the court had failed to consider for the reason that, to sustain the offending tax, it was found unnecessary to do so. This appellee believed necessary not only to advise Your Honors that appellee had not acquiesced in the trial court's findings and rulings, but to show that if such findings were deemed material, appellee was entitled to have the same reveiwed either by this Court, or to have the causes remanded for that purpose to the State supreme court.

Of course, should Your Honors follow any other course, it would mean that the State would be wholly deprived of its unquestioned right to have these adverse findings and rulings of the trial court reviewed either by this or the State supreme court.

Upon an appeal from a decree of the Supreme Court of the Philippine Islands erroneously reversing the trial court solely on a question of law, this Court held in *Philippine Sugar &c. Co. v. Philippine Islands,* 247 U. S. 385, that, in order to dispose finally of the case, Your Honors might review the facts, when all the evidence proffered was admitted, and was in the record, and where the appellant in the court below sought to review the trial court's findings.

The Court will find the evidence on the question of whether or not the appellant railroads are in fact losing money on their local business, and the trial court's adverse rulings on the admissibility of evidence relating thereto, reviewed at length in Appendix "A" (Post, pp. 93-151) as to the N. P., and in Appendix "B," (Post, pp. 152-180) as to the G. N.

EVIDENCE AS TO N. P. AND G. N. NET EARNINGS IN INTRASTATE BUSINESS IN 1933.

The Northern Pacific:

The undisputed evidence showed that instead of losing $413,866 as claimed, had the N. P. computed its passenger operating expense on the same basis as the G. N., its net earnings would have been $87,710; and having made this correction, had it apportioned taxes on a relative use basis as required by the *Minnesota Rate Cases*, 230 U. S. 352, instead of on a relative gross revenue basis, its net earnings would have been $285,131; and having made these corrections, had it correctly apportioned traffic expenses, and not charged pensions as an operating expense, its net earnings would have been $457,160. Having made these corrections, had the N. P., in its calculations, used the intrastate revenues reported to the D. P. W., its net earnings would have been $583,154. (Post, pp. 140-1.)

The Great Norhern:

The undisputed evidence showed that by its own calculations, by using the intrastate revenues reported to the D. P. W., its net earnings were $202,458, and not deducting car and joint facility rentals as an operating expense, its net earnings were $491,544. (GN Ex. "11," p. 1, GN Rec. 258.)

But making the full deductions from its reported revenue as claimed, and not deducting car and joint facility rents as an operating expense, its net earnings were $114,152. (GN Ex. "11," p. "A," item 5, GN Rec. 254.) And even making such deductions from revenue and deducting such car and joint facility rents as an operating expense, but correctly apportioning taxes and joint facility rents, eliminating pensions as an oper-

ating expense, and eliminating duplications of expense, its net earnings were $132,256. (Post, pp. 175-6.)

G. N. AND N. P. CONCEDED A SUBSTANTIAL PROFIT FROM THEIR INTRASTATE FREIGHT BUSINESS.

The N. P. admittedly made a profit of $729,940 on its intrastate freight business, but claimed to have absorbed such profits in its claimed net loss of $1,143,806 on its passenger business with a resulting claimed net loss on the two activities combined of $413,866. (Post, pp. 141-3.)

The G. N., on its most extreme calculations, admittedly made a profit of $430,234 on its intrastate freight business, but claimed to have absorbed such profits in its claimed net loss of $529,503 on its passenger business with a resulting claimed net loss on the two activities combined of $99,269. (Post, pp. 176-8.)

Surely it cannot be seriously contended that any valid statute or constitutional provision, either state or federal, can compel an intrastate carrier to continue its intrastate passenger business, every dollar of revenue from which costs the carrier $1.95 (as the G. N.), and $3.66 (as to the N. P.). See *Railroad Commission v. Eastern Texas R. R.*, 264 U. S. 79.

And if such carrier elects to continue such losing local passenger business, why, we ask, charge the loss to its local freight profits, rather than to its system passenger business to which its local passenger business is at best, merely incidental?

For the purpose of this inquiry, should not these carriers' passenger and freight operations, we ask, under the circumstances here revealed, be treated as separate and distinct business activities for the purpose of determining the validity of the offending tax?

RAILROAD APPELLANTS' CONTENTION THAT OCCUPATIONAL TAX ACT INVALID AS TO THEM, IF THEIR INTRASTATE BUSINESS IS CONDUCTED AT A LOSS.

We submit that under the facts revealed by the record the State supreme court was absolutely correct in not condemning the tax on the ground urged. To quote the language of the court:

"But it is said that the intrastate business is being conducted at a loss, and this loss must be borne by the interstate business and therefore is a burden upon interstate commerce. There is an expression in the case of *Postal Telegraph-Cable Co. v. Richmond,* 249 U. S. 252, 39 S. Ct. 265, that would appear to support this contention, even though the question was not necessarily involved in that case; and further, in that case there was not involved an excise tax based upon gross income, as here.

"In this state, if the respondent's intrastate business is conducted at a loss, the legislature has provided a remedy, first, by application to the department of public service, with the right of review by the superior court and an appeal to this court. From the findings, it appears that an application has been made and denied by the department, and that another application is pending. It does not appear, however, that the respondent has exhausted the relief granted by the statute, and until it does so, it cannot be said that, even though the intrastate business is being conducted at a loss, it is such a burden upon interstate commerce as would justify holding the law unconstitutional.

"The facts in the case of *Postal Telegraph-Cable Co. v. Fremont,* 255 U. S. 124, 41 S. Ct. 279, presented a similar question, and it was there held that, where the state law affords a means to prevent the tax from burdening interstate commerce, through an application to increase intrastate rates, the tax will not be held void, in the absence of a showing that the company had exhausted the remedy afforded by an increase of the rates on intrastate business. We see no just or legal reason why the respondent should not comply with chapter 191, as all other businesses in this state are required to do." *State v. N. P. Ry. Co.,* 83 Wash. Dec. 52, 61-2, 48 Pac. (2d) 931; NP Rec. 54, 62.

The court recites, it will be noted, that "from the findings, it appears that an application" (for an increase in local tariffs) "has been made and denied by the department, and that another application is pending."

But it definitely appears from counsel's own admissions that neither the N. P. nor G. N. has ever sought an increase of rates from either the D. P. W. or the I. C. C. *by reason of the imposition of the occupational tax.* Thus, speaking of the showing made by the N. P. and G. N. in certain rate investigations pending before each of those bodies, counsel for the N. P. said:

"There was no occupational tax included, because none had ever been levied against the railroad, much less collected, and we don't think any will ever be collected, either. So it certainly was not in the showing." (NP Rec. 154; GN Rec. 200.)

And in the rate proceeding instituted by these roads before the D. P. W. in September, 1934, the railroads did not make any claim based on the occupational tax. (NP Rec. 155; GN Rec. 200.)

Thus the records reveal that far from petitioning these regulatory bodies for an increase of rates to meet the occupational tax, they have always taken the position that such tax is void as to them.

True, each of these carriers alleged in its answer (NP Rec. 13; GN Rec. 19), and secured a finding of the trial court (NP Rec. 50; GN Rec. 73) to the effect that most of its local rates cannot be raised, because of competitition from other kinds of transportation. But there is, we submit, not a syllable of evidence in the record to justify any such finding.

The "competition" referred to, is no doubt highway

transportation companies, but the same tax imposed on railroads is likewise exacted of truck lines. (Laws of Wash. 1933, Ch. 191, Sec. 2(2)(e)XI,) May it not therefore be fairly assumed in the absence of evidence to the contrary, that these competitors have met with the same problem as these appellants as to the necessity of a rate increase to meet the tax. Indeed, the problem of the trucks is all the more pronounced in that their total tax burden is very materially increased by the New Tax Plan whereas that of the railroads, as we have shown, is materially lightened.

The only evidence offered by these roads in support of their allegations of inability to raise *many* of their local rates, was an order of the D. P. W. dated April 27, 1933, denying the carriers' application made January 13, 1933, for an order extending to September 30, 1933, a 15% local rate increase then in effect, to September 30, 1933 (NP Rec. 14-16; GN Rec. 21-23), which order recited that it was a matter of common knowledge that "the present level of rail rates is too high to permit freedom of movement by rail."

But it is apparent that the rates to which the commission referred were the rates which had been in effect up to March 30, 1933, but a few days before such order was entered. It would have had no occasion to speak of any other rates.

Moreover, the effect of the order was to deny a 15% increase. To meet the occupational tax, only a 1½% increase would have been necessary. There is nothing in the order to indicate that the D. P. W. had any occasion to consider the effect of the occupational tax. Nor could it have had, since the order was made in April, 1933, and

the Tax Act did not take effect until August 1, 1933,

It must follow that any statements made in this order relative to the existing rates being as high as the traffic would bear, could not have been made in the light of the imposition of the occupational tax, which would fall as heavily, if not more heavily on the railroads' competitors than on the railroads themselves.

It would not follow, we submit, that because the local traffic would not bear a 15% rate increase, these carriers would have lost patronage because of a 1½% increase in rates.

But the most persuasive reason why any recitals in this order are wholly immaterial is that it is obviously directly opposed to the railroads' own position in these proceedings. If these carriers honestly believe what they allege in their answers, that not many of their local rates can be increased on account of competition, then *why were they before the D. P. W. in April, 1933, petitioning for an increase in such rates? And why, in September, 1934, were they again before the D. P. W. and I. C. C. seeking such an increase?* [NP Rec. 155; GN Rec. 200.]

These carriers cannot, we submit, be heard to assert in one proceeding that the facts justify an increase in their local rates and in other proceedings taken but a few weeks before the trial of these cases, that such increases are wholly unwarranted.

Nor, as already pointed out (Ante, pp. 35-36) is there anything in the Occupational Tax Act indicating a legislative purpose to forbid the public service companies so taxed from thus shifting the burden by an increase of rates. See *State ex rel. Stiner v. Yelle,* 174 Wash. 402.

410; *American Exp. Co. v. Michigan,* 177 U. S. 404, 412-3, and other cases heretofore cited.

The appellant railroads, having never applied to any regulatory body, let alone a reviewing tribunal, for permission to increase their rates *to meet the occupational tax,* cannot now be heard to assert that the same is a burden on interstate commerce either because they are doing local business at a loss, or that they are under legal compulsion to continue their intrastate operations. *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124; *Postal Tel.-Cable Co. v. Richmond,* 249 U. S. 252; *Chicago, etc. R. R. Co. v. Hedges,* 5 Fed. Supp. 752, 759-60.

As shown in our review of the evidence bearing thereon, the record does not support these appellants' claim that in 1933 either of them actually conducted its intrastate business at a loss. (See post, pp. 35-6.) But if such a showing had in fact been made, there is nothing in the record to show that 1933 was representative of what was to be expected in future years. The G. N. made no attempt to show that its 1933 operations were representative, and from such showing as the N. P. attempted, it appeared that 1934 showed at least some improvement over 1933. (Post, pp. 148-151.) In *Williams v. Talladega,* 226 U. S. 404, 417, a eleven-months test period was held insufficient, and in *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124, 126, a finding of the State Court that a two-year test period was insufficient was not disturbed. In his concurring opinion in *Chicago, etc. R. Co. v. Hedges,* 5 Fed. Supp. 752, 760, Judge Cushman said:

"The bills of complaint make no disclosure as to income and expense other than for the years 1932 and 1933. It was stated, in effect, upon the hearing, and not disputed, that no application had been made under the

Public Service Commission Law to increase rates.

"Complainants' case is based upon the presumption that future results will be similar to those already experienced, but such presumption cannot be indulged where there have been so numerous, radical, and far-reaching changes. When such presumption obtains, it depends upon the existence and continuance of the applicable precedent conditions. Any determination now reached, it is clear, would be based upon little more than conjecture and speculation."

Inasmuch as the reasonableness of a rate depends upon whether or not it yields a fair return, the sum required to meet the operating expenses of the utility must be considered. Taxes to which the utility is subject in the performance of its public duties, including state taxes on earnings and federal income taxes are to be considered as part of its operating expenses.

51 C. J. 25;

Galveston Elec. Co. v. Galveston, 258 U. S. 388, 399;

Georgia Ry. v. R. R. Com., 262 U. S. 625, 633.

We submit that the Act is not vulnerable to attack by reason of the claimed present inadequacy of appellants' earnings from intrastate business.

CONTENTION THAT OCCUPATIONAL TAX ACT IS VIOLATIVE OF COMMERCE CLAUSE IF APPELLANTS, AS MATTER OF LAW, CANNOT RENOUNCE THEIR INTRASTATE BUSINESS WITHOUT ALSO WITHDRAWING FROM THEIR INTERSTATE BUSINESS.

Answering this contention, the State supreme court said (*State v. N. P. Ry. Co.*, 83 Wash. Dec. 52, 56, 48 Pac. (2d) 931, NP Rec. 54, 57-61):

"In the case of *Sprout v. South Bend*, 277 U. S. 163, 48 S. Ct. 502, 62 A. L. R. 45, the court had before it an ordinance of the city, in the state of Indiana, which prescribed license fees varying in amount depending upon

the seating capacity of a bus, the bus company being engaged in both intrastate and interstate business, and it was there held that 'the ordinance is void because of the imposition of the license fee.' In the course of the opinion, it was said that a state may, by appropriate legislation, require the payment of an occupation tax from one engaged in both intrastate and interstate commerce, but, in order that the fee or tax may be valid,

"'* * * it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.'

"It will be observed that one of the conditions there placed upon the right of a state to impose the tax is that the person or corporation taxed 'could discontinue the intrastate business without withdrawing also from the interstate business.' The last quoted expression, so far as we are informed, was first used in the case of *Pullman Co. v. Adams,* 189 U. S. 420, 23 S. Ct. 494, where the tax involved was in a specific amount levied upon

"'* * * each sleeping and palace car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad-track over which the company runs its cars.'

"In the case of *Cooney v. Mountain States Tel. & Tel. Co.,*— U. S. —, 55 S. Ct. 477, there was involved a statute of the state of Montana prescribing a tax 'for each telephone instrument used in the conduct of the business of operating or maintaining telephone lines and furnishing telephone service in the state of Montana.' There, the telephone company, as is the railroad company here, engaged in both intrastate and interstate business, and it was held that a privilege or occupation tax which a state imposes with reference to both kinds of business, though an indiscriminate 'application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid.'

"It will be observed that in none of the three cases mentioned was the tax based upon the gross income of the intrastate business. There is a difference between

a tax imposed as a license to do business or upon the instrumentality and a tax based upon the gross income. If the tax be a license tax or one upon the instrumentality, it necessarily inheres in the interstate as well as the intrastate business. Where the tax is upon the gross income, the income from the interstate business may be segregated from the intrastate and be held valid.

"In the case of *Bowman v. Continental Oil Co.*, 256 U. S. 642, 41 S. Ct. 606, the state of New Mexico had imposed an excise tax of two cents for each gallon of gasoline sold or used, and an annual license tax of fifty dollars for each distributing station or place of business. The oil company was engaged in both interstate and intrastate business. It was held that the two cents tax per gallon could be sustained because the income from the intrastate business could be segregated from the interstate, but that the fifty dollar tax was void because no such segregation could be made. It was there said:

" 'The applicable rule is that laid down in *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, where, in response to a question whether a single tax, assessed by a state upon the receipts of a telegraph company derived partly from interstate commerce and partly from commerce within the State, but returned and assessed in gross and without separation or apportionment, was wholly invalid or invalid only in proportion and to the extent that the receipts were derived from interstate commerce, this court unanimously answered that so far as levied upon receipts derived from interstate commerce the tax was void, but so far as levied upon receipts from commerce wholly within the State it was valid. This case has been cited repeatedly with approval and its principle accepted. *Western Union Telegraph Co. v. Alabama*, 132 U. S. 472, 476-477; *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192, 200-201; *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692, 697; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 31.

" 'But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void under the authority of *Leloup v. Port of Mobile*, 127 U. S. 640,

647; *Crutcher v. Kentucky*, 141 U. S. 47, 58-59; *Williams v. Talladega*, 226 U. S. 404, 419; and other cases of that character'.

"In the case of *Cooney v. Mountain States Tel. & Tel. Co., supra*, it was distinctly pointed out that the tax there involved was

"'* * * not laid on revenue derived from monthly rates as distinguished from toll charges. It is not imposed with respect either to the nature of the revenue, or to the character of the service from which the revenue is derived, or to the manner in which the charges for the service are fixed.'

"From what is there said, it would appear to be a reasonable inference that, if the tax were of the character described in the quotation just made from the opinion, the result might be different.

"In *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 51 S. Ct. 499, the state of Ohio imposed upon every corporation engaged in the business of supplying consumers within the state with natural gas for light, heat or power a tax based upon the gross receipts, and the law was sustained. The East Ohio Gas Company, which resisted the tax, was engaged both in interstate and intrastate business. It brought gas from the states of West Virginia and Pennsylvania over high pressure pipes, and, as stated in the opinion, this was interstate commerce until it reached the distributing pipes which supplied the consumers, and after that it became intrastate and was subject to the tax. In the course of the opinion in that case, we find the same statement with reference to the conditions precedent to the right of a state to impose a tax upon a person or corporation engaged in both intrastate and interstate business, as appears in the quotation from the case of *Sprout v. South Bend, supra*. In the *Ohio Gas Co.* case, however, the court did not apply the provisions that the gas company could not retire from its intrastate business without withdrawing from its interstate business. The facts, as they appear in the opinion, make it plain that, if the gas company had withdrawn from its intrastate business, it would have completely destroyed its interstate business. The tax there involved was not one upon the instrumentality or a license tax, but was an excise or a tax upon the privilege of doing business.

"The result of the holding in that case, as we view it, would sustain a holding in the case now before us that the tax upon the gross income of the intrastate business was valid, even though the railway company could not withdraw from that business without also withdrawing from its interstate business. We do not look upon cases which involve either a tax upon instrumentalities or a license tax as applicable to the law now in question, which imposes, as already indicated, an excise or tax on the privilege of engaging or continuing in business."

EVEN WERE APPELLANTS UNDER LEGAL COMPULSION TO CONTINUE THEIR INTRASTATE BUSINESS EVEN AT A LOSS, TAX WOULD NOT BE DEEMED AN UNLAWFUL BURDEN ON INTERSTATE BUSINESS UNTIL APPELLANTS HAD BEEN DENIED RATE INCREASES TO MEET TAX.

The same contention as made here by appellants, was made without success in *Postal Tel.-Cable Co. v. Fremont*, 255 U. S. 124, 128. May we here repeat the following language already quoted from that case:

"The company, as we have seen, cites § 7408 as a compulsion upon it to engage in intrastate business and at designated rates. From the rigor of the requirement § 7409 provides a mode of relief, and until it is denied the company cannot complain under the circumstances presented by this record. In other words, if § 7408 is imperative upon the company to continue intrastate business, § 7409 affords a means of obtaining relief from burdensome obedience. The sections are counterparts. If submission to § 7408 results in insufficient revenue and a burden upon interstate commerce, it is made the duty of the Railway Commission by § 7409 upon complaint of the Postal Company to raise the intrastate rate 'fixed' in § 7408. No attempt to secure relief under § 7409 appears to have been made."

True, here the revenue measure does not itself provide the machinery for an application for rate increases, but other regulatory measures do, and until appellants have exhausted the remedy thus afforded, they have no reason to complain.

It would, we feel, be an impertinence to attempt to add anything further to what has been so clearly stated by the State supreme court in this connection.

But we do not agree that there is any such legal obligation as the court assumes.

STATE SUPREME COURT HAS NOT CONSTRUED STATE STATUTES AND CONSTITUTION AS REQUIRING APPELLANTS TO RENOUNCE THEIR INTERSTATE BUSINESS IF THEY WITHDRAW FROM THEIR INTRASTATE BUSINESS.

As heretofore noted, in the present cases the State supreme court merely assumed such to be the law, for argument's sake. And obviously, if in other cases the State supreme court has not construed the State constitutional and statutes as thus assumed, appellants' contention must be without merit.

Appellants contend that under the Public Service Commission Law (Ch. 117, Laws of 1911) and Article XII, Sections 13, 14, 15, and 19, of the state constitution, they cannot withdraw from their intrastate activities while continuing to carry on their interstate business.

Before examining the local decisions, may we suggest that only the sovereign could complain should appellants elect to withdraw from their local business. No one, we submit, can question appellants' right to retire from their local business *with the State's consent. Day v. T. R. & R. Co.*, 80 Wash. 161, 166 and cases cited. But neither appellant contends that it has ever sought the State's permission to renounce its local business. Until it does so, it is hardly in a position to claim that such consent, if in fact necessary, would be withheld.

TAX ACT ITSELF PERMITS WITHDRAWAL.

The Act provides:

"If any person shall engage or continue in any business * * * for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington, a license under this act to engage in and to conduct such business * * * for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such function." (Sec. 3, ch. 191, Laws of 1933.)

Another section (Sec. 17, ch. 191, Laws 1933) provides for the institution of injunction proceedings in the name of the state to restrain the continuance of any taxable business until the tax is paid.

Any person or corporation engaged in a taxable activity is thus given the option of either withdrawing therefrom, or paying the tax. Surely the sovereign State exacting such tax could not be heard to complain of such renunciation.

By the very constitutional provisions upon which appellants rely, railroad, telegraph and telephone companies are "declared to be common carriers and *subject to legislative control.*" (See Art. XII, Secs. 13 and 19.) Surely, no form of "legislative control" could be deemed more legitimate than the exercise of the right of taxation. Nor could the prohibition until payment of the continuance of the business taxed, be deemed an unreasonable or unusual method of tax enforcement.

Article 11, Sec. 5, of the Idaho Constitution provides:

"All railroads shall be public highways, and all railroad; transportation, and express companies shall be

common carriers, and *subject to legislative control*," etc.

The case of *Northern Pacific Ry. Co. v. Gifford*, 25 Ida. 196, 136 Pac. 1131, 1136, involved the validity of a license tax measured by authorized capital stock, imposed upon all foreign and domestic corporations doing a local business in the state of Idaho. In upholding the tax as to foreign railroad and express companies doing an interstate and local business the court said:

"'In this connection it has been suggested by counsel for respondent that under the provisions of section 5 of article 11, of the state Constitution the respondent corporation as a common carrier could not decline or refuse to carry on domestic or intrastate business. This provision of the Constitution is dealing with domestic business and with corporations doing business in this state as distinguished from interstate business. *Foore v. Simon Piano Co., supra.* But, if it were otherwise, this provision of the Constitution says they are subject to *legislative control*, and in the case at bar the Legislature has spoken and designated the terms on which respondent can do business in the state, and that, upon failure to comply with the legislative requirement, it shall have no existence or standing in the state so far as local and intrastate business is concerned, and shall have no standing in the courts for the purpose of prosecuting actions or defending any rights of property. *We conclude, therefore, that to refuse to comply with this provision of the statute, and to become outlawed so far as it involves its right to do business in this state, would not subject it to another process compelling it to do the very business that it is prohibited doing under this legislative direction.*" (Italics ours.)

The foregoing decision was later adhered to in *Northern Pacific Ry. Co. v. Gifford*, 27 Ida. 667, 151 Pac. 909.

Here, as in the Idaho case, the legislature has designated the terms on which appellants may do a local business in this state, namely, by paying the occupational tax exacted, and that upon failure so to do, they have no

right to continue a local business. In view of this requirement, it would seem that the conclusion of the Idaho court is inevitable.

In *State v. Northern Express Co.*, 80 Wash. 309, it was held that a state law levying an excise or privilege tax upon express companies measured by 5% of their gross receipts from intrastate business only, did not impose a burden upon interstate commerce.

It was further held that since the State had no power to place a burden upon interstate commerce, an interstate express company doing business in that state was free to renounce its intrastate business, notwithstanding the constitutional and statutory provisions making express companies common carriers subject to state control, and prohibiting discrimination in privileges and transportation charges.

The case was heard *en banc*, the court overruling its former departmental decision (76 Wash. 636) relied upon by appellants here.

Answering the express company's contention that under the state statutes and constitution it was not at liberty to abandon its intrastate business while continuing its interstate activities within the State, the Court said, after reviewing numerous decisions including *Pullman Co. v. Adams*, 189 U. S. 420:

"Respondents make a general reference to the public service commission law of 1911 as supporting their contentions. It may be answered that no provision of that law could operate as a regulation upon interstate commerce. All that it seeks to do, and all that the state has power to do, is to impose regulations upon local business, and while the state cannot say to the foreign corporation, 'We will annex certain conditions with which you must comply before you can do an inter-

state business in or through this state,' it can say to such corporation, 'If you choose to do a business which is purely local in its character and which has attached to it no elements of interstate commerce, you must submit that business to the regulation and control of the laws of this state.' To go further than this, the state has not attempted, or if it has, its attempt is vain. So far as any constitutional provision is concerned, we find no essential difference between our constitution and that of the State of Mississippi referred to in the *Adams* case. Our constitution provides, in Sec. 13, Art. 12, that 'all railroad, canal and other transportation companies are declared to be common carriers and subject to legislative control.' Section 195 of the constitution of Mississippi reads: 'Express, telegraph, telephone, and sleeping car companies are declared common carriers in their respective lines of business, and subject to liability as such.' If, under this provision of the Mississippi constitution, nothing could be found compelling express companies to do a local business, we can find nothing in the language of our constitution which adds any such power. The whole theory of state control of public service corporations is based upon the doctrine, as expressed in *Munn v. Illinois,* 94 U. S. 113, that, when one devotes his property to a public use, he grants to the public an interest in that use, and must submit to be controlled by the public for the public good to the extent of the interest he has created. 'He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to control.' So here the express company may withdraw its property from any local use and discontinue such use; but so long as it continues in such use, it must submit to state control and regulation." (pp. 324 5.)

It will be urged that the *Northern Express* case was modified or overruled in the later case of *Great Northern Railway Co. v. State,* 147 Wash. 630, 646-7, likewise an *en banc* decision, wherein appears the following language:

"We are firmly convinced, however, and we are bound by our convictions to so decide, that under the more recent cases of the supreme court of the United

States, particularly that largely quoted from, *International Paper Co. v. Commonwealth of Massachusetts, supra,* the operation of the statutes in question here, under the commerce clause of the federal constitution, necessarily burdens such interstate commerce, *because (1)of the legal condition that respondent is a public carrier largely engaged in business in this state and not free to withdraw therefrom;* (2) under such conditions the state by the exaction of these fees is compelling such foreign corporation, as a condition of its right to do a local business in this state, to submit to a burden on its interstate business; and, (3) that the statutes violate the due process clause of the Fourteenth Amendment to the federal constitution because of imposing a tax on property beyond the jurisdiction of the state." (Italics ours.)

The court does not say, it is to be noted, whether the company's want of ability to withdraw was due to restrictions in the State or federal statutes, or to practical necessity.

What the court intended to say, we submit, is that the interstate railroad company was not free to withdraw as a practical matter, by reason of the intercommingling of its intra and interstate activities—and for the following reasons:

(1) The court says, it will be noted:

"We are firmly convinced * * * that *under the more recent cases of the supreme court of the United States* * * * the statutes in question * * * necessarily burdens such interstate commerce, because (1) of the legal condition that respondent is a public carrier largely engaged in business in this state and not free to withdraw therefrom;" etc. (Italics ours.)

But a careful search shows that there were no United States supreme court decisions tending to support the conclusion that the railroad company was forbidden by constitution or statute from withdrawing from its local business.

(2) Other language used in the opinion shows that the court could not have intended that the company was forbidden by law from withdrawing from its local business. Thus, in commenting on a case relied upon by counsel, the court said (147 Wash. 646):

"It will be noted that that case was not a case involving a public carrier required to do business in this state and unable to withdraw therefrom. *It was more free to withdraw* than was Northern Express Company in the case cited in 80 Wash. 309, 141 Pac. 757, and perhaps as free to withdraw as the two complaining parties in 136 Wash. 285, 239 Pac. 840 and 138 Wash. 72, 244 Pac. 398, cases heretofore cited.". (Italics ours.)

It is apparent, of course, that here the court was speaking of the ability of the company to withdraw from its state business *as a practical matter*. Otherwise, why imply that there were different degrees of freedom to withdraw? If continued operation was made mandatory by constitution or statute, the duty was absolute, not relative.

(3) After having so exhaustively considered the question in the *Northern Express* case (80 Wash. 309), and having concluded that an interstate carrier was under no statutory or constitutional compulsion to continue its intrastate operations, it is inconceivable that the court could have intended, without discussion, to have overruled its earlier decision.

But were there any doubt as to the effect of the Great Northern case on the attitude of the present court, it is, we submit, set at rest by what was said in the cases from which these appeals are taken. To quote:

"So far as the opinion in the case of *Great Northern R. Co. v. State*, 147 Wash. 630, 267 Pac. 506, is out of harmony with the holding in this case, it will be dis-

approved." *State v. N. P. Ry. Co.*, 83 Wash. Dec. 52, 62, 48 Pac. (2d) 931, NP Rec. 54, 63.

IT IS NO LONGER WITHIN THE STATE'S POWER TO DENY THE APPELLANT RAILROADS THE RIGHT TO DISCONTINUE THEIR INTRASTATE ACTIVITIES.

It is, of course, recognized by all courts that Congress has the unquestioned right to regulate intrastate commerce when the situation becomes such, by reason of the interblending of the interstate and intrastate operations of the enterprise that adequate regulation of the particular commerce between the states cannot be maintained without regulating intrastate transactions of a like character.

This rule is elaborately and convincingly explained in the well considered case of *Stafford v. Wallace*, 258 U. S. 495, 517 *et seq.*, where the authorities are cited and reviewed. More recent cases affirming this rule are: *Georgia Public Service Com. v. U. S.*, 283 U. S. 765; *Alabama v. U. S.*, 283 U. S. 776, and *U. S. v. Louisiana*, 290 U. S. 70.

Thus, in *Railroad Commission v. C. B. & Q. R. Co.*, 257 U. S. 563, it was held that the I. C. C. had authority under the Transportation Act of 1920 to fix passenger rates on intrastate business to the end "that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system," both intra and interstate.

And in *Colorado v. U. S.*, 271 U. S. 153, it was held that under the 1920 Transportation Act the I. C. C. had power to authorize abandonment, as respects both intrastate and interstate traffic, of a branch line of railroad lying wholly within a state, upon the ground that con-

tinued operation would result in large operating deficits constituting an undue burden upon interstate commerce, even where the State was present resisting such abandonment.

In *Texas v. U. S.*, 292 U. S. 522, it was held that the I. C. C. has power to authorize a lease of one interstate railway to another permitting the lessee to abandon or remove general offices and shops of the lessor, the maintenance of which as found by the Commission would entail unnecessary and wasteful expenditures, even though such abandonment or removal was forbidden by the statutes of the State of the lessor's incorporation in which such offices and shops were located.

"Even explicit charter provisions," it was there said, "must yield to the paramount regulatory power of the Congress."

And Your Honors cited numerous authorities as supporting the following excerpt:

"Obligations assumed by the corporation under its charter of providing intrastate service are subordinate to the performance by it of its federal duty, also assumed, 'efficiently to render transportation services in interstate commerce.'" (292 U. S. 531-2.)

It must therefore follow that whatever provisions may be found in the constitution and statutes of the state of Washington which might be so construed as to impose the absolute duty upon interstate railroads of continuing their intrastate business, such provisions, even if otherwise valid, are now, if not wholly superseded, at least suspended and no longer effective by reason of the field being wholly occupied by paramount federal regulations.

FEDERAL REGULATION DOES NOT PREVENT STATE TAXATION.

But it is equally true that Congress has never undertaken to control the action of the states in the imposition

on interstate carriers of either *ad valorem* or privilege taxes.

In *Federal Compress & Warehouse Co. v. McLean,* 291 U. S. 17, 23, this Court said:

"The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy."

No such "obstacle" is, we submit, presented where, as heretofore shown, the State's New Tax Plan actually results in a substantial reduction of the carrier's aggregate tax burden.

The tax there involved was a non-discriminatory tax on the business of storing and compressing cotton.

The following is quoted from *Western Union Tel. Co. v. Texas,* 105 U. S. 460, 466:

"The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a state, and does not affect other nations or states or the Indian Tribes, that is to say, the purely internal commerce of a state, belongs exclusively to the state, is as well settled as that the regulation of commerce which does affect other nations or states or the Indian Tribes belongs to Congress. Any tax, therefore, which the state may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States."

In *Osborne v. Florida,* 164 U. S. 650, 655, it was said:

"It has never been held * * * that when the business of the company which is wholly within the state, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local."

(Quoted in *Kehrer v. Stewart,* 197 U. S. 60, 68, and *Allen v. Pullman Car Co.,* 191 U. S. 171, 181.)

"The importance of the commerce clause to the Union," said Mr. Justice Holmes in *Superior Oil Co. v. Mississippi,* 280 U. S. 390, 395, "of course is very great. *But it also is important to prevent that clause being used to deprive the States of their life-blood by a strained interpretation of facts.*" (Italics ours.)

The following language of the supreme court of Mississippi is impressive:

"It does not matter whether the intrastate business done was nearly equal to the interstate business, the state's control over the intrastate business is full and complete, subject only to the provisions of the Federal Constitution. The powers of the state, not given to the United States government by the Federal Constitution, are reserved to the state or the people. The state constitutes an essential unit in the federal scheme, and the state should not be embarrassed in the operation of its functions within its sphere, but should be left to discharge those functions according to its own conception thereof. This nation, as it was founded, cannot exist without the states fulfilling their proper functions in the scheme. The importance of the powers and rights of the states have not been magnified, and have been frequently overlooked. The power of the state is not restricted except by the Federal Constitution or the State Constitution.

"That which is inherent in intrastate commerce does not lose its essential nature when it becomes a part of transactions in interstate commerce. *York Mfg. Co. v. Colley,* 247 U. S. 21. * * *

"The constitutional equality of the states is essential to the harmonious operation of the scheme upon which the republic was organized. This country is an indestructible union of indestructible states. *Coyle v. Smith,* 221 U. S. 559, 31 S. Ct. 688, 55 L. Ed. 853; *White v. Hart et al.,* 13 Wall. (80 U. S.) 646, 20 L. Ed. 685. In *Texas v. White* it was held that, if a state would exercise its sovereign power, then it must be permitted to exercise its legitimate power in all legitimate ways." *Chassanoil v. Greenwood,* 166 Miss. 848, 148 So. 781, 786.

"We must remember," as Your Honors emphasized in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 154, "that the revenues of the United States must be obtained in the same territory, from the same people, and excise taxes must be collected from the same activities, as are also reached by the states in order to support their local government."

Of course the interstate carrier is enabled to enjoy its privilege of engaging in local business primarily as a result of the privilege so to do originally derived from the states themselves. The respective privileges enjoyed by the carrier, derived from the national and state governments respectively, may be likened to two franchises, one from the federal government, and one from the State. Each is a valuable right, taxable by the sovereignty from whom derived, even when such right, having once been exercised, can be abandoned only with the consent of both.

In *Central Pacific R. R. v. California*, 162 U. S. 91, it appeared that the interstate road had two franchises, one from the Federal government and one from the State. The possession of either would have entitled it to operate without the other. The Court sustained the action of the State assessing board in its assessment and taxation of the State franchise notwithstanding the possession by the road of the Federal franchise which was alone sufficient to authorize its operation. In so holding it was said (p. 127):

"If the state franchise to be assessed were confined to the right to operate the road and take tolls, such a franchise was originally granted by the State to this company, and as such was taxable property. If the subsequent acts of Congress had the effect of creating a Federal franchise to operate the road, that merely rendered the state right subordinate to the Federal right, and did not destroy the state right nor merge it into

the Federal right, and no authority is cited to sustain any such proposition. * * * Whether plaintiff in error now operates its road under the franchise derived from the United States or from the state is immaterial, as the Supreme Court well said. The right to operate the road is valuable, whether it is being exercised or not, and the question, we repeat, relates to the existence of the franchise, and not to the extent of its value."

Recognizing the principle that because intrastate activities are not immune from state taxation simply because subject to federal regulation, this court has repeatedly held that decisions holding a given activity subject to state taxation, are not pertinent in determining whether such activity is subject to federal regulation. For example:

"The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. It does not follow that because a thing is subject to state taxation it is also immune from Federal regulation under the Commerce Clause. *Stafford v. Wallace, supra,* pp. 525-527; *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, 245."

Binderup v. Pathe Exchange, 263 U. S. 291, 311.

Besides the cases cited in the above excerpt, see also *Swift & Co. v. U. S.,* 196 U. S. 375, 400.

STATE IS LIKEWISE WITHOUT POWER TO PREVENT THE APPELLANT TELEPHONE COMPANY FROM RENOUNCING ITS INTRASTATE BUSINESS.

What has been said in this connection with respect to the appellant railroads, applies also with respect to the appellant telephone company. The intra and interstate activities and instrumentalities of this company are, we submit, no less completely interwoven than are those of the railroad appellants.

It must follow that any state law, whether embodied in constitution or statute, which would seek to condition this company's continued operation as an interstate

instrumentality, upon its continuing to carry on its intrastate activities, however unprofitable the latter might become, would be unquestionably obnoxious to the commerce clause.

True, Congress, while having delegated to the Federal Communication Commission the complete regulation of the interstate activities of telephone companies, has not yet given such Commission jurisdiction of local telephone exchange service where regulated by state commissions (USCA Title 47, Ch. 5, Sec. 221 (b)). But this, we submit, is wholly immaterial. Congress unquestionably has this power if and when it seeks to exercise it, just as truly as in the case of interstate railroads. And a State statute requiring continued intrastate operation as a condition to a continuance of interstate operation would quite obviously just as truly violate the commerce clause, whether Congress has or has not undertaken the regulation of the company's intrastate activities.

This leads us to our next point:

STATE CANNOT LAWFULLY CONDITION A PUBLIC SERVICE COMPANY'S RIGHT TO DO AN INTERSTATE BUSINESS, ON ITS CONTINUING TO DO A LOCAL BUSINESS.

State statutes, imposing conditions on corporations precedent to their right to transact business within the state, are ineffectual to prevent transactions constituting interstate commerce.

Thus a state statute requiring certain classes of foreign corporations to file statements is an invalid restriction and burden and unconstitutional as to foreign corporations engaged in interstate commerce. *Buck Stove and Range Co. v. Vickers,* 226 U. S. 205; *Inter-*

national Textbook Co. v. Pigg, 217 U. S. 91; *Crutcher v. Kentucky,* 141 U. S. 47, 56, 57.

And, in *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 291, it was said:

"A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. *Crutcher v. Kentucky,* 141 U. S. 47, 57; *Western Union Telegraph Co. v. Kansas,* 216 U. S. 1, 27; *International Text-Book Co. v. Pigg,* 217 U. S. 91, 112; *Sioux Remedy Co. v. Cope,* 235 U. S. 197."

It is of course apparent that if a State may not lawfully impose conditions on the right of a corporation to carry on interstate commerce within its territorial limits, it cannot impose conditions on its continuing to carry on its existing interstate business.

Again—a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. *Terral v. Burke Const. Co.,* 257 U. S. 529, 532-3.

Conversely, a State cannot lawfully condition a foreign corporation's constitutional right to engage in interstate commerce within its boundaries, upon its doing a local business therein, or thereafter forbid such interstate activities because of such foreign corporation's renouncing a local business already established.

And see also *Michigan Commission v. Duke,* 266 U. S. 570, and *Buck v. Kuykendall,* 267 U. S. 307.

The Constitution of Mississippi, Art. 7, section 195, provides:

"Express, telegraph, telephone, and sleeping-car companies are declared common carriers in their respective lines of business, and subject to liability as such."

Mississippi Code 1892, Sec. 3378, imposed a privilege tax on each sleeping and palace car company carrying passengers from one point to another in the state of "$100, and, in addition thereto, 25 cents a mile for each mile of railroad over which the company runs its cars."

In *Pullman Co. v. Adams*, 78 Miss. 814, 30 So. 757, it was held no defense to a suit for such taxes, that the local business of defendant, an interstate and intrastate sleeping car company, was done at a loss, and that it could not have declined the business, because, by the above constitutional provision, it was made a common carrier. The court said:

"The contention that the appellant does its local business at a loss, and yet must do it under the constitution of 1890 making it a common carrier, and hence that its interstate business is indirectly burdened, is fallacious. Were that so, it would be the provisions of law declaring the sleeping car companies, common carriers, that would contravene the interstate commerce clause of the federal constitution, not this license tax.

"It is not for the appellant to get all out of the local business the 'traffic will bear' and then escape the correlative burden of this license tax by pleading that it, though conforming to the law making it a common carrier, as to profits, should not conform to the law taxing the business it does wholly local and entirely within this state."

The Mississippi decision was affirmed by the United States Supreme Court in *Pullman Co. v. Adams*, 189 U. S. 420, on the assumption that interstate sleeping car

companies would be held free by the state court to abandon the local business taxed if they saw fit, and in so holding, said:

"If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in *Crutcher v. Kentucky,* 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by *Osborne v. Florida,* 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax.

"* * * If the constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the constitution or the tax act, is invalid. But we assume that the opinion of the Supreme Court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, *and we take it so the more readily that we can see no ground for a different view.*" (Italics ours.)

Thus, not only did Your Honors conclude that under the decision of the Mississippi court interstate common carriers are free, if they choose, to renounce their local business while continuing their interstate activities, but expressly say that it "*can see no ground for a different view.*"

The State supreme court took the same view in *State*

v. Northern Express Co., 80 Wash. 309, 324-5, where it was said:

"It is equally fallacious if it is meant by this assertion that, as a condition for engaging in interstate commerce, the state requires the corporation to also engage in intrastate commerce. Such a plea violates a rule concerning which there is now no dispute, that the state can impose no burden upon interstate commerce nor exact any condition upon which foreign corporations may engage in such business within this state. If the constitution should be read as imposing an obligation upon corporations doing an interstate business to also engage in a local business, then, as said in the *Adams* case, 'the question for us might be which, if not both, the clause of the constitution or the tax act, is invalid.'

"Respondents make a general reference to the public service commission law of 1911 as supporting their contentions. It may be answered that no provision of that law could operate as a regulation upon interstate commerce. All that it seeks to do, and all that the state has power to do, is to impose regulations upon local business, and while the state cannot say to the foreign corporation, 'We will annex certain conditions with which you must comply before you can do an interstate business in or through this state,' it can say to such corporation, 'If you choose to do business which is purely local in its character and which has attached to it no elements of interstate commerce, you must submit that business to the regulation and control of the laws of this state.' To go further than this, the state has not attempted, or if it has, its attempt is vain."

Answering a similar contention made by the complaining interstate railroad companies, Judge Neterer said, in *Chicago, M., St. P. & P. R. Co. v. Hedges*, 5 Fed. Supp. 752, 758:

"The contention that the law must fail for that intra and inter state business of the complainants is so inseparably interwoven that interstate (intrastate) business cannot be renounced, is not convincing. Equity does not require a useless thing. The complainants would not renounce intrastate business, which is: N. P., $6,613,-

958.98; interstate, $6,231,366.63. O-W., intrastate, $779,676.88; interstate, $3,026,256.60. Milwaukee, intrastate, $1,171,236.56; interstate, $2,163,054.27. G. N., intrastate, $1,860,608; interstate, $2,616,837. S. C. P., intrastate, $81,568.98; interstate, $1,333,410.73. Such claim, in the face of the history and record in the case, is fallible. *Ohio Tax Cases,* 232 U. S. 576, 34 S. Ct. 372, 58 L. Ed. 737; *Gant v. Oklahoma City, supra.* While these cases are not directly in point, they are lucid and bear upon the history in the instant issue. Complainants' claim is narrow and without equity, and does not weigh upon conscience. No attempt has been made to renounce, nor purpose to do so, and, until this is done, complainants cannot complain. No right is withheld or denied. The laws and constitution of the state give way to the commerce clause of the United States Constitution (Art. 1, Sec. 8, cl. 3), and the vitalizing Commerce Act (49 USCA Sec. 1 *et seq.*). See *Colorado v. United States,* 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878. And the rate-making body could and would afford relief, and, if denied, complaint might be available."

That the P. T.'s interstate business is negligible compared with its local business, is shown by the following figures taken from its returns to the tax commission for the last five months of 1933. (Plff's Ex. "22" PT Rec. 131-150):

	Pacific Company
Gross revenues from local and interstate business.....	$4,175,350
Gross revenues from interstate and foreign commerce..	355,662
Percentage of gross revenues from interstate and foreign commerce of total gross revenues within the State.	8.52%

Thus, the language of Judge Neterer is particularly pertinent to that company.

APPELLANTS MAY WITHDRAW FROM LOCAL BUSINESS IF NOT MAKING A FAIR RETURN.

The appellant Telephone Company alleges that for the first six months of 1933 its net earnings on intrastate business were not in excess of 1.75% of the fair value of the property used and useful in furnishing such service.

(PT Rec. 4.) And the N. P. and G. N. each contend that in 1933 it lost money on its intrastate business.

If this be true, then each complaining company has the undoubted right to withdraw from its local business, since the state would certainly not be in a position to compel operation at less than a fair return. But, having voluntarily continued their local operations, they cannot now be heard to claim exoneration from the business tax imposed.

To repeat what was said in *Pullman Co. v. Adams*, 78 Miss. 814, 30 So. 757 (affirmed: 189 U. S. 420):

"It is not for the appellant to get all out of the local business the 'traffic will bear' and then escape the correlative burden of this license tax by pleading that it, though conforming to the law making it a common carrier, as to profits, should not conform to the law taxing the business it does wholly local and entirely within this state."

In this connection, may we observe that the payment of the offending tax is not made a condition precedent to the carrying on of the business upon which the same is imposed. Thus as already noted, section 3, chapter 191, Laws of Washington, 1933, provides:

"If any person shall engage or continue in any business * * * for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

In other words, it is not made unlawful for a person to engage in a taxable business without having first

secured a license. Failure to pay the tax is not made a criminal offense. But if a person continued in the taxable activity after August 1, 1933, he became subject to the tax which could be collected either summarily or by an action at law. (See Sec. 16, ch. 191, Laws 1933.)

That even a domestic corporation may renounce its unprofitable local business though its operations be controlled by regulatory measures similar to those upon which appellants here rely, has been definitely settled by this court.

Thus in *Railroad Commission v. Eastern Texas R. R.*, 264 U. S. 79, it was held that the usual permissive charter of a domestic railroad company did not obligate the company to operate its railroad at a loss, nor was such obligation to be implied from the acceptance of its charter and operation thereunder. In so holding, Your Honors said:

"The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return."

There the Texas statutes relating to railroads were carefully analyzed, from which analysis it was found that they were all of the usual permissive type which did not obligate the company to continue to operate indefinitely.

What was said in that case as to the Texas regulatory statutes applies, we submit, with equal force to all of the numerous statutes and constitutional provisions cited in appellants' briefs and pleadings. *State v. Northern Express Co.*, 80 Wash. 309, 325.

In *I. C. C. v. Oregon-Wash. R. Co.*, 288 U. S. 14, it was held that because the charter of a railroad company authorized it so to do, it was not made its duty to construct and operate an extension to its existing lines.

From the cases cited it seems that a railroad company is under no compulsion to construct a line for the rendition of either interstate or intrastate service even though its charter contemplates such construction and service. Having constructed such line and finding the local business unprofitable, it may abandon such service. Under such circumstances can it be said that there is any contractual obligation to continue operations whether its operations be profitable or unprofitable? We submit not. If there be a contract obligation to operate, it must necessarily exist whether or not its operations prove remunerative.

In this connection, attention is also called to *Williams v. Mayor,* 289 U. S. 36, involving the right of the state of Maryland to grant an exemption from *ad valorem* taxes to a railroad corporation for a period of two years. The railroad was already in operation, and had there been a contract obligation on its part to continue operation, the grant of a tax exemption would, of course, have been without consideration and void. But in upholding the right of the company to such exemption, the court said in part (pp. 44-5):

"It is idle to say that a railroad, when once it has been organized, is under a duty to go on, and hence that its distress is not important for any one except itself. Science has wrought her wonders, but the time is not yet here when trains will run under the impulsion of duty without more. There is room, indeed, for question whether even the duty is so absolute as the respondents' argument assumes. *Railroad Commission v. Eastern Texas R. Co.,* 264 U. S. 79, 85. Certain it is, in any

event, that operation may end with the consent of the Public Service Commission when the earnings are inadequate."

CORPORATION SUBJECT TO PRIVILEGE TAX THOUGH FRANCHISE REQUIRES CONTINUATION OF SERVICE.

That any provisions of the constitution or statutes claimed to impose upon public service companies the continuing duty to operate must be construed in the light of the state's paramount power of taxation, is, we submit, well illustrated by those cases upholding the right of a municipality to impose license taxes upon public service companies operating under an unexpired franchise from the very municipality exacting the tax.

It is of course well established that where a municipal ordinance or state law grants to a public service corporation the right, for the benefit of its inhabitants, to occupy the streets of a city with mains and pipes for furnishing water or gas, wires and poles for lighting or telephone service, or tracks for street car service, and such franchise is accepted and acted upon, the same cannot be revoked by the state or municipality during the life of such franchise. *Northern Ohio Traction & Light Co. v. Ohio,* 245 U. S. 574, 585; *Old Colony Trust Co. v. Omaha,* 230 U. S. 100, 117; *Owensboro v. Cumberland Telephone Co.,* 230 U. S. 58, 73; *Grand Trunk Western Ry. Co. v. South Bend,* 227 U. S. 544, 556; *Louisville v. Cumberland Tel. Co.,* 224 U. S. 649, 664.

It is equally true that when such a franchise has been accepted by the grantee, the same becomes a contract binding the public service company to furnish public service on the terms and conditions set forth in, and *during the life of the franchise. Columbus Ry. & Power Co. v. Columbus,* 249 U. S. 399; *Cleveland v.*

Cleveland City Ry. Co., 194 U. S. 517; *Opelika v. Opelika Sewer Co.*, 265 U. S. 215; *St. Cloud Public Service Co. v. St. Cloud*, 265 U. S. 352; *Henderson Water Co. v. Corporation Com.*, 269 U. S. 278; *Thomas v. Railroad* Co., 101 U. S. 71, 83; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396; *Russell v. Sebastian*, 233 U. S. 195, 209.

But notwithstanding such contract obligation assumed by the public service company to continue its public utility operations during the life of its franchise, and the reciprocal obligations of the state or municipality, it is well-recognized that the municipality may nevertheless exact from such public utility company a license tax for the privilege of so performing its franchise obligations.

Memphis Gas Light Co. v. Shelby County, 109 U. S. 398;

Erie Railroad Co. v. Pennsylvania, 21 Wall. 492;

Railway Co. v. Philadelphia, 101 U. S. 528;

St. Louis v. United Railways Co., 210 U. S. 266;

Puget Sound P. & L. Co. v. Seattle, 291 U. S. 619, 627.

In the case last cited it was said:

"Appellant asserts a contract under its franchise to use the streets of the city for the purpose of carrying on its business for an unexpired term of years. It argues that the franchise is a contract license to carry on the business, and that the exaction of a tax as a condition precedent to the enjoyment of the license will operate to destroy the privilege granted by the franchise. This argument was made and answered in *Memphis Gas Co. v. Shelby County*, 109 U. S. 398, and in *St. Louis v. United Railways Co.*, 210 U. S. 266. Surrender of the state's power to tax the privilege is not to be implied from the grant of it. Hence, appellant took its franchise subject to the power of the state to tax the granted privilege in common with all other privileges

and property in the state. Without a clearly expressed obligation on the part of the city to surrender that power the contract clause does not limit it." (Citing authorities.)

None of the appellants either alleged or proved when they began to do an intrastate business within the state of Washington. As a matter of fact it was in each case, long after the adoption of the State constitution in 1889. Hence, if the obligations imposed by the state constitution be likened to the contract obligations assumed by the Puget Sound Light & Power Company in the case last cited, then obviously such obligations were assumed with full knowledge of the State's right to impose the tax now complained of just as the Puget Sound Company did in that case.

Every presumption is in favor of the reservation by the State of the complete exercise of its fundamental right to tax. *Tacoma v. State Tax Commission,* 177 Wash. 604, 611.

We respectfully submit that this presumption obtains just as truly to constitutional provisions as to statutes. By simply imposing upon certain corporations the obligations of public service companies, the constitutional convention did not, we insist, evidence an intent to relieve such corporations from taxation for the privilege of so functioning. Instead, a contrary purpose is evidenced by section 1, article 12, of the State constitution, providing that "all laws relating to corporations may be altered, amended, or repealed by the legislature at any time," and that "all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law." Surely, conditioning the right to continue operations upon the payment of a legiti-

mate occupational tax does violence neither to this section nor to the right of "legislative control" reserved as to these public service companies. (See Art. 12, Sec. 13, 19 Wash. St. Const.)

CONTENTION THAT SAME INSTRUMENTALITIES ARE USED IN BOTH INTRA AND INTERSTATE BUSINESS, AND RENUNCIATION OF INTRASTATE BUSINESS WOULD RESULT IN INTERSTATE RATES GREATER THAN TRAFFIC COULD BEAR.

The P. T. alleges that its interstate and intrastate business is done over the same lines, through the same exchanges, by the same employees, and with the same facilities, and that it is impossible for it to operate otherwise, and that if it could and should abandon its intrastate business, the entire burden of maintaining and operating its intrastate system, equipped to handle both classes of business, would fall entirely on interstate business and would necessitate an increase of rates greater than the same could bear and would result in the destruction of an essential instrument of interstate commerce and of the value of its properties in amounts of many millions of dollars. (PT Rec. 5-6.)

The answers of the appellant railroads contain similar allegations. (NP Rec. 10-11; GN Rec. 17-19.)

Whether or not these averments are supported by the evidence is discussed in Appendix "C," Post, pp. 181-7.

But even accepting such allegations at their face value, this, we submit, would be no defense to a business tax measured solely by a percentage of their intrastate revenues.

May we first point out that appellants constructed

their properties fully conscious of the State's undoubted right to impose excises on their intrastate business. They need not renounce such local business so long as they pay the tax. It is not shown, as we have seen, that, by adjustment of intrastate rates, the offending tax cannot be passed on to appellants' customers. Their election to withdraw from intrastate business will, if made, be purely voluntary.

Obviously the same objection here advanced might be made with equal plausibility to any duty imposed on appellants in connection with their intrastate business, whether it be the payment of a license tax or compliance with some rule or order of the state regulatory body. Let us suppose that the D. P. W. should promulgate some (to appellants) offensive rule or regulation affecting telephone or railroad intrastate operations. Could appellants be heard to question the validity of such regulation on the ground that the expense of carrying on their interstate business would be increased by the abandonment of their intrastate business thereby necessitating an increase of interstate rates and a consequent burden on interstate commerce?

Were appellants' operations confined wholly to intrastate business, the validity of the occupation tax as applied to these objecting companies could not be questioned. Because these companies are also engaged in interstate business, this tax which is imposed only on their intrastate receipts and which is not in the slightest degree increased by their interstate operations cannot, we submit, be said to constitute an unlawful burden on interstate commerce. The possible indirect effect on their interstate business visioned by appellants is, we

submit, too remote and fanciful to be deemed a valid objection to the tax.

While the states are without power directly to regulate, prohibit, or burden interstate commerce, yet, to come within the rule, such interference must be direct and substantial, and not merely incidental. The states may, so long as they do no more than legitimately exercise their reserved police and taxing power, enact laws which will be valid, although they may incidentally affect interstate commerce. 12 C. J. 13, 50; *Boston & Maine R. Co. v. Armburg*, 285 U. S. 234, 238, and cases cited.

The length to which this court has gone in upholding state legislation potentially but not directly affecting interstate commerce is, we submit, illustrated by its early decisions in *Reading R. Co. v. Pennsylvania*, 15 Wall. 284, and *State of Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, upholding state excise taxes measured by the gross receipts of foreign and domestic railway companies derived from both their intra and interstate business.

And while, as heretofore shown, Your Honors, in *Galveston, Harrisburg etc. Ry. Co. v. Texas*, 210 U. S. 217, in a five-to-four decision, held invalid a Texas statute of this kind, so far as interstate revenues were concerned, never, so far as we can find, has this court held a state occupational tax, measured only by the intrastate gross receipts of interstate public service companies, whether foreign or domestic, unconstitutional as violative of the commerce clause.

Were it true, as claimed, that appellants' intra and interstate businesses are hopelessly commingled we may

assume that a state excise imposed directly upon their instrumentalities used in both activities, such as cars, engines, or telephone instruments, would offend the commerce clause.

But this, if the court pleases, is not true of *a tax measured by a percentage of gross receipts from intrastate business only.* Such a tax cannot, we submit, be held to burden appellants' interstate operations. Appellants' instrumentalities used in interstate operations are taxed only to the extent that the same are used in local service. If not so used, they are not taxed at all.

We know of no decision, and are confident counsel can cite none, striking down an occupational tax measured only by intrastate revenues, however intercommingled may be the local and interstate operations of the public service company. On the other hand, such a tax has been in numerous cases sustained by this court.

It is a matter of common knowledge, of course, that the instrumentalities of railroads and telegraph companies in carrying on their intra and interstate activities are no less commingled than are those of interstate telephone companies. To possibly a lesser extent this is likewise true of express and sleeping car companies.

In *Pacific Express Co. v. Seibert,* 142 U. S. 339, a privilege tax measured by 2% of the interstate express company's local revenues was sustained. On the other hand, in the later case of *Barrett v. New York,* 232 U. S. 14, a city ordinance imposing a license tax *directly on an interstate express company's express wagons* used in hauling both interstate and local express was condemned as a burden on interstate commerce.

We may add that in *Osborne v. Florida,* 164 U. S. 650, a lump-sum license tax imposed by cities upon ex-

press companies doing both intra and interstate business was sustained.

In *Pullman Co. v. Adams,* 189 U. S. 420, an excise measured in part by the mileage of line operated by a sleeping car company doing both local and interstate business was sustained. A lump sum excise tax was sustained as to a company doing the same kind of business in *Allen v. Pullman Co.,* 191 U. S. 171.

In *Western Union Tel. Co. v. Alabama,* 132 U. S. 472, and *Ratterman v. Western Union Tel. Co.,* 127 U. S. 411, occupational taxes measured by a percentage of local revenues were sustained as to telegraph companies doing both a local and interstate business, while in *Telegraph Co. v. Texas,* 105 U. S. 460, an excise measured by the number of intrastate messages sent, was sustained as to an interstate company.

And in *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124, *Postal Tel.-Cable Co. v. Richmond,* 249 U. S. 252, and *Postal Tel.-Cable Co. v. Charleston,* 153 U. S. 692, lump sum license taxes imposed by municipalities on interstate telegraph companies for the privilege of doing a local business were sustained.

In *Lehigh Valley R. Co. v. Pennsylvania,* 145 U. S. 192, and the well-considered case of *Ohio River & W. R. Co. v. Dittey,* 232 U. S. 576 (the "Ohio Tax Cases"), occupational taxes measured by a percentage of local revenue, were sustained as to railroad companies doing both intra and interstate business.

In *St. Louis S. Ry. Co. v. Arkansas ex rel. Norwood,* 235 U. S. 350, a privilege tax measured by the proportion of the company's capital stock used within the state,

was sustained as to a foreign railway company doing both intra and interstate business.

In *People ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549, a privilege tax measured by local gross earnings was sustained as to a navigation company doing both local and interstate business.

Is it not, we ask, most remarkable that if counsel's position be sound, the same would not have been successfully urged in some one of these numerous cases?

Were counsel's contention meritorious, no good reason could, we submit, be suggested why the tax should not for the same reason be condemned as to every private enterprise compelled by economic necessity to use the same instrumentalities in doing both a local and interstate business. Yet who would seriously urge that such institutions as Sears-Roebuck or Montgomery Ward should be relieved from the tax on this ground?

Indeed, this court has held directly contrary to appellants' contention.

In *Bowman v. Continental Oil Co.*, 256 U. S. 642, a statute of New Mexico, applicable to distributors of gasoline, imposed an excise of two cents for each gallon sold or used, and an annual license tax of $50.00, payable in advance, for each distributing station, place of business or agency. The law was held invalid as to the $50.00 license tax *on each distributing station* as a direct tax on an interstate instrumentality, the court saying (p. 648):

"No doubt the State might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the State has not done this by any act of legislation. * * *

But the difficulty is that, since *plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce.* * * *." (Italics ours.)

Thus, in the *Bowman* case the contestant established precisely the same defense asserted here, namely, that it necessarily conducted its interstate and domestic commerce in gasoline at the same stations and by the same agencies. Yet this court upheld that part of the law imposing a 2 cent gallonage tax on gasoline in so far as it applied to domestic sales, Your Honors saying (p. 646):

"* * * so far as the excise tax is concerned—imposed as it is upon the sale and use of gasoline according to the number of gallons sold and used—the divisible nature of the subject renders it feasible to control the operation and effect of the tax so as to prevent it from being imposed upon sales in interstate commerce, while allowing the State to enforce it with respect to domestic transactions and with the allowance of an injunction limited accordingly plaintiff will receive the full protection to which it is entitled under the Constitution of the United States."

Examination will show that in all of the cases relied upon by appellants, the tax was imposed on *the interstate instrumentality itself,* and not merely measured by intrastate revenues from such instrumentality, as shown by the following review:

Interstate Busses v. Holyoke Street Ry., 273 U. S. 45:

There the state law complained of by the carrier operating an interstate and intrastate bus line required a license of *all* for-hire motor vehicles and also a certificate of public convenience and necessity issued by the state regulatory body. Neither license nor certificate

were required as to carriage exclusively interstate. The carrier contended that since it carried both interstate and local passengers on the same busses, the state regulation was invalid and unenforcible as to it, as a burden on interstate commerce. But the court said (p. 51):

"It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried efficiently and economically in busses used exclusively for that purpose or that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the Act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employes."

Now, let us assume that the court had there actually found that the bus company was in fact compelled by unavoidable circumstances to use the same busses for the carriage of both interstate and local passengers, and for that reason had held the state law invalid as a burden on interstate commerce, would this case, even on this assumption, lend color to counsel's contention? Obviously not, for the reason that such statutory requirement of a license and certificate of necessity would then have been a *direct burden* on the carrier's interstate business—a regulation of the *instrumentalities themselves,* used by the carrier in its interstate operations. The issuance of licenses and granting of a certificate of necessity being within the discretion of the state officers, the extent of the service rendered would likewise obviously be within the control of such authorities. Such a law, it might plausibly be argued, would directly burden and restrict interstate commerce.

On the contrary, the Washington Occupational Tax

Act in no way interferes with appellants' interstate operations. These companies may carry on their interstate business as they see fit, and are limited in their local operations only to the extent that they must contribute to the support of the state government for the privilege of so doing. Surely, this is not a *direct* burden on interstate commerce forbidden by the commerce clause.

LeLoup v. Port of Mobile, 127 U. S. 640:

In that case the offending city ordinance exacted a license tax from telegraph companies doing business within the city, of $225 per year. The ordinance was applicable to all companies whether engaged in intrastate or interstate business, or both, and imposed a fine for failure to pay the license fee imposed. The court said as to the point involved:

"The question is squarely presented to us, therefore, whether a state, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one state to another and between the United States and foreign countries * * *. We are not prepared to say that this can be done."

There, the burden on interstate commerce was more direct even than had the tax been directly imposed on the interstate instrumentality. It was exacted of the interstate telegraph company itself.

It is interesting to note that in that case the companies were paying in addition to a property tax, "a tax of three-quarters of one per cent on their gross receipts within the state." (p. 645.) *As to this occupational tax, no question was raised.*

Western Union Tel. Co. v. Kansas, 216 U. S. 1:

There the offending law required that the telegraph company pay a given percentage of its authorized capital, whenever and however employed, as a condition to its right to continue to do domestic business in Kansas. It was held that such a tax burdened interstate commerce and taxed property beyond the limits of the State.

It thus appears that the tax here assailed is in no way similar to that imposed under the Kansas law.

Postal Tel.-Cable Co. v. Richmond, 249 U. S. 252:

There a license tax imposed on intrastate business was upheld as against the objection that it imposed a burden on the company's interstate business because the net receipts from its intrastate business were insufficient to pay the tax, and the payment would therefore have to be made from interstate receipts.

Barrett v. New York, 232 U. S. 14:

There an ordinance of the city of New York imposed a license fee, not upon or measured by the intrastate revenues of the express company, but upon the *very instrumentality* used in its interstate business, namely, the express wagons used to haul both kinds of business.

Bowman v. Continental Oil Co., 256 U. S. 642:

The tax there held bad was a license tax of $50 per station imposed on companies distributing gasoline in both domestic and interstate commerce. It was shown that the company necessarily conducted its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies. It was held under those circumstances that the tax was void as a burden on interstate commerce. There again, the tax

was on the interstate instrumentality itself, the gasoline station.

As already noted, this case is a highly presuasive authority in support of the tax here in question.

The distinction between this class of cases and the case at bar is, we submit, clearly pointed out in the recent case of *Cooney v. Mountain States Tel. & Tel. Co.*, — U. S. —, 55 Sup. Ct. 477, 482, 79 L. Ed. 498, 504, where Your Honors said as to a privilege tax made applicable to telephone instruments used in both interstate and intrastate business:

"A privilege or occupation tax which a State imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid. * * * *Barrett v. New York*, 232 U. S. 14, 29, 31. * * * *Bowman v. Continental Oil Co.*, 256 U. S. 642, 647, 648, 65 L. Ed. 1130, 1144, 1145, 41 S. Ct. 606. In the cases of the express companies, the principle was applied to a privilege tax imposed alike with respect to wagons used in the movement of both interstate and intrastate shipments. The local shipments 'were handled in the same vehicles, and by the same men' that were employed in connection with the interstate transportation and it was impracticable to effect a separation. *Barrett v. New York*, 232 U. S. 14, 58 L. Ed. 483, 34 S. Ct. 203, and *Platt v. New York*, 232 U. S. 35, 58 L. Ed. 492, 34 S. Ct. 209, *supra*. In *Bowman v. Continental Oil Co.*, 256 U. S. 642, 65 L. Ed. 1139, 41 S. Ct. 606, supra, the question arose under a statute of New Mexico laying an annual license tax of five dollars for each station distributing gasoline. The court pointed out the distinction between an excise tax on sales of gasoline where, as the subject matter was separable, full protection could be afforded by enjoining enforcement as to the interstate business, and the license tax which with its prohibition fell upon the business as a whole. The Court said: 'But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect

this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void.' The difficulty, continued the Court, 'is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence, it cannot be enforced at all.'

"In the instant case, the tax, being indivisible and indiscriminate in its application, necessarily burdens interstate commerce."

Although we have reviewed only those cases relied upon by appellants' counsel, we are satisfied that all cases in which state or municipal regulatory or tax measures have been held repugnant to the commerce clause are readily distinguishable for the same reason pointed out with respect to the *Holyoke* and *Adams Express* cases. And in no case decided by the highest court, has a state excise tax or ordinance been adjudged offensive to the commerce clause, where imposed for the privilege of doing, and measured by gross income from, interstate business alone.

For the reasons urged, we respectfully submit that the judgments of the State supreme court should in each instance be affirmed.

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,

Attorneys for Appellees.

APPENDIX "A"

Challenge to Trial Court's Findings of Fact and rulings on admissibility of evidence in N. P. Ry. Co. v. State, No. 529.

ASSIGNMENTS NP-3 TO NP-33

Each railroad appellant owns and operates a railroad between Puget Sound and the Great Lakes. As such interstate carrier, each keeps its system accounts as prescribed by the I. C. C. (GN Rec. 110, NP Rec. 79.) The I. C. C., however, does not prescribe rules for the apportionment of system revenues and expenses as between the various states through which such appellants operate. (GN Rec. 110.)

Whether each road's local business is profitable or unprofitable depends, of course, upon the amount of its intrastate revenues less operating expenses and taxes properly chargeable to its intrastate operations.

Such local revenues can obviously be ascertained with reasonable accuracy. But where, as here, these companies' local traffic is handled at the same terminals, and hauled over the same rails, on the same trains, by the same engines, and with the same employes, as their interstate traffic, the extreme difficulty of accurately apportioning these joint operating expenses to local traffic becomes at once apparent. Consequently, any method or methods proposed for so doing, must, we submit, be scrutinized with the utmost caution before the court can set aside a revenue measure on the theory

that the railroad so taxed is in fact losing money on its local business.

It must be remembered that these roads do both an intra and interstate passenger business, and an intra and interstate freight business over the same rails. Consequently, to discover what proportion of their operating expenses should equitably be apportioned to their intrastate traffic, these roads were confronted, among numerous others, with the following problems:

(1) The apportionment of system operating expenses as between freight and passenger service;

(2) The apportionment of each of some hundreds of different items of system passenger expenses and system freight expenses to its Washington operations;

(3) The apportionment of each of these numerous items of passenger and freight expenses (so apportioned to Washington) as between Washington intra and interstate freight and passenger service.

Pursuant to the I. C. C.'s instructions, each railroad divides its system operating expenses under some 197 separate and distinct accounts, and in reporting its operating expenses in Washington to the D. P. W., each company uses these same accounts and account numbers. (See NP Ex. "9," pp. 702-707, NP Rec. 276-281.) These accounts are divided into the following six main divisions of operating expenses:

(1) "Maintenance of Way and Structures"; (2) "Maintenance of Equipment"; (3) "Traffic"; (4) "Transportation — Rail Line"; (5) "Miscellaneous Operations" (which includes such items as dining and buffet service, hotels and restaurants, grain elevators,

stockyards, etc.); and (6) "General" (which includes salaries of officers and clerks, legal expenses, etc.).

Confronted with the problem of isolating its operating expenses incident to local traffic, each road pursued the following course:

It proceeded on the assumption, first, that its operating expenses incident to its operations, both intra and interstate, in the state of Washington, were, as to both freight and passenger traffic, accurately shown in its reports to the D. P. W. for 1933 and previous years.

All intra and interstate passenger service expense as so reported was apportioned as between intra and interstate passenger service (a by the N. P. according to relative intra and interstate passenger miles (a method challenged by the State); and (b) by the G. N., according to the relative intra and interstate passenger revenue (a method not contested by the State).

But the segregation of intrastate freight service expenses did not prove so simple. Intra and interstate freight, it was found, was hauled (as above noted) over the same rails, by the same engines, in the same cars and trains, by the same employes, and by means of the same terminal facilities. Moreover, freight movements were found to involve at least two distinct classes of expenses: (1) line-haul expense and (2) terminal expense. Each road, therefore, undertook to make two special studies each covering a seven-day period—one to determine the average cost of the various elements of terminal or switching expense, and the other to ascertain the line-haul expense incident to local freight traffic. Having purported to find the total line-haul expense for the test week chosen, and the number and character of

the various switching operations incident thereto, and having, in a separate study, purported to find the cost of such various switching operations, it purported to calculate therefrom the total operating expenses incident to the intrastate operations for the test week. The total operating expenses incident to intrastate freight traffic for 1933 were then computed by the two roads in substantially the following manner: As to the N. P., the cost per intrastate revenue ton mile was found for the week, and such cost multiplied by the total intrastate revenue ton miles for the year. The G. N.'s method was somewhat more complicated, but substantially the same in principle.

To the intrastate freight service operating expenses as so computed, each company then added certain other items of claimed expense (questioned by the State), and thus arrived at what each claimed to be its total intrastate operating expenses for 1933. This amount was then deducted from its claimed total operating revenues for the year (a figure likewise contested by the State), and reached what was termed its "net revenue from railway operations." From the latter figure, each road then deducted what it claimed to be the amount of its 1933 taxes properly apportionable to its intrastate operations. To arrive at this amount, each road apportioned its property taxes as between its intra and interstate traffic in the relation which its intrastate revenues bore to Washington's mileage proportion of its revenues from interstate traffic (a method most vigorously challenged by the State).

The figure arrived at by such deduction of taxes and railway operating expenses from its railway operat-

ing revenues is known as "Railway operating income," and it is this figure which the N. P. claims to be determinative of whether the company has made or lost money for the year. (NP Rec. 97.)

The G. N. contended, however, that for the purpose of determining whether it was doing business at a loss, it was entitled to make the following additional deductions: (1) the excess of rental paid and rental received for the use of equipment ("equipment rentals"); and (2) the excess of rentals paid for the use of tracks and other facilities of other carriers over the rentals received for its own facilities from other carriers ("joint facility rent").

These joint facility rents were apportioned by the G. N. to intrastate traffic in the relation which it found all its operating expenses incident to intrastate traffic bore to its total operating expenses for the year within the state (a method protested by the State).

This was a debit item as to the G. N., but a very substantial credit item for the N. P., which possibly explains the difference in the attitude of counsel for the two companies.

Before specifically pointing out the different results reached by the State's and railroads' witnesses, it is thought appropriate at this point to discuss the various Assignments of Error involving the admissibility of evidence and the propriety of the appellant railroad's methods of apportioning operating expenses, taxes, and joint facility rents.

ASSIGNMENT NP-3*

COURT'S ERROR IN PERMITTING N. P.'s WITNESS, PETERSON, TO TESTIFY AS TO RELATIVE AMOUNT OF FREIGHT TRAFFIC DURING TEST WEEK AND ENTIRE YEAR 1933.

The N. P.'s claim that it lost money on its intrastate business for 1933 was based as above noted, on a purported special study of line-haul intrastate freight traffic during the week of October 22, 1933 (NP Rec. 89, *et seq.*), and a special study as to switching operations during the week of June 3, 1934. (NP Rec. 102, *et seq.*) For the purpose of attempting to show that this October test week was representative of the year's business, Peterson testified that a study was made for the purpose of comparing the relative revenues earned and ton miles and car miles operated during October and said test week in October, with the total for the year. (NP Rec. 89.) The State's counsel objected to any testimony as to such study if the same was based on entries in the company's books not introduced in evidence. (NP Rec. 90.) The objection being overruled, the witness testified to such comparative figures, from which he concluded that October was more favorable to both intra and interstate traffic than the average for the year. He further testified that to obtain the figures for October, 1933, he had the auditor of freight receipts make a special compilation, which figures were not reported to the D. P. W. (NP Rec. 90.) The court thereupon denied

*(NP 3) The court erred in permitting the N. P.'s witness, Peterson, to testify over objection that the same was hearsay and that the underlying data was not produced, as to the relative ton miles, revenue and average miles of haul of Washington traffic in October, 1933, and during the week of October 22, 1933, as compared with the entire year, and in refusing to strike such testimony after received. (NP Rec. 90-92.)

the State's motion that the testimony with respect to such comparative figures be stricken as hearsay and as based on the company's books not introduced in evidence. (NP Rec. 91.) The witness then testified over objection of the State's counsel as to the same kind of a comparison made with respect to the week of October 22, 1933, and the entire month of October. (NP Rec. 91-2.)

It would seem that the mere recital of these proceedings is sufficiently convincing that this evidence was not admissible under the hearsay and best evidence rules. Not only were the books not produced, but the individual who, it is claimed, took this data from the original records was not produced as a witness. Neither was this data (for the month and test week) reported to any state department. It would seem that in a proceeding in which a state law is assailed as unconstitutional, the State's counsel should not be left in a position where it is entirely impossible for him to verify figures and conclusions sought to be injected into the record in violation of some of the most fundamental rules of evidence.

The evidence, we submit, was not admissible.

ASSIGNMENT NP-4*

COURT'S ERROR IN RECEIVING IN EVIDENCE N. P.'s EXHIBIT "7" OVER OBJECTION THAT SAME WAS BASED ON HEARSAY AND RECORDS NOT RECEIVED IN EVIDENCE.

N. P. Exhibit "7" consisted of 22 pages of set-ups and computations based upon the special traffic study made during the week of October 22, 1933. (NP Rec. 93-4.)

This exhibit was received in evidence over the State's objection that the same was hearsay, largely based on conclusions and on estimates not made by a qualified expert, and from data taken from books not introduced in evidence and which the State's counsel had no opportunity to examine, and compiled by persons whom the State's counsel was given no opportunity to examine. (NP Rec. 101-2.)

As pointed out under Assignment NP-3, the value of the exhibit hinges on whether or not the test week chosen was representative of the year's traffic. The data bearing upon whether or not this was in fact a representative week was based upon records not received in evidence and the individual who took such data from the company's books was not even called as a witness.

Moreover, it appears that the revenues shown upon the N. P.'s books and reported under oath to the D. P. W. as the revenues received from intrastate freight traffic were not used in the preparation of such exhibit, but a lesser figure resulting from deducting therefrom certain revenues claimed to have been derived from

---

***(NP 4) The court erred in receiving in evidence N. P.'s Exhibit "7" over objection that the same was hearsay, and that the data upon which based was taken from the N. P.'s records not introduced in evidence. (NP 101-2.)**

interstate or foreign shipments and switching although theretofore reported under oath to the D. P. W. as intrastate revenues. Mr. Peterson testified that these deductions were taken from the answers to interrogatories submitted by the N. P. (NP Rec. 94.) This is not the fact. No deductions of any kind were made in the answers to interrogatories *sworn to be true* by the N. P.'s assistant general auditor. (NP Rec. 78-9.) They were taken instead from so-called supplemental answers to interrogatories, verified by Mr. da Ponte, one of the N. P.'s attorneys, who only avers such answers to be true "to the best of affiant's knowledge and belief." (NP Rec. 84.) Da Ponte most certainly would not have been qualified to testify as an accountant. How, then, can his affidavit on mere information and belief be deemed to override the positive sworn statement of the N. P.'s assistant general auditor, and the sworn report to the D. P. W. which the N. P. itself introduced in evidence? (NP Ex. "9," Rec. 284.)

This information was contained in the records at the N. P.'s storage elevators (NP Rec. 151) and there is nothing to show that the same could not have been readily produced.

As shown under Assignment NP-17 (Post, pp. 131-133), the deductions attempted to be made as so-called interstate switching revenue were not shown by any exhibit of any kind although the records from which such showing might have been made were available in the state. (NP Rec. 248.)

Without going into further detail, we submit that, for the reasons shown, N. P.'s Exhibit "7" was not admissible and should be disregarded.

ASSIGNMENT NP-5*

COURT'S ERROR IN FINDING THAT N. P.'s METHOD OF APPORTIONING OPERATING EXPENSES TO ITS WASHINGTON TRAFFIC IS CORRECT.

In support of this assignment we need hardly do more than call attention to the following footnote that appeared in the N. P.'s report to the D. P. W. and tax commission for 1933 and for a number of years theretofore (NP Rec. 117):

"The statements herein either of revenues or expenses attributed to Washington are misleading unless properly understood. They are necessarily based on arbitrary assumptions as follows:

"Revenues contain (first) the revenues of business wholly local within the State and in addition a proportion of interstate revenues determined by the proportion of mileage which each interstate freight shipment or passenger is carried within the State.

"Charges for expenses contain (first) those expenses incurred in each state, and are considered wholly applicable to that state, and in addition some mileage proportion of expenses which cannot be localized. *Apportioning either such revenues or such expenses on a mileage basis is purely arbitrary* and has been adopted for want of any other basis." (Italics ours.)

Asked whether in his opinion the method used for apportioning operating expenses to Washington was the best method that can be used for the purpose of determining the propriety of rates both in this and other states, N. P.'s witness, Mr. Peterson, replied:

"I think each question there will have to depend largely on the local situation. You ask whether or not, for the purpose of determining the propriety of a local

---

*(NP 5) The court erred in finding that the method used by the N. P. in assigning operating expenses to its Washington properties is the method prescribed by the D. P. W., and that the expenses incurred in Washington by the N. P. were correctly stated in Finding VI. (Finding VIII-b, NP Rec. 36-7.)

rate in any one of the states traversed by the N. P. the method used in the apportionment of these operating expenses as I have reported them to the state of Washington is the best method that could be used for the purpose of making such apportionment. I would say no. You ask me why. Well, because the conditions are constantly changing." (NP Rec. 118.)

We can only wonder if Mr. Peterson's replies were not actuated by apprehension that perhaps his answers might be used against him later in some rate hearing in the middle or "bridge" states.

Operating expenses incident to maintenance of way and structures, with the exception of superintendence, insurance, stationery and printing and "general" were practically all, Mr. Peterson testified (NP Rec. 115), directly assignable to Washington.

Mr. Peterson testified further:

"The expenses incident to all terminal services rendered within the state as to both interstate and intrastate traffic are all apportioned directly to the state. In addition to the actual operating expenses that are incident to the terminal services, the N. P. maintains large terminal facilities, such as docks, warehouses, yards, repair shops, depots, and so on in the larger cities of the state of Washington," etc. (NP Rec. 123.)

And see also the testimony of Mr. Lonergan. (NP Rec. 172-3.)

This, we submit, is an important reason why the N. P.'s method of apportioning operating expenses to Washington is indefensible in a case in which its true earnings from local business is in issue. Washington is a terminal state where the long-haul interstate business is assembled and distributed. The intermediate or "bridge" states have no terminal facilities comparable with the terminal states. (NP Rec. 128.) C. R. Lonergan

gan, since 1927 chief of traffic division of the D. P. W., and for 33 years in the N. P.'s employ in various capacities, including that of traveling freight agent, general agent, assistant general freight agent, general freight agent, and assistant to the vice-president in charge of traffic (NP Rec. 172), testified:

"I am familiar with the method of accounting of the N. P. to the state of Washington in accounting for its railway operating expenses. (NP Rec. 173.) * * *

"The objection to the apportionment of all of the expenses connected with the maintenance of way and structures of a terminal state such as Washington as applies to the N. P., to the state of Washington, and the apportionment of none of those expenses whatever to the bridge state is that it does not place the proper charge upon interstate traffic; it places it all where it is expended, in the state of Washington. The terminal facilities located in Washington are of benefit to the traffic traversing the intermediate states, and in my opinion some of that expense should be apportioned to those intermediate states. That should also be true in regard to the maintenance of the terminals in Wisconsin and Minnesota. That should likewise be apportioned to this state and to the intermediate states as well. A portion of the taxes imposed by the state of Washington on the N. P. terminal facilities in Washington should likewise be apportioned to the bridge states, for the same reasons I have stated." (NP Rec. 175-6.)

It follows, of course, that if it is improper that all the terminal expense be assigned to Washington, an unjust maintenance expense burden must fall on intrastate business when such total terminal expenses are divided between Washington intra and interstate business according to relative freight car miles as was used in the N. P.'s special study. (See NP Ex. "7," p. 19, NP Rec. 167.)

We submit that a method of apportionment of expenses between states which the N. P., in its reports,

concedes to be "purely arbitrary" (NP Rec. 117-8), cannot yield results from which the court can set aside a state tax on the theory that this appellant is losing money in the state.

ASSIGNMENTS NP-6 TO NP-8*

COURT'S ERROR IN FINDING THAT STATE CONTENDED THAT N. P. SHOULD CREDIT PART OF ITS MAIL AND EXPRESS REVENUE TO LOCAL BUSINESS (NP AB. 288) AND IN FINDING THAT ANY PART OF SUCH REVENUE SHOULD BE APPORTIONED TO INTRASTATE.

These findings are wholly unsupported by the record. The State's only contention with respect to the N. P.'s revenues from mail and express was in connection with the method adopted by N. P.'s witness Peterson in apportioning passenger operating expenses between intra and interstate traffic. Peterson had prepared an exhibit in which he apportioned such expenses on a relative passenger mileage basis. (NP Ex. "7," p. 11.†)

---

*(NP 6) The court erred in finding that plaintiff contended that the N. P. should credit part of its mail and express revenue to local business, whereas no such contention was in fact made. (Finding XII, NP Rec. 43-4.)

(NP 7) The court erred in finding that $221,359 or any other sum should be added to the N. P.'s intrastate passenger revenue for 1933, for intrastate mail and express, such finding being wholly unsupported by the record. (Findings IX-h, IX-i and IX-j, NP Rec. 40-41.)

(NP 8) The court erred in finding that the N. P.'s intrastate passenger revenue for 1933 was any sum greater than $429,635 as shown by plaintiff's Exhibit "25." (Finding IX-j, NP Rec. 42, 212A.)

†Defendant's Exhibit "7," p. 11, was omitted from the printed Transcript of Record, possibly because of its being inadvertently omitted from the transcript certified to this court by the clerk of the State supreme court. The same has now been properly certified to

The State sought to show on cross-examination (NP Rec. 132-3) that the use of this method wholly ignored the expenses incurred in connection with mail and express traffic, all of the revenues from which were assigned by the N. P. to interstate traffic. (NP Rec. 132.) *There is not a suggestion in the record that counsel for the State ever made the slightest objection to the apportionment of all mail and express revenue to interstate.* Counsel for the N. P. thereafter had Peterson prepare another exhibit apportioning a certain proportion of this mail and express revenue to intrastate based on relative passenger miles (NP Ex. "53," p. 2; NP Rec. 229), but without the slightest basis therefor since Peterson conceded what the court well knows to be the fact, that there is no relation between the proportion of interstate passengers and the proportion of interstate mail and express carried on a given train. Peterson testified:

"You ask if, as a matter of fact, it is impossible to make any apportionment of mail and express. It is, unless you consider that the mail that moves on local

---

this court, but not having been printed as part of the Transcript of Record, it is herein set forth, as follows:

Def.'s Ex. "7," p. 11

NORTHERN PACIFIC RAILWAY COMPANY

State of Washington—Year 1933

Passenger proportion of Operating Expenses, Intrastate.			
Total passenger proportion of Operating Expenses year 1933, Intra and Interstate			$3,142,708
Revenue Passenger miles		%	
Intrastate	18,052,604	47.76	
Interstate	19,749,788	52.24	
	37,802,392	100.00	
Passenger proportion of Operating Expenses as applicable to Intrastate Traffic 47.76% of $3,142,708 or			1,500,957

trains is intrastate mail. That is the only way. That is not used. You ask if you can safely assume that. *No, I can't assume it, it is a false assumption.*" (NP Rec. 141.)

And again:

"You ask how much money the lines in the state of Washington realize from local mail and local express. I don't know. We know there is some, but the matter of division is a matter I can't inform you on." (NP Rec. 209.)

And again asked as to the relation between such revenue and passenger miles, he said:

"You ask if it is not true that I don't know anything about the relation. I can't give an exact opinion of the relationship, no." (NP Rec. 210.)

Counsel for the N. P. was, of course, actuated by no mere spirit of generosity in attempting to slough off a part of this mail and express revenue to intrastate traffic. He realized that whereas the total passenger revenue, intrastate and interstate, for 1933 was only $1,351,082 (Plff.'s Ex. "25," NP Rec. 212a), the operating expenses in connection therewith were $3,142,708 (Plff.'s Ex. "26," NP Rec. 217); *i. e.*, that the reported expenses were 232% of the reported revenues. Consequently the more passenger business he could donate to local operations, the more operating expenses he could pile up on the intrastate side of the ledger.

The offending findings should, we submit, be wholly ignored.

ASSIGNMENTS NP-9 AND NP-10*

COURT'S ERROR IN FINDING THAT N. P.'s PASSENGER SERVICE OPERATING EXPENSES SHOULD BE APPORTIONED TO INTRASTATE ON RELATIVE PASSENGER MILE BASIS INSTEAD OF RELATIVE REVENUE BASIS.

As part of its purported operating expenses, the N. P. made the following charge:

> "Passenger proportion of operating expenses applicable to Intrastate Traffic..... $1,500,957."
> (N. P. Ex. "7," p. 11; NP see footnote *ante*, pp. 105-6.)

This result was reached by apportioning the total intra and interstate operating expenses incident to Washington passenger traffic ($3,142,708) to intrastate traffic on the basis of relative passenger miles hauled in intra and interstate service. In so doing, the N. P.'s witness wholly ignored the obvious fact that its passenger trains are operated largely for the purpose of hauling express and mail, all of the revenues from which are apportioned to its interstate business. (Plff.'s Ex. "25," accts. 106-7, NP Rec. 212a.) It is, of course, clear that the relative number of Washington interstate and intrastate passengers hauled one mile has no logical relation to the amount of mail and express hauled on the passenger trains accommodating passengers. This was virtually conceded by N. P.'s witness Peterson, who prepared the exhibit. (NP Rec. 132-3.)

---

*(NP 9) The court erred in finding that the correct method of apportioning the N. P.'s passenger service operating expenses as between intra and interstate passenger service is in the relation of relative revenue passenger miles, and not relative gross revenues. (Finding IX-i, NP Rec. 41-2.)

(NP 10) The court erred in finding that the N. P.'s expense of intrastate passenger business for 1933 was $1,500,000, or any other sum greater than $999,381 as shown by plaintiff's Exhibit "26." (Finding IX-j, NP Rec. 42.)

Take, for example, the passenger trains operating between Seattle and Grays Harbor. These trains, as we well know, are operated principally to afford mail and express service, yet, according to the N. P.'s theory, if on an average ten revenue passengers were carried on these trains, only one of which was an interstate passenger, then 90% of the operating expenses would be apportioned to the N. P.'s intrastate passenger service, although all of the revenue from mail and express is apportioned to interstate operations. Such an apportionment of expense, is, of course, wholly indefensible. Expenses must logically be apportioned as between intra and interstate operations with reference to the relative amount of interstate and intrastate business handled, and *since relative revenues is our only available data* as to the relative amount of intra and interstate passenger train business done (including mail, express, milk and other activities; see Plff.'s Ex. "25"; NP Rec. 212a) it is, we submit, impossible to conceive of how these expenses can logically be apportioned on any basis other than relative revenues. And were further justification for our position necessary, we need but turn to the G. N. exhibits, where we find the G. N. apportioning passenger operating expenses by precisely the method we urge here. To quote (G. N. Ex. "11," p. 7; GN Rec. 265-6):

"2. PASSENGER PROPORTION OF OPERATING EXPENSES—INTRASTATE:

"(a) Passenger proportion of operating revenues Intrastate and Interstate	$1,540,264
"(b) Passenger proportion of operating expenses—Interstate and Intrastate—as reported to W. D. P. W.	2,481,136
"(c) Operating Ratio	161.09%*
"(d) Intrastate Operating Revenues Passenger proportion	551,845

"(e) Intrastate Operating Expenses—Passenger proportion (d) × (c) ..... 888,967"

*Arrived at by dividing (b) by (a)—expenses by revenues.

Thus, in making its apportionment, the G. N. first finds the ratio of passenger operating expenses, both interstate and intrastate, to passenger operating revenues, both interstate and intrastate, and applies that ratio (161.09%) to the total intrastate passenger operating revenues to ascertain the passenger service proportion of intrastate operating expenses. In other words, it apportions its operating expenses as between intra and interstate passenger service on the basis of relative operating revenues from the two classes of service. That there may be no mistake, let us follow the G. N.'s method in the N. P. case:

"PASSENGER PROPORTION OF OPERATING EXPENSES—INTRASTATE:

"(a) Passenger proportion of operating revenues intrastate and interstate (Plff's Ex. "25"; NP Rec. 212a)	$1,351,082
"(b) Passenger proportion of operating expenses—Interstate and Intrastate (N. P. Ex. "7," p. 11; see footnote, *ante*, pp. 105-6)	3,142,708
"(c) Operating ratio (b ÷ a)	232.61%
"(d) Intrastate operating revenues, Passenger proportion (N. P. Ex. "7," p. 7, 1st figure in 5th line; Plff's Ex. "25," total of 2nd vertical column; NP Rec. 212a.)	429,635
"(e) Intrastate Operating Expenses—Passenger proportion ("d" × "c")	999,374"

And this figure, it will be observed, is just $7 less than the figure reached by plaintiff's witness, Manschreck, who followed the method here urged by plaintiff. (See Plff.'s Ex. "26," NP Rec. 213.)

But as shown, the N. P. charged $1,500,957 as its 1933 intrastate passenger operating expenses, or $501,-

576 more than can be reached on any reasonable theory. (N. P. Ex. "7," p. 11, see footnote, *ante* pp. 105-6.)

ASSIGNMENTS NP-11 AND GN-10*

COURT'S ERROR IN FINDING THAT THE MILEAGE PRORATE DIVISION OF REVENUES FROM INTERSTATE SHIPMENTS AS BETWEEN STATES IS THE CORRECT METHOD OF APPORTIONING SUCH REVENUES TO WASHINGTON.

Both the N. P. (N. P. Ex. "7," p. 7; NP Rec. 161) and the G. N. (G. N. Ex. "11," pp. "9," and "C;" GN Rec. 256, 267-8) contend that the ad valorem taxes on their respective operating properties in Washington should be apportioned between intrastate and interstate traffic in that proportion which the revenues from intrastate traffic bear to the revenues from interstate traffic. It is further conceded that for the purpose of determining the amount of such interstate revenue the total revenue from each interstate shipment is apportioned to Washington in that proportion which the miles of haul in Washington bear to the total mileage of haul as to each individual shipment. (NP Rec. 118-9; GN Rec. 127). The State contends in each case that this method of apportionment of taxes is improper, for the reason, if for none other, that this mileage prorate division, while it may do for purely statistical purposes, is

*(NP 11) The court erred in finding that the mileage prorate division of revenues from interstate shipments is the method prescribed by the D. P. W. and the I. C. C., and is the correct method for apportioning such revenues to Washington. (Finding VIII-a, NP Rec. 36.)

(GN 10) The court erred in finding that in the apportionment of operating revenues received from interstate freight business to the G. N.'s Washington operating properties, such properties were not entitled to more than a mileage prorate of such interstate freight revenues. (Finding VII-e, GN Rec. 65-7.)

purely arbitrary and is unfair to a terminal state such as Washington, and for this reason: The rate exacted for handling traffic involves at least two services, (1) the line-haul service, and (2) the terminal service. The terminal service is just as essential as the line-haul service, and falls most heavily on terminal states such as Washington where a large part of the profitable long-haul business originates and terminates. The mileage prorate is computed on a station-to-station movement only (GN Rec. 146; NP Rec. 120), and consequently, such apportionment method wholly ignores both the terminal service rendered and terminal expenses incurred in the movement. Thus, Mr. Peterson testifying for the N. P., said:

"The company furnishes a large amount of service in connection with the movement of that traffic (interstate) which is included in the tariff aside from the purely line haul. * * * I will say that it includes the large expenses in connection with switching, also handling of freight at terminals for both classes of traffic, both intrastate and interstate. * * * The assembling of the cars into the originating trains would involve some switching, none of which would be reflected in the mileage prorate division. The mileage prorate would include the line haul only." (NP Rec. 120-121.)

Mr. Burn of the G. N. testified substantially to the same effect. (GN Rec. 146-7.)

It is rather startling to compare the court's findings that the mileage prorate is "the method prescribed by the Department of Public Works" (NP Rec. 35), with the following testimony of Mr. Lonergan, since 1927 chief of the D. P. W.'s traffic division (NP Rec. 172):

"You ask me to state whether or not in my opinion such method of apportioning revenues followed by the N. P. is a proper method of apportioning revenues to

the state of Washington for the purpose of determining the true net railway revenues in the state. I would say not for ratemaking purposes. (NP Rec. 174.) * * *

"You ask whether it is my opinion that the interstate revenues should be apportioned to Washington on a mileage prorate. No. You ask why not. Because that division does not allow for the terminal service. In other words, if the expenses are to be apportioned locally, to the terminal state, then a greater proportion of the earnings or the revenues should be apportioned to that state. You should either apportion a certain proportion of the expenses connected with this terminal service to the remainder of the states, or you should apportion a greater percentage of the interstate revenues to the state to equalize those expenses. (NP Rec. 176.) * * *

"The rate is made to compensate for the haulage over the mountains. It is also made to cover cost of terminal services. The terminal service charge is absorbed in the line haul rate. The terminal services and the line haul service is all included as part of the structure of the service, the total service, to be paid for by the imposition of this tariff. If the computation of mileage is from station to station, the terminal service is in no way whatever reflected by the apportionment on a mileage prorate. It wholly ignores it and considers only the mileage of haul." (NP Rec. 182.)

"It is," Mr. Lonergan said, "a matter of common knowledge that these figures that are filed in the annual reports of the railroads covering their state revenues and expenses are incorrect." (NP Rec. 175.) With respect to the recognition of this principle by the D. P. W., Mr. Lonergan said:

"In all consideration of intrastate rates we have always taken into account these arbitrary assumptions that are contained in the state figures, and to quite an extent have disregarded them. That is, the mileage prorate which gives the state of North Dakota or Montana the same revenue per mile as it does in the state of Washington without regard to the terminal services, the absorption of competitive switching on interstate busi-

ness, and many other factors which distort the figures." (NP Rec. 175.)

And we find the D. P. W. making the following finding of fact in 1930 in a proceeding in which the G. N. and N. P. were parties:

"All of the operating cost figures are based upon the arbitrary allocation of revenues and expenses now employed under which interstate revenues are apportioned to states on basis of a mileage pro-rate. This disregards the terminal proportion of the revenue and gives the intermediate states as great a share in proportion to mileage as the states in which the traffic originates and terminates. It gives no consideration to relative costs in different states as constituting any measure of relative revenue which should be apportioned to such states. Non-revenue freight or company material is a large factor in the operating costs in Washington, but under the existing plan of localizing expenses to the state in which they occur, the costs of handling company freight is not distributed in proportion to their responsibility for the expenses. Absorption of competitive switching charges on interstate traffic and many other factors also contribute to distort the facts." (Plf.'s Ex. "24," NP Rec. 211-2.)

In this connection it is also important to note that in the division of revenues as between connecting carriers on through shipments, the originating and terminating carrier is commonly allowed far more than a mileage prorate division. The terminal line usually receives a minimum of 25% of the through rate with the local rate as the maximum.

Asked whether there was any general principle governing the apportionment of interline revenue as between two terminal lines and an intermediate line, Mr. Edmunds, assistant traffic manager of the Union Pacific System (NP Rec. 199; GN Rec. 247) testified:

"The basis most generally used has been a mileage prorate with a minimum of 25% to any line, whether the terminal lines or the intermediate line. The local rate is the maximum generally, yes. It might be less than 25%, depending on the agreement of the parties. These divisions would apply both west and east, to traffic going in both directions. As a rule the short line would get the 25% minimum whether it received the traffic or originated the traffic." (NP Rec. 201; GN Rec. 248.)

The Oregon-Washington ("O-W") operates between Portland and Huntington (on the Idaho-Oregon boundary); the Oregon Short Line ("O. S. L."), between Huntington and Granger, Wyoming; and the Union Pacific ("U. P.") between Granger and Omaha. Huntington corresponds roughly with the location of Spokane on the G. N. and N. P., and Omaha is approximately the same distance from Chicago as St. Paul. 100% of the O-W stock is owned by the O. S. L. and approximately all of the O. S. L. stock is owned by the U. P. On a shipment between Portland and Omaha the O. W. receives 35%, the O. S. L. 27% and the U. P. 38% of the through rate. On the same haul, the mileage prorate would give the O-W 22.05%, the O. S. L. 30.44% and the U. P. 47.51%. (NP Rec. 199-203; GN Rec. 247-50.)

A graph is set forth in the record (NP Rec. 228a; GN Rec. 250a) comparing the divisions as compared with the mileage prorate division between the O-W and the Milwaukee and G. N. east and west of Spokane, and as between the N. P. and O-W east and west of Wallula.

On shipments between the points on the Southern Pacific ("S. P.") and Omaha via the U. P. system, the S. P. receives about twice its maximum mileage prorate of the West of Missouri River revenue. (GN Rec. 252.)

The through rate on lumber from Longview points

to Omaha is 62.5 cents. Of this, the railroad there (before being absorbed by other roads) received 3½ cents for a 5-mile or 23-mile haul. (GN Rec. 253.)

A striking illustration of the inadequacy of the mileage prorate as to terminal states exists in the cases of Oregon and Wisconsin, as to which Mr. Peterson testified:

"The N. P. reports to the regulatory bodies, of Oregon and Wisconsin: The states of Wisconsin and Oregon have a considerably higher expense because of the short mileage in the state and the terminal operations in that state. In making its reports to Wisconsin and Oregon regulatory bodies it uses the same basis of allocation to the state as it did the state of Washington. The net revenue from operation in the state shows a deficit for the year 1933 for Wisconsin and Oregon. I know that has been true for a good many years. No, I would not say that the lines in Oregon and Wisconsin are not a valuable part of the N. P. system. You ask if that means that the N. P. is not actually making money from its railway operations in Wisconsin and Oregon. We are making money probably from the operations as a whole, but not necessarily from the operations in that state. It does not mean that the N. P. system would profit by having the portion of its system located in Oregon and Wisconsin eliminated." (NP Rec. 121-2.)

It is interesting to note the trial court finds that the mileage prorate method is "the method prescribed by the • • • Interstate Commerce Commission." (NP Rec. 36.) Let us quote from a few of the I. C. C. decisions:

"Fundamentally, this statement proceeds on what we consider to be an erroneous theory; that is, that certain portions of a system of railroad can be segregated from the whole and the expenses and earnings be charged and credited to such portions on a mileage-prorata basis." *Investigation of Advances in Rates on Grain*, 21 I. C. C. 22, 25-26.

"It is to be expected that an originating division would apparently not be self-supporting any more than would the average large terminal in a city. To make them self-supporting it is necessary to assign to the originating division and to the terminal a sufficient portion of the revenues to more than offset the expenses. This would have to be an arbitrary sum. It could hardly be accomplished by the ordinary method of prorating the revenue or dividing it under a block-mileage system." *Louisville & Nashville R. R. Coal and Coke Rates*, 26 I. C. C. 20, 29.

"The apportionments of revenues, expenses, and other income items between the line of the United States and Canada and the lines of the Grand Trunk in Canada are in many instances made upon bases of road mileage, car-mileage, or train mileage. We have held that a portion of a railroad system can not be separated from the whole, and the earnings and expenses charged, and credited to such portion on a mileage prorate basis. *Investigation of Advances in Rates on Grain*, 21 I. C. C. 22, 25; *Louisville & Nashville R. R. Coal and Coke Rates*, 26 I. C. C. 20, 30. It is well known that a mileage prorate of transportation revenues or expenses will in many cases result in a showing of deficits for branch lines of light traffic density, notwithstanding the showing for the system as a whole is a substantial profit." *Deficit Status of U. S. & Canada R. R.*, 76 I. C. C. 455, 457-8.

It is to be particularly noted that these companies themselves each year set out in an impressive foot note in their reports to the D. P. W.:

"Apportioning either such revenues or such expenses on a mileage basis is purely arbitrary and has been adopted for want of any other basis." (NP Ab. 82.)

"The figures entered as 'revenues earned within the State on interstate traffic,' are compiled upon a straight mileage basis in accordance with order of the Railroad Commission and are given under protest for the reason that *this Company claims that basis does not accurately reflect the revenues earned within the state of Wash-*

ington from such traffic.'' (GN Rec. 147-8.) (Italics ours.)

We respectfully submit that by apportioning *ad valorem* taxes on the basis of the relation of intrastate earnings which are known, and interstate "earnings" apportioned to Washington, a terminal state, on this mileage prorate basis, the court would by these companies' own admissions, be resorting to most arbitrary and erroneous assumptions for the purpose of defeating the occupational tax. This, we are confident, the court will not do.

ASSIGNMENTS NP-12 TO NP-14*

COURT'S ERROR IN IGNORING TAXES PAID BY N. P.'s TENANT LINES, AND HOLDING THAT TAXES SHOULD BE APPORTIONED BETWEEN INTRA AND INTERSTATE TRAFFIC ON RELATIVE REVENUE BASIS.

The N. P.'s first error was in attempting to apportion the entire amount of *ad valorem* taxes payable on its Washington operating property ($2,005,015) to its intra and interstate operations (N. P. Ex. "7," p. 7; NP Rec. 161) whereas $227,600.74 of these taxes were in fact paid by its tenant companies. (Plff.'s Ex. "28;" NP Rec. 214.) Thus, in reality, the N. P. paid in taxes on its operating properties only $2,005,015 less $227,601, or $1,777,414.

Having determined the correct figures, how should these taxes be apportioned as between the N. P.'s Washington intrastate and interstate freight operations? On a relative revenue basis? We submit not. If A and B have the joint use of a private roadway and A uses the same four times as much as B, clearly A should equitably pay 4/5ths of the taxes payable by A and B jointly. And it is immaterial, we submit, whether B receives pro-

---

*(NP 12) The court erred in finding that the 1933 ad valorem taxes on the N. P.'s Washington operating property should not be apportioned as between intrastate and interstate traffic on a relative use (car mileage) basis, but instead on a relative revenue basis, with interstate freight revenues apportioned to Washington on a mileage prorate basis. (Finding XII, NP Rec. 43-4.)

(NP 13) The court erred in finding that in computing the ad valorem taxes properly apportionable to the N. P.'s intrastate traffic for 1933, credit should not be allowed such traffic for the taxes contributed by the N. P.'s tenant lines. (Finding XII, NP Ab. Rec. 43-4.)

(NP 14) The court erred in finding that the N. P.'s intrastate traffic for 1933 should be charged with ad valorem taxes paid in the sum of $876,083 or any greater sum than $678,662. (Finding XI-b, NP Ab. Rec. 43, 215-6.)

portionally more gross revenue from his use of such roadway than does A. To support our contention, we need fortunately go no further than the N. P.'s own agreements with the G. N. and O. W. for the joint use of the N. P.'s tracks between Portland and Seattle. The N. P. owns these tracks but the G. N. and O-W. use them in their railway operations jointly with the N. P. For this privilege the G. N. and O-W. pay the N. P. an annual rental based on a certain percentage of the cost of construction plus betterments, and in addition, contribute a certain proportion of the taxes paid on this portion of the N. P.'s road. Now how are those taxes apportioned as between the N. P., G. N. and O-W.? According to the relative amount of gross revenue received by each carrier? No. *The taxes are apportioned according to the relative amount of use made of such property by the respective roads.* To quote from the O-W. agreement (p. 13, Sec. 2):

"The Oregon Company (O-W.) also will pay such pro rata proportion of the cost actually incurred by the Pacific Company (N. P.) in the maintenance and operation of the Point Defiance Line (which cost shall include insurance and *taxes* and a just sum to cover cost of superintendence and management) as the number of miles on the said railway or any part thereof run by engines and cars in its trains bears to the whole number of miles run by engines and cars in trains of all the parties using the same or any part thereof." (NP Rec. 156.)

And further quoting from the G. N. agreement (p. 6, sec. 2):

"The Northern Company (G. N.) will also pay such pro rata proportion of the cost actually incurred by the Pacific Company (N. P.) in the maintenance and operation of the property (which cost shall include insurance and taxes and a just sum to cover cost of superinten-

dence and management) as the number of miles on said railway or any part thereof run by engines and cars in its trains bears to the whole number of miles run by engines and cars in trains of all the parties using the same or any part thereof." (NP Rec. 131.)

This, then, is the way these litigants by their own, voluntary agreements apportion taxes as between themselves. Nor have they offered any valid reason for apportioning taxes on a different basis as between intrastate and interstate operations. It is to be noted that no distinction is made in these joint user agreements as between passenger and freight train cars.

Nor are we without authority. In the *Minnesota Rate Cases,* 230 U. S. 352, certain railroad companies including the N. P. and G. N. were contending that certain intrastate rates fixed by the Minnesota regulatory authority were confiscatory, as not yielding a fair return upon that portion of the complaining carriers' operating property used in intrastate operations. Having established the value of all of their respective Minnesota operating properties used in both interstate and intrastate operations, they then attempted to apportion such value as between their interstate and intrastate operations on the basis of relative gross revenues received in these two classes of service. But in condemning this method the court said (230 U. S. p. 458 *et seq.*):

"The apportionment of the value of the property, as found, between the interstate and intrastate business, was made upon the basis of the gross revenue derived from each. This is a simple method, easily applied, and for that reason has been repeatedly used. It has not, however, been approved by this court, and its correctness is now challenged. * * *

"In support of this method, it is said that a division of the value of the property according to gross

earnings is a division according to the 'value of the use,' and therefore proper. But it would seem to be clear that the value of the use is not shown by *gross* earnings. The gross earnings may be consumed by expenses, leaving little or no profit. * * *

"When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business, and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments respectively, the property exclusively used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common. It is suggested that other methods of calculation would be equally unfavorable to the state rates but this we cannot assume.

"It is sufficient to say that the method here adopted is not of a character to justify the court in basing upon it a finding that the rates are confiscatory."

In brief, the Supreme Court holds that the value of operating property should be apportioned as between such interstate and intrastate business in proportion to the *extent* of the use made of such property in each business, and not in proportion to the relative gross revenue derived therefrom.

And since taxes are based upon property *values* it must logically follow that the relative amount of taxes chargeable to each of two kinds of business jointly utilizing the same property must be determined by the same

method; namely, by the *relative extent of use* made of the joint property in such two classes of business—not by the relative gross revenues derived therefrom.

The N. P., as already shown, has used the gross revenues method condemned by the Supreme Court. The State, on the contrary, has apportioned taxes on the basis of relative extent of use, the method approved by the Supreme Court.

Thus, in Plaintiff's Exhibit "29" (NP Rec. 215-6) Mr. Manschreck first finds the ratio of total state *passenger* car and locomotive mileage to total state *freight and passenger* car and locomotive mileage to be 15.91%. He therefore apportions 15.91% of the total N. P.'s taxes to passenger service and the remainder (84.09%) to freight service. The ratio of interstate freight car mileage to total of intra and interstate freight car mileage for the test period was found by defendant to be 42.30%. (N. P. Ex. "7," p. 13; NP Rec. 164.) Manschreck therefore apportions 42.30% of the total taxes apportionable to state intra and interstate freight service to intrastate freight service, or $632,227. There being no other factor available, Manschreck finds the ratio of intrastate passenger revenue to the total intra and interstate passenger revenue and apportions to intrastate passenger operations that percentage (31.80%) of the total taxes apportionable to both intra and interstate passenger service, or $89,926, making a total of $722,153. This added to the $13,236 regulatory license tax makes a grand total of $735,389 apportionable to Washington intrastate operations. The taxes apportioned to this service under the N. P.'s calculations, are $889,319, or $153,930 less than the maximum apportionable by the proper method used by Mr. Manschreck.

But if the N. P. is to be allowed to transfer $369,606 reported under oath to the D. P. W. as intrastate freight revenue, to interstate freight revenue, then obviously Mr. Manschreck has apportioned too much taxes to intrastate freight traffic. Mr. Manschreck's figures were based on the assumption that all of the freight business reported as intrastate was in fact intrastate. The total freight revenues reported by the N. P. as intrastate were $5,372,895 (Plff.'s Ex. "25," NP Rec. 212a, 1st vertical column). The N. P. contends (erroneously as we will show later) that $369,606, of this revenue was in fact revenue derived from shipments for export and therefore foreign and not intrastate traffic. Since we are not furnished with data as to the corresponding number of freight car miles involved, we are compelled to assume that a reduction should be made corresponding with the revenue involved, *i. e.*, in the relation of $369,606 to $5,372,895, or 6.879%. This percentage of $632,227 (the taxes Manschreck found should be apportioned to intrastate freight service) is $43,491. Deducting this amount from the grand total of taxes which Manschreck found should be apportioned to intrastate freight and passenger traffic, we have $735,389 less $43,491, or $691,898, or $197,421 less than the $889,319 reached by the N. P.'s calculations.

It will be observed in making this modified calculation we have ignored the $161,031 which the N. P. contended should be transferred from its reported intrastate switching revenue, to interstate. (NP Ex. "7," p. 4; NP Rec. 159-160.)

ASSIGNMENTS NP-15 AND GN-13*.

COURT'S ERROR IN FINDING THAT PENSIONS PAID WERE PROPERLY CHARGEABLE AS PART OF THE N. P.'s AND G. N.'s OPERATING EXPENSES.

It was shown that if "pensions" were eliminated as an item of operating expense, the operating expenses incident to intrastate traffic would be reduced by at least $103,471 in the case of the N. P. (Plff.'s Ex. "37," NP Rec. 231, Test. of Manschreck, NP Rec. 191-2), and $22,066 in the case of the G. N. (Plff.'s Ex. "25," GN Rec. 233-4.)

Mr. Manschreck's computation as to the G. N. was based on the G. N.'s "book showing," *i. e.*, the assumption that all its operating revenues reported as intrastate were in fact intrastate. If, however, the court finds it to be established by competent evidence that a certain amount of the G. N.'s revenues reported as intrastate, should be transferred to interstate, then its intrastate freight revenue for 1933 would be $1,622,644 (G. N. Ex. "11," p. "B," GN Rec. 255), instead of $2,753,703 as shown by its books and sworn report to the D. P. W. (GN Ex. "11," p. 11, GN Rec. 268a), and this item of $22,066 would have to be reduced to an amount represented by the proportion which $1,622,644 bears to

---

*(NP 15) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "General Expenses," for the week of October 22, 1933, was $5,945.44, or was any sum in excess of $4,407.89, which error was the result of the court including "pensions" as an item of operating expenses. (Finding IX-e, NP Rec. 39, 221.)

(GN-13) The court erred in finding that pensions paid were properly chargeable as part of the G. N.'s operating expenses for the purpose of determining its railway operating income for 1933. (Finding VII-j, GN Rec. 69.)

$2,753,703, or 58.92%, making the amount 58.92% of $22,066, or $13,001 only.

However commendable the practice of these roads of paying pensions, we cannot believe it a good defense in an action for a legitimate tax, that the company elects to pay pensions to its ex-employes and hence cannot pay the contested tax without drawing on its interstate earnings.

Mr. Manschreck testified in the G. N. case:

"My thought on the pensions was that pensions are a donation by the owners of this property to its former employees, and would be in the same class as paying dividends on this stock. I think pensions should be charged to profit and loss, and not to operating expenses. I think this is a gift or a grant. I don't think it is deferred compensation to those employees." (GN Rec. 224.)

In Railroad Retirement Board v. Alton R. Co., — U. S. —, 55 Sup. Ct. 758, 770-773, the court said in holding invalid the Federal Compulsory Retirement and Pension Act:

"We think it cannot be denied and indeed, is in effect admitted, that the sole reliance of the petitioners is upon the theory that contentment and assurance of security are the major purposes of the act. We cannot agree that these ends if dictated by statute, and not voluntarily extended by the employer, encourage loyalty and continuity of service. We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the states, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment

of the railroads' duty to serve the public in interstate transportation."

If the payment of pensions to superannuated employees is not a duty which regulatory bodies may lawfully impose on public service companies, does it not logically follow that if such companies, voluntarily elect to pay such pensions, they are not at liberty to set up such payments as claims against their gross operating revenues superior to the right of the sovereign authority to collect its taxes? We submit not, Your Honors.

ASSIGNMENT NP-16*

COURT'S ERROR IN FINDING THAT $530,637, OR ANY OTHER SUM WHICH WAS REPORTED BY THE N. P. TO THE D. P. W. FOR 1933 AS INTRASTATE FREIGHT REVENUE WAS IN FACT INTERSTATE REVENUE.

The first item on page 4, NP's Ex. "7" (Ab. NP Rec. 159) is as follows:

> "Operating revenues State of Washington Intrastate as reported to Department of Public Works.....:...$5,802,530."

There is then deducted from this amount the sum of $530,637 as "deduction account of amount as included in connection with foreign commerce $369,606," and "deduction account of switching in connection with interstate traffic included as intrastate, $161,031."

There is, we submit, nothing in the record justifying these deductions. These revenues, as indicated by the exhibit itself, were reported to the D. P. W. intra-

*(NP 16) The court erred in finding that $530,637, or any other sum reported by the N. P. to the D. P. W. for 1933 as intrastate freight revenue was in fact interstate revenue. (Finding X, NP Rec. 42-3.)

state revenues. That this was true was likewise testified to by Mr. Peterson, defendant's statistician. (Plff.'s Ex. "25," NP Rec. 182, 212a.)

Counsel for the N. P. seem to justify these deductions by certain purported supplemental answers to interrogatories filed in the cause by this appellant's counsel. But this, we submit, is no justification whatever. The N. P. filed with the D. P. W. its report for 1933, sworn to be the Assistant General Auditor to the following effect:

"That it is his duty to have supervision over the books of account of the respondent and to control the manner in which such books are kept; that he knows that such books have, during the period covered by the foregoing report, been kept in good faith in accordance with the accounting and other orders of the Interstate Commerce Commission, effective during the said period; that he has carefully examined the said report and to the best of his knowledge and belief the entries contained in the said report have, so far as they relate to matters of accounts, been accurately taken from the said books of account and are in exact accordance therewith; that he believes that all other statements of fact contained in the said report are true, and that the said report is a correct and complete statement of the business and affairs of the above-named respondent during the period of time from and including January 1, 1933, to and including December 31, 1933." (N. P. Ex. "9," NP Rec. 284.)

Such report was also sworn to by the company's vice president to the effect that he has carefully examined the foregoing report; that he believes that all statements of fact contained therein are true, and that the said report is a correct and complete statement of the business and affairs of the N. P. and the operations of its property during the year 1933. (NP Ex. "9," p. 915, NP Rec. 284.)

On page 700 of this report (NP Rec. 275) the revenues of the N. P. on intrastate traffic are shown to have been $5,802,530.12.

In the N. P.'s answers to interrogatories the revenues of the N. P. on intrastate traffic are set forth for each of the months of August, September, October, November, and December, 1933, both by accounts and in the total amounts, and such answers are verified by W. C. Pinger, defendant's assistant general auditor, who avers:

"That he prepared the foregoing answers to the interrogatories propounded by plaintiff and made the same for and in behalf of said Northern Pacific Railway Company; that said answers are to affiant's knowledge true and correct." (Plff.'s Ex. "2," NP Rec. 78-9.)

Then on June 27, 1934, a paper is filed denominated "Defendant's Second Supplemental Answers to Interrogatories" in which it is stated that certain amounts should be deducted from the amounts shown under account No. 101 in the original answers to interrogatories. But these so-called "supplemental answers" are merely verified by L. D. da Ponte, attorney for defendant, to the effect that the same are "true and correct to the best of affiant's knowledge and belief." (NP Rec. 84.) Moreover, not a word is said in these so-called supplemental answers as to switching in connection with interstate traffic.

We have then, on the one side, the N. P.'s report to the D. P. W. sworn to by the N. P.'s assistant general auditor and vice-president that the N. P.'s intrastate revenues for 1933 were $5,802,530, and the answers to interrogatories sworn to by the N. P.'s assistant general auditor that the same are *"to affiant's knowledge,*

true and correct," and on the other, the affidavit of one of the N. P.'s attorneys that to the best of his knowledge and belief, the original answers to interrogatories are erroneous in certain particulars. Whom should the court believe? The sworn report of the company's vice-president and assistant general auditor who are in a position to know, and the sworn statement of the company's assistant general auditor that the answers to interrogatories are correct, or the attempted controverting statement of counsel sworn to merely on information and belief with no averment that he has knowledge of the facts? Had counsel attempted to testify at the trial as to the matters set forth in his affidavit he of course could not have qualified as such witness. How, then, can it be said that his written statement sworn to merely on information and belief, can change the effect of the assistant general auditor's sworn statement? We submit that Mr. daPonte's statement should be utterly disregarded, and the company's report and the original answers to interrogatories should be accepted as undisputed evidence.

See 32 C. J. 354, 357;
Lake Shore & M. S. Ry. Co. v. Felton (C. C. A.), 103 F. 227;
Behre v. Anchor Ins. Co. (C. C. A.), 297 Fed. 986;
Pine-Coffin v. Erie R. Co., 69 N. Y. S. 333.

Unless Mr. daPonte's affidavit made on mere information and belief be held to overcome the positive sworn statement of the company's assistant general auditor, and the company's verified report to the state regulatory body, then N. P.'s Exhibit "7," p. 4 (NP Rec. 159-160), is erroneous and $530,637 must be added to the company's intrastate revenues for 1933.

But a corresponding amount of operating expenses must also be added. The relation of operating expenses to revenues is shown by N. P.'s Exhibit "7," p. 4, to be 68.06%. Consequently .6806 × $530,637 or $361,152 must be added to operating expenses, and the difference of $169,485 should be added to the "net revenue from railway operation" as shown in line "3," NP Ex. "7," p. 1, NP Rec. 159-160.)

ASSIGNMENT NP-17*

COURT'S ERROR IN REFUSING TO STRIKE AVERMENT IN PETERSON AFFIDAVIT THAT AMOUNT OF N. P.'s INTERSTATE SWITCHING REVENUE FOR 1933 WAS $207,965.

On November 13, 1934, the court, on the State's motion, reopened the case for the purpose of permitting it to introduce further evidence as to the matters set forth in Manschreck's affidavit (NP Rec. 232-241), and on November 16, 1934, the date set for such hearing, Manschreck's affidavit was received in lieu of his testimony, it being stipulated that the N. P. might file an affidavit in rebuttal thereto, but that the State might have the right to cross-examine such witness if it so desired. (NP Rec. 251.) Nothing was set forth in the Manschreck affidavit except a criticism of the calculations made, and conclusions reached, by Peterson in N. P. Exhibit "7," based on the special studies for the weeks of October 22, 1933, and June 3, 1934. (NP Rec. 232-241.)

---

*(NP 17) The court erred in refusing to strike paragraph 7 of Peterson's affidavit to the effect that the amount of the N. P.'s interstate switching revenue for 1933 was $207,965 because not based on any record evidence before the court (NP Rec. 248-9.)

On November 26, 1934, the N. P. offered in evidence the affidavit of E. V. Peterson which was received in evidence over the State's said objection. (NP Rec. 242.)

In paragraph 7 of the Peterson affidavit above referred to it is stated that an analysis had been made for the year 1933 showing that the amount of the N. P.'s interstate switching revenue for 1933 was $207,965. (NP Rec. 245.) It will be recalled that this switching revenue was all reported to the D. P. W. as intrastate revenue (NP Rec. 132), but in the N. P.'s studies the N. P. attempted to transfer a large part ($161,031) from intrastate to interstate. (N. P. Ex. "7," p. 4; NP Rec. 159-160.)

With regard to this switching revenue, Peterson testified:

"You ask if it is not a fact that there is no record in the state of Washington anywhere, that would show these facts. No, the only report we furnished to the D. P. W. for 1933 was in Ex. '9,' the annual report, in which it showed the entire amount of switching revenue. It was all shown as intrastate. That was sworn to by our officers and filed. It was made March 4, 1934, and was made on the same basis of previous years. The record in the state would be available at the various stations. You ask if there is any record here to show the change in our book accounts. No, there is no record here. There is no record offered in exhibits of any kind that would tend to show whether these were interstate or intrastate movements. I couldn't do that without going to our records scattered around throughout different parts of the state or our records in St. Paul." (NP Rec. 248.)

The State's counsel thereupon moved to strike paragraph 7 as not based on anything shown of record, and because based on record evidence not produced, which motion was denied. (NP Rec. 248-9.)

For the reasons pointed out in the motion to strike we respectfully submit that this portion of the Peterson affidavit should have been stricken and the same disregarded.

ASSIGNMENT NP-18*

COURT'S ERROR IN FINDING THAT "TRAFFIC" EXPENSE SHOULD PROPERLY BE APPORTIONED BETWEEN INTRA AND INTERSTATE OPERATIONS ON A RELATIVE TONNAGE BASIS INSTEAD OF A RELATIVE REVENUE BASIS.

"Traffic" expenses are those incident to the solicitation of traffic. The purpose of such expenditures is to secure revenue-bearing traffic. It is logical, therefore, to assume that expenses in the solicitation of freight traffic are proportional to the amount of freight *revenue* received and not to the amount of *tonnage* originated. For example, the intrastate tonnage of logs for 1933 was 2,000,463 and all other intrastate freight, 1,776,398 (see N. P. Ex. "7," p. 16; NP Rec. 166.) We think the court judicially knows that the N. P.'s log traffic is largely if not entirely non-competitive. Consequently, little or no "traffic expense" can rightfully be charged to that kind of traffic. Yet said appellant apportions as much "traffic expense" to a ton of logs as to a ton of automobiles with perhaps ten times the revenue per ton mile.

Logs are a very low revenue-producing commodity. (NP Rec. 126.) The length of haul is very short even

*(NP 18) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "Traffic Expenses" for the week of October 22, 1933, was $3,086.41, or was any sum in excess of $2,366.77, as shown by Exhibit "B" attached to the affidavit of State's witness, Manschreck. (Finding IX-e, NP Rec. 39; 241.)

as compared with other intrastate business. The greatest volume of this traffic is 18 miles. (NP Rec. 146.) Something, we submit, is decidedly wrong with a method of apportionment which assigns the same proportion of expense to a ton of logs hauled but a few miles, and to a ton of silk hauled 2,000 miles.

Mr. Manschreck apportioned these "traffic" expenses as between intra and interstate on a relative revenue basis, rather than on a relative tonnage basis (NP Rec. 241) which, we submit, yields a result as nearly correct as the limited data supplied by the N. P. permits. This apportions 50.149% to intrastate. The percentages apportioned by other possible factors would be as follows: relative freight car miles, 42.30%, relative gross ton miles, 41.92%; relative net ton miles, 46.47%. (NP Ex. "7," p. 13; NP Rec. 164.)

Using the relative revenue basis, the State's calculations in "Exhibit B" attached to the Manschreck affidavit (NP Rec. 241), shows that the N. P.'s 1933 intrastate freight expenses charged to "traffic" would have been $37,525.65 less, and its operating income correspondingly greater than as shown by N. P.'s Exhibit "7."

In his criticisms of Exhibit "B" attached to Mr. Manschreck's affidavit (NP Rec. 241) Mr. Peterson insists that the total reduction on Mr. Manschreck's theory should be $31,552.81 instead of $37,525.65 as shown in Mr. Manschreck's exhibit. In our final calculations we will therefore use the figure of $31,552.81 instead of the figure found by Mr. Manschreck.

ASSIGNMENTS NP-19 TO NP-21*

COURT'S ERROR IN FINDING THAT OPERATING EXPENSES INCIDENT TO MAINTENANCE OF WAY AND STRUCTURES AND FREIGHT-TRAIN CAR REPAIRS SHOULD BE DETERMINED BY THREE-YEAR INSTEAD OF ONE-YEAR AVERAGE.

With the above exceptions the operating expenses and revenues for the single year, 1933, were taken by the N. P. as the test in making its calculations. But as to maintenance of way and structures and freight-train car repairs, the annual average for 1931 to 1933 was taken. It would seem that if the results of more than one year's operations were taken as to these large items of expense, the same period should be used as to all other items of expense and revenues. There was no showing as to the amount of deferred maintenance of way and structures and equipment there may have been at the beginning of this three-year period taken as the test. The amount of freight-train car repairs expense necessary for a given period would, of course, depend upon the condition of the cars at the beginning of the period, as well as the extent of the use of the cars during such period. Mr.

---

*(NP 19) The court erred in finding that the N. P.'s operating expenses incident to maintenance of way and structures should be determined by taking the annual average for three years instead of for 1933 alone, or that the N. P. had any deferred maintenance in 1933. (Finding XIII, NP Rec. 45.)

(NP 20) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "Maintenance of Way and Structures," for the week of October 22, 1933, was $11,202.01, or was any sum in excess of $8,724.02 as shown by plaintiff's Exhibit "31." (Finding IX-e, NP Rec. 39, 217.)

(NP 21) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "Freight car repairs, depreciation and retirement," for the week of October 22, 1933, was $9,552.01, or was any sum in excess of $8,372.41, as shown by plaintiff's Exhibit "32." (Finding IX-e, NP Rec. 39, 218.)

Peterson, who sponsored the three-year test, had no personal knowledge as to extent of such deferred maintenance if any. (NP Rec. 127, 210.)

Whatever may be said in justification of using a three-year instead of a one-year average as to these items, the fact remains that had only a one-year period been taken, the expenses for the year chargeable to intrastate freight traffic would have been $167,563 less than the amount charged in the N. P. Exhibit as shown by Manschreck's figures. (See item "M," Plff's Ex. "36," NP Rec. 220.) And see Manschreck's testimony in explanation of this and companion exhibits. (NP Rec. 188-192.)

ASSIGNMENT NP-22*

COURT'S ERROR IN FINDING THAT ANY SUM LESS THAN $1,127,464 SHOULD BE ASSIGNED AS NET JOINT FACILITY RENTS TO THE N. P.'s INTRASTATE OPERATIONS FOR 1933.

The N. P. pays out a certain amount each year for the use of the tracks and other facilities of other roads, and also receives from other roads certain rentals for the joint use of its own tracks and other operating property. The excess of the rentals so received over those paid out as to its Washington properties was, in the year 1933, $1,355,064 (NP Ex. "7," p. 8; NP Rec. 161.) Of this amount, the sum of $227,600.74 (NP Ab. 178) should be deducted as the net amount of the taxes

---

*(NP 22) The court erred in finding that only $582,774, or any other sum less than $1,355,064, of the net joint facility rents received by the N. P. from its Washington operating properties should be assigned to the N. P.'s intrastate operations for 1933. (Finding XIV-b, NP Rec. 46-7.)

paid by foreign lines, which taxes seem to be credited as part of the joint facility rentals. This leaves, then, $1,355,064 less $227,600, or $1,127,464 as the net amount earned by the N. P. during 1933 as rental for the joint use of its facilities in Washington by foreign lines.

It is at once apparent that since this amount represents rentals of property located in Washington, and since such property, to the extent used by other lines, is not used by the N. P. in its interstate operations, the entire amount should be credited to the N. P.'s local operations.

As will later be shown, the G. N. insists that the excess of the joint facility rentals which it pays over those which it receives, should be treated as an operating expense item in determining whether it is making or losing money on its intrastate business. (See GN Ex. "11," pp. 1 and "A," GN Rec. 254, 258.) If this be true, then clearly the net amount received as such rentals should be added to the N. P.'s income in calculations made for the same purpose. In our discussion of the evidence in the G. N. case we will later point out (Post, pp. 165-171). why it is thought that neither joint facility rental paid nor joint facility rentals received should be considered in making these calculations. We are, however, submitting the net figures as shown in the N. P. case for use by the court should it conclude that such rentals received should be deemed a proper item of revenues, and the rentals paid be deemed a proper operating expense item.

ASSIGNMENTS NP-23 TO NP-26*

COURT'S ERROR IN COMPUTING N. P.'s GROSS REVENUES, OPERATING EXPENSES, TAXES, JOINT FACILITY RENTS, AND NET INCOME FROM ITS INTRASTATE OPERATIONS.

Duplication of Operating Expenses.—In the preparation of the N. P.'s Exhibit (N. P. Ex. "7") the N. P.'s witness, Peterson, assumed that all of the expenses charged to intrastate freight operations ($3,291,785; see N. P. Ex. "7," p. 6; NP Rec. 160) were expended solely in connection with the revenues credited under account 101, "freight," and that additional operating expenses should be charged in connection with all the other freight revenue credits. These additional freight revenue credits (other than account 110 "Switching") were as follows (Plff.'s Ex. "25," NP Rec. 212A):

*(NP 23) The court erred in finding that the N. P.'s total intrastate freight operating expenses for the week of October 22, 1933, was $75,078.42 or any sum in excess of $69,163.64 (Finding IX-e, NP Rec. 39); that the N. P.'s cost per revenue net ton mile was .98411c or any greater sum than $69,163.64 divided by 7,629,079 or .906579c, or that the N. P.'s total intrastate freight operating expenses for 1933 were $3,291,785 or any other sum greater than 334,493,591 multiplied by .906579c, or $3,032,448.64. (Finding IX-f, NP Rec. 39-40.)

(NP 24) The court erred in finding that the N. P.'s total intrastate operating expenses for 1933, other than taxes, were $4,796,440, or any other sum greater than $999,381 plus .6064 times the amount of the N. P.'s intrastate freight revenue for 1933. (Finding XII, NP Rec. 43-4.)

(NP 25) The court erred in finding that the N. P.'s total intrastate operating revenues for 1933 were only $5,271,893, or $5,493,252, or any other sum less than $5,802,530, as reported under oath by the N. P. to the D. P. W. for that year, and as alleged in its answer. (Findings X and XII, NP Rec. 42-4; Answer, NP Rec. 9.)

(NP 26) The court erred in finding that the N. P.'s net earnings from intrastate business for 1933 was a deficit of $228,623.22 or any other amount less than $817,443 if joint facility rents are not included, or $1,944,907 if joint facility rents are included. (Finding XII, NP Rec. 44.)

Acct. 111	Special service train	$1,149
112	Other freight train	102,002*
132	Hotel and restaurant	7,831*
135	Storage—freight	825
137	Demurrage	9,741
142	Rent of buildings and other property	5,569
143	Miscellaneous	46,504
151, 152	Joint facility—net debit	9,417 (red)
	Total	$164,204

The N. P. attempts to calculate these assumed additional operating expenses by first finding the ratio between the total operating expenses incident to intrastate freight service ($3,291,785) to the operating revenues received from intrastate freight operations credited to account 101, "freight" only, *i. e.*, $4,836,839, and then applies this percentage (68.06%) to the above sum, $164,204, thereby reaching a figure of $111,757, which it charges as additional operating expenses to intrastate freight operations. (See first calculation, NP Rec. 160.) But, as is conclusively shown by the affidavit of Mr. Manscheck (NP Rec. 232-241), in arriving at the figure of $3,291,785, the N. P.'s witness has already taken into account every item of operating expense incident to its entire intrastate freight operations with the exception of the starred items: "Other freight train, $102,002" (which we now concede, but is not shown in the Manschreck affidavit) and "Hotel and restaurant, $7,831." Excluding these starred items, the above total would be: $164,204 less $102,002 and less $7,831, leaving $54,371. Applying the operating ratio of 68.06% to this item, we have .6806 times $54,371, or $37,005 which constitutes a clear duplication of operating expenses in the N. P.'s Exhibit and should hence be deducted therefrom.

Mr. Manschreck, in his affidavit, most convincingly explains in detail this attempted duplication of expense, and to this affidavit we respectfully refer the court for further details as to our position. (NP Rec. 232-241.)

Conclusions as to N. P.'s intrastate income for 1933:

The results of the State's showing with respect to the items of expense discussed under the foregoing assignments may be summarized as follows:

N. P.'s railway operating income from 1933 intrastate operations as shown by N. P.'s calculations (N. P. Ex. "7," p. 1, NP Rec. 158)	$413,866 (red)
Plus excess charge for intrastate passenger operating expenses as shown by Manschreck (Plff's Ex. "26;" NP Rec. 213)—$1,500,957 (NP Ex. "7," p. 11, see footnote *ante*, pp. 105-6) less $999,381 (Plff's Ex. "26.") (See *ante*, pp. 108-111)	501,576
Such Ry. operating income after above correction	$87,710
Plus excess charge for taxes apportionable to 1933 intrastate operations as shown by corrected showing made by Manschreck—$889,319 (NP Ex. "7," p. 7, NP Rec. 161) less $735,389 (Plff's Ex. "29," NP Rec. 215-6) less $43,491 (see *ante*, pp. 119-124)	$197,421
Such Ry. operating income after above corrections	$285,131
Plus items of expense duplicated in N. P.'s calculations (see *ante*, pp. 138-9)	37,005
Such Ry. operating income after above corrections	$322,136
Plus item of expense charged to intrastate operations as "pensions" (Plff's Ex. "37," NP Rec. 221; *ante*, pp. 125-7)	$103,471
Such Ry. operating income after above corrections	$425,607
Plus reduction in operating expenses charged to "Traffic expense," by apportionment on revenue instead of tonnage basis (Manschreck's Ex. "B," NP Rec. 241; *ante*, pp. 133-4)	$31,553
Such Ry. operating income after above corrections	$457,160

Plus net amount by which N. P.'s railway operating income erroneously reduced by transferring revenues reported as intrastate, to interstate (*ante*, pp. 127-131), $169,485 less proportionate taxes: $43,491 (*ante*, p. 124)	$125,994
Such Ry. operating income after above corrections	$583,154
Plus reduction in operating expense as to maintenance of way and structures and freight-train car repairs, if reported 1933 expense be taken instead of 3-year average (Item "M," Pfl's Ex. "36," NP Rec. 220; *ante*, pp. 135-6)	$167,563
Such Ry. operating income after above corrections	$750,717
N. P.'s railway operating income from 1933 intrastate operations after above corrections (Continued)	$750,717
Plus net joint facility rents received by N. P. on its Washington operating properties in 1933 (*ante*, pp. 136-7)	$1,127,464
N. P.'s net railway operating income from its 1933 intrastate operations after above corrections	$1,878,181

EVIDENCE UNDISPUTED THAT N. P.'S NET EARNINGS WERE AT LEAST $720,940 FROM ITS INTRASTATE FREIGHT TRAFFIC IN 1933:

The N. P.'s various set-ups show its revenues and expenses incident to its intrastate passenger service separately from its revenues and expenses incident to its intrastate freight service. Consequently the results of its freight service operations alone may be readily calculated by deducting the revenues and expenses incident to its intrastate passenger service from its figures purporting to show the results of its combined intrastate freight and passenger service for that year.

The claimed "Result of Intrastate Operations" for 1933, freight and passenger, are set forth in NP's Exhibit "7", page 1 (NP Rec. 158) wherein the following results are shown:

(1) Gross operating revenues	$5,271,893
(2) Operating expenses	4,796,440
(3) Net revenue from railway operation	$475,453
(4) Railway taxes (on operating property)	889,319
(5) Railway operating income (deficit)	$413,866 (R)

Now, using this same form of set-up, and showing the corresponding figures incident to freight service alone, we have:

(1) Gross operating revenues	$5,271,893	
Less revenues from all intrastate passenger operations (Col. 2, Plff's Ex. "25", NP Rec. 212a; NP Ex. "7", p. 7, NP Rec. 161):	429,635	$4,842,258
(2) Operating expenses	$4,796,440	
Less operating expenses incident to intrastate passenger service operations (NP Ex. "7", p. 6, ln. 2, NP Rec. 160):	1,500,957	3,295,483
(3) Net revenue from freight service operations only (ln. 1 less ln. 2)		$1,546,775
(4) Railway taxes on operating property incident to passenger service only (NP Ex. "7", p. 7, NP Rec. 161)		816,835
(5) Railway operating income from freight service operations only (ln. 3 less ln. 4)		$729,940

NET LOSS CLAIMED BY N. P. ON 1933 INTRASTATE PASSENGER BUSINESS.

Revenues from passenger service (Plff's Ex. "25," vertical Col. 2, NP Rec. 212a)		$429,635
Operating expenses from passenger service other than taxes (NP Ex."7", p. 6, 2nd item, NP Rec. 160)	$1,500,957	
Taxes apportioned to passenger service (NP Ex. "7", p. 7, next to last item, NP Rec. 161)	72,484	$1,573,441

Net loss claimed by N. P. on 1933 intrastate passenger service	$1,143,806
Ratio between total expense and total revenues	366%
Cost of each dollar of revenue received	$3.66

ASSIGNMENTS NP-27 AND NP-28*

COURT'S ERROR IN PERMITTING PETERSON TO TESTIFY THAT THE N. P.'s INTRASTATE OPERATING EXPENSES WERE $251,000 GREATER IN 1933 THAN SHOWN BY THE N. P.'s SPECIAL STUDY, AND IN FINDING THAT THE USE OF SUCH TEST WEEK RESULTED IN AN UNDERSTATEMENT OF SUCH EXPENSES OF SOME $300,000.

Paragraph 4 of the Peterson affidavit, referred in Assignment NP-17 (*ante*, pp. 131-3) is to the effect that the study for the week of October 22, 1933, showed a traffic movement "greatly in excess of the average for 1/52 of a year" and if proper adjustment were made for that situation, the operating expenses as to intrastate freight traffic would be increased by $251,000 over those stated in N. P. Exhibit "7," page 1. (NP Rec. 243.) The State moved to strike this paragraph of the affidavit because not based on any record evidence before the court, which motion was denied. (NP Rec. 249-250.) The court thereupon stated that it was understood that paragraph 4 would be considered only in connection with

---

*(NP 27) The court erred in refusing to strike paragraph 4 of Peterson's affidavit (NP Rec. 243) to the effect that the N. P.'s intrastate operating expenses for 1933 were $251,000 greater than as shown by N. P.'s Exhibit "7," on the ground that the same was not based on any record evidence before the court. (NP Rec. 249-250.)

(NP 28) The court erred in finding that the N. P.'s use of the test week of October 22, 1933, to determine its intrastate operating expenses resulted in an understatement of such cost for 1933 of approximately $300,000, or any other sum. (Findings IX-b and IX-g, NP Rec. 37-8, 40.)

and in explanation of evidence already in the record. (NP Rec. 250.)

The court will find that the only data or figures in the record that could possibly afford a basis for Peterson's conclusions are the figures which he gave over the objections urged in Assignments NP-3 and NP-4 (*ante*, pp. 98-101) as to the relative revenue and traffic during the test week and the whole of 1933. This testimony was hearsay and not the best evidence and was clearly inadmissible. Hence we insist (1) that Peterson's conclusions as to the intrastate freight operating expenses being greater than the results shown by N. P. Exhibit "7," page 1 (NP Rec. 158) were inadmissible and should be disregarded; and (2) that the court erred in making a finding based on such testimony.

The data and computations, if any, by which Peterson reached his conclusions are nowhere set forth in the record. The only figures mentioned in the record were pure hearsay. The records themselves were neither produced nor offered in evidence, and witness who, it is claimed, took off this data, was not produced as a witness. (See Assignment NP-3, *ante*, pp. 98-9.) Surely a revenue measure should not be set aside on mere estimates of this character. The following is quoted from the *Minnesota Rate Cases*, 230 U. S. 352, 465-6:

"We are of opinion that on an issue of this character involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation."

The finding, it will be observed, is in any event erroneous, in that the excess is found to be $300,000,

whereas Peterson estimated it to be only $251,000. (NP Rec. 243, Findings IX-b and IX-g, Rec. 37-8, 40.)

ASSIGNMENT NP-29*

COURT'S ERROR IN REFUSING TO STRIKE AVERMENT IN PETERSON'S AFFIDAVIT THAT OPERATING RATIO ON N. P.'s SHIPMENTS FOR EXPORT WAS LOWER THAN ON ITS INTRASTATE FREIGHT TRAFFIC.

In paragraph 3 of the Peterson affidavit above referred to, the court will find certain averments as to the relative traffic density and cost per net ton mile on N. P.'s main and branch lines, and the conclusion that consequently in N. P.'s Exhibit "7" there was an excessive deduction made from intrastate freight operating expense by reason of elimination of so-called foreign commerce. (NP Rec. 243.)

Peterson conceded that there was nothing in the record to substantiate the conclusions and facts set forth in this paragraph. (NP Rec. 250.) The court denied the State's motion to strike this paragraph because not supported by anything in the record. (NP Rec. 243.)

For the reasons urged under Assignment NP-28 we submit that this paragraph should have been stricken, and that the facts therein averred should be disregarded.

---

*(NP 29) The court erred in refusing to strike paragraph 3 of Peterson's affidavit (NP Rec. 243) to the effect that the N. P.'s operating ratio on shipments for export was lower than on its intrastate freight traffic. (NP Rec. 250.)

ASSIGNMENTS NP-30 AND GN-17*

COURT'S ERROR IN FINDING THAT IN PROPORTION TO REVENUE, COST OF THE N. P.'s AND G. N.'s INTRASTATE BUSINESS WAS GREATER THAN THE COST OF THEIR INTERSTATE BUSINESS.

This is truly a most remarkable finding in the light of the undisputed evidence. By operating ratio is meant the relation between operating expenses and operating revenues. The N. P.'s statistician found the N. P.'s operating ratio for *intrastate* freight traffic for 1933 to be 68.06% (NP Rec. 160), while Mr. Manschreck, the State's witness, found it to be 64.74% (NP Rec. 220, line "G"). Mr. Manschreck found the N. P.'s operating ratio for *interstate* freight traffic for 1933 (based on the N. P.'s own calculations) to be *91.20%* (NP Rec. 219, Line "E").

As to the N. P., no operating ratio as to either intrastate or interstate passenger traffic was computed by any witness, so that the court's finding is directly contrary to the undisputed facts.

In the G. N. case we again find the court reaching a conclusion directly contrary to the undisputed evidence. The G. N.'s statistician found the G. N.'s operating ratio for intrastate freight traffic for 1933 to be 51.33%. (GN Rec. 256, lines 1-b.) The operating ratio as to interstate freight traffic was not computed by any witness, but since it is the relation of operating expenses

---

*(NP 30) The court erred in finding that, in proportion to revenue, the cost of the N. P.'s intrastate business is greater than the cost of such company's interstate business. (Finding IX-a, NP Rec. 37.)

(GN 17) The court erred in finding that in proportion to revenue, the G. N.'s cost per unit of doing intrastate business is greater than its cost per unit of doing interstate business. (Finding V, GN Rec. 60.)

to operating revenues, it is exceedingly easy to calculate. Thus:

(A) Total freight service operating revenues for 1933, interstate and intrastate (G. N.'s Ex. "11," p. 11, GN Rec. 268a)	$6,574,087
(B) Less freight service operating revenues for 1933, intrastate, as claimed by G. N. (G. N.'s Ex. "11," p. "B," GN Rec. 255)	1,622,644
(C) Total freight service operating revenues for 1933, *interstate* (A—B)	$4,951,443
(D) Total freight service operating expenses for 1933, interstate and intrastate (Pfff's Ex. "25," line 2, GN Rec. 233)	$4,620,998
(E) Less total intrastate freight service operating expenses for 1933 as claimed by G. N. (GN's Ex. "11," p. "C," GN Rec. 256, line 1-c)	832,903
(F) Total freight service operating expenses, *interstate* (D—E)	$3,788,095
(G) Interstate freight service operating ratio (F ÷ C)	76.5%
Interstate freight service operating ratio (shown above)	51.33%

It is noted that in the G. N.'s calculations as to intrastate freight operating expenses a three-year average was taken as to maintenance of way and structures and freight train car repairs. This was a larger expense figure in each case than the figure for 1933 alone. Consequently, had we used the three-year average expenses as to these items as to interstate, we would have had a larger figure for line "D," and for line "F," and consequently a higher operating ratio for interstate freight service in line "G."

The operating ratio as to intrastate passenger service was shown to be 161.09% (G. N.'s Ex. "11," p. "C," GN Rec. 256, line 2-c), and a different ratio was not claimed as to interstate passenger service. Thus, as in the N. P. case, the court's finding is directly contrary to the undisputed facts.

ASSIGNMENT NP-31*

ERROR OF THE COURT IN FINDING THAT THE N. P.'S NET REVENUES WOULD BE LESS IN 1934 THAN IN 1933.

The findings of fact were made on March 25, 1935, nearly three months after the close of the year 1934, and at a time when the results of the N. P.'s 1934 operations must have been known to counsel who prepared these findings. Yet we find counsel preparing for the court a deliberate misstatement of facts regarding the N. P.'s 1934 operations. In the annual reports of the N. P. and G. N. to the tax commission for the year 1934, at pages 24 and 25, we find the following operating statistics for the years 1932 to 1934:

SYSTEM (N. P.)

	1932	1933	1934
Railway operating revenues	$47,084,176	$47,578,676	$51,407,775
Railway operating expenses	41,433,179	38,993,492	41,550,814
Net revenues from railway operations	$5,650,997	$8,585,184	$9,856,961
Railway tax accruals	6,677,354	5,883,251	5,312,592
Uncollectible railway revenues	23,209	23,848	16,575
Railway operating income	$1,049,567 (deficit)	$2,678,086	$4,527,795
Net railway operating income*	$1,990,389	$5,975,973	$7,915,209

*After adding rentals from joint facilities and equipment.

---

*(NP 31) The court erred in finding that the tendency in 1934 was towards a substantial decrease in the N. P.'s net revenues, that increased cost of operation would be still greater in 1935, and that there was nothing apparent at the time said findings were made to suggest an increase in the N. P.'s gross revenues, but that the facts known suggested a decreased net income for 1935. (Finding V, NP Rec. 34-5; Conclusion 7, NP Rec. 53.)

STATE OF WASHINGTON (N. P.)

	1932	1933	1934
Railway operating revenues	$12,845,326	$12,064,954	$13,368,674
Railway operating expenses	12,336,819	11,145,042	11,675,083
Net revenues from railway operation	$508,507	$919,912	$1,693,591
Railway tax accruals	$2,730,016	$1,882,093	$1,833,863

SYSTEM (G. N.)

	1932	1933	1934
Railway operating revenues	$55,549,246	$61,923,891	$70,752,877
Railway operating expenses	45,655,673	41,545,224	48,610,181
Net revenues from railway operation	$9,893,574	$20,378,667	$22,142,696
Railway tax accruals	$6,697,424	$6,660,944	$6,181,111
Uncollectible railway revenues	14,210	7,213	10,527
Railway operating income	$3,181,940	$13,710,510	$15,951,058
Net railway operating income	$1,290,551	$11,810,227	$14,101,650

STATE OF WASHINGTON (G. N.)

	1932	1933	1934
Railway operating revenues	$8,389,154	$8,114,350	$9,062,655
Railway operating expense	7,682,590	7,102,133	7,955,682
Net revenues from railway operation	$706,564	$1,012,217	$1,106,973
Railway tax accruals	$1,569,162	$1,363,567	$1,247,239

These reports being made pursuant to law, it would seem that statistical data contained therein should be matters of which the court should take judicial notice, particularly in actions wherein the constitutionality of a tax is attacked on the ground of insufficient earnings.

As a matter of fact, the increase in gross and net for 1932 over the 1933 figures was sufficiently forecast by Mr. Peterson, who testified for the N. P. on direct examination:

"The total operating revenues of the system for the eight months of 1934 were $33,044,301, an increase of $3,311,859 over the same period of 1933. During the same period the total operating expenses were $27,270,562 for the eight months of 1934, or an increase of $1,175,203 over the corresponding eight months in 1933. * * * Any estimate made for the balance of the year would be wholly conjectural. I don't know that it will be better in 1934 than in 1933. I think it will be pretty much the same as 1933. That is only an estimate that I make in the light of what knowledge I now have." (NP Rec. 112.)

Mr. Peterson's figures were of value as tending to indicate the upward trend of the business of these roads in 1934. But it is apparent that as a prophet, he had no better qualifications than the rest of us. If counsel wished to attempt to portray the future, he should have produced the then known facts and allowed the court to draw its own conclusions.

We are indeed at a loss to understand how, in the light of either the figures given by Peterson or the above reports, counsel for the N. P. would have the temerity to propose findings inducing the court to find that "the tendency in the year 1934 is toward * * * decreased net revenues." (NP Rec. 34-5.)

May we note here that these studies were made in one of the worst years in the history of these two roads. Whatever their intrastate earnings in 1933, who can say that such showing is representative of future years? The occupational tax act was in force but five months in 1933. Need we point out that a similar study made in 1934

would have shown quite different results. As was said in *Postal Tel.-Cable Co. v. Richmond*, 249 U. S. 252, 258:

"But a careful examination of the record fails to convince us that it contains that clear and convincing evidence that the tax thus falls upon interstate commerce which is necessary to justify a finding that the ordinance is unconstitutional and void."

APPENDIX "B"

Challenge to Trial Court's Findings of Fact and Rulings on Admissibility of Evidence in G. N. Ry. Co. v. State, No. 573.

ASSIGNMENT GN-4*

COURT'S ERROR IN FINDING THAT THE MAKING OF ACCURATE REPORTS AS TO THE G. N.'S INTRASTATE REVENUES WAS NEVER A MATTER OF IMPORTANCE PRIOR TO OCCUPATIONAL TAX ACT.

It is at once apparent that if it were contemplated that such reports were to be used as evidence in local rate investigations, such accuracy was always a matter of importance.

Nor are we so sure that these carriers are in a position to urge that it is not a matter of importance that a report required by statute to be made under oath be accurately made, and it is at least rather startling to find the lower court reaching such a conclusion.

Moreover, ever since 1929 both the G. N. and N. P. have been required to pay a fee of 1/10th of 1% on their gross operating revenue. (Laws 1929, Ch. 107, pp. 209-210; R. R. S. Sec. 10417.) In the case of the N. P. this fee is alleged to have been $6,481.32 for 1932 and $5,700.53 in 1933. (NP Rec. 15, 85.) The N. P.'s intrastate revenues were $6,613,959 and $5,802,530, respectively, in those two years. The G. N. alleges that this fee was $3,338.97 for 1932 and $3,137.05 for 1933 (and its local revenues $3,338,973 for 1932 and $3,137,047 for

---

*(GN 4) The court erred in finding that the making of accurate reports to the D. P. W. of the G. N.'s intrastate revenues was never a matter of importance prior to the imposition of the Occupational Tax Act of 1933. (Finding VI, GN Rec. 60-61.)

1933. (GN Rec. 14.) From these allegations it is evident that the fee was deemed both by the D. P. W. and the carriers to have been imposed only on intrastate revenues. Confirming this conclusion, Mr. Peterson testified on behalf of the N. P.:

"In paying this 1/10th of 1% tax that I have testified to, that is computed on the amount of local business in the way I have just described. * * * The N. P. has been paying the 1/10th of 1% tax for the years since 1929." (NP Rec. 87.)

Where these carriers have each, since 1929 been paying a tax or fee measured by their reported intrastate revenues, how is it possible, we ask, to sustain a finding that prior to the enactment of the occupational tax act in 1933 there was no incentive for these carriers accurately to report under oath their intrastate revenues to the D. P. W.?

ASSIGNMENT GN-5

(GN 5) The court erred in finding that the G. N. has never accurately reported its intrastate revenues to the D. P. W. (Finding VI, GN Rec. 60.)

Under the next assignment, we will show that no competent evidence was received at the trial showing that the G. N.'s intrastate revenues were other than as reported to the D. P. W.

But how, we ask, can such a finding be thought to aid these carriers who both base their calculations on the revenues as reported to the D. P. W.?

If it be true as found, that the G. N.'s reports as to State revenues have never been "accurately made" (GN Rec. 60), then surely the G. N.'s whole contention that it is doing business at a loss must fail. If there was no in-

centive to make accurate reports how can either the State or the G. N. rely upon such reports as evidence in a law suit involving the constitutionality of a tax?

ASSIGNMENT GN-6*

ERROR IN ALLOWING TESTIMONY THAT REVENUES ENTERED IN BOOKS AND REPORTED AS INTRASTATE WERE IN FACT INTERSTATE, WITHOUT REQUIRING PRODUCTION OF RECORDS FROM WHICH TAKEN.

The G. N. introduced in evidence Exhibit "11" upon which it relied to support its contention that in 1933 it lost money on its intrastate business. Pages 1 to 27 of this exihibit were based on the division of revenues between interstate and local business as reported by the G. N. to the D. P. W. for 1933. (GN Rec. 137, 142.) The results of this study are shown on page 1 of Exhibit "11" (GN Rec. 135-6, 258), and show that according to the G. N.'s own calculations, its railway operating income for 1933, after payment of taxes, was $491,544, and its net railway operating income (after deduction of joint facility rents and equipment rents paid) was $202,458. (GN Rec. 258.) In other words, *if the G. N. correctly entered upon its books of account, and correctly reported to the D. P. W. its intrastate operating revenues, said appellant, by its own admissions, wholly failed to prove that in 1933 it lost money on its intrastate operations.*

---

*(GN 6) The court erred in permitting various of the G. N.'s witnesses to testify over plaintiff's objection that the same was hearsay and not the best evidence, that certain railway operating revenues for 1933 entered in the G. N.'s books of account and reported under oath to the D. P. W. as revenues from intrastate business, were in fact revenues from interstate business, and in refusing to strike such testimony after the same was so received. (G. N. Rec. 175-9, 183-193.)

Mr. Burn, the G. N.'s statistician (GN Rec. 115) prepared these pages 1 to 27, of Exhibit "11" and brought the same out from St. Paul to Seattle about a week before the trial, and after showing his exhibit to the company's attorneys, prepared the remaining pages, "A" to "F," in which a large amount of revenue shown on the G. N.'s books of account and report to the Washington D. P. W. to be intrastate revenues, were switched over to the interstate side of the ledger. (GN Rec. 141-2.) This revised showing was made from Identification "20" (GN Rec. 202) which was given to Mr. Burn after reaching Seattle. (GN Rec. 142.)

The following is a comparison of the G. N.'s interstate and intrastate revenues for 1933 as shown on its books of account and report to the D. P. W., with those used by Mr. Burns in the preparation of that part of Exhibit "11" which it is claimed shows that as to Washington intrastate business the G. N. was operating in the red in 1933:

Acct. No.	Account	As shown by G. N.'s books of account and report to D. P. W. (G. N.'s Ex. "11", p. 11, GN Rec. 268A)	After attempted change in G. N.'s books without production of underlying data. (Fdg. 7(g), GN Rec. 67-8)
101	Freight	$2,599,331	$1,502,153
110	Switching	41,977	38,367
111	Special Service Train	14	14
112	Other freight train	434	434
135	Storage—Freight	2,010	2,010
137	Demurrage	1,016	1,016
138	Telegraph and Telephone	4,095	3,653
142	Rents of buildings and other property	52,205	46,570
143	Miscellaneous	52,621	28,427
152	Joint facility—net debit	0	0
	Total Freight	$2,753,703	$1,622,644

Total revenue which court found without the production of any basic data, should be transferred from intrastate as shown by G. N.'s books and reports, to interstate..... $1,131,059

As noted above, this transfer of revenues from intrastate to interstate was made by Mr. Burn in accordance with a written statement (GN's Ex. "20") handed to him after reaching Seattle (GN Rec. 142). This statement was offered and received in evidence as a convenient statement showing what had been eliminated and not to prove the fact that the items thereon were properly to be eliminated as intrastate traffic (GN Rec. 175), and is as follows (GN Rec. 202):

Revenues eliminated as applicable to interstate and foreign commerce as reported in amended answers to interrogatories:

Account		Total Applicable Aug. 1, 1933, to Dec. 31, 1933	Total Applicable To Year 1933
(101) Freight:			
(a) Consignments originating in Washington and specifically billed for export.....	$92,580		
(b) Consignments originating in Washington and billed to warehouses and elevators, practically all of which would be exported or transported by water and/or rail to other states.....	65,558		
(c) All other imports billed to Washington stations from Washington ports	8,033		
(d) The initial local state revenue collected for shipments into transit stations.....	308,896		
(e) Absorbed switching	14,997		
(f) Milling in transit adjustment on grain originating outside of Washington and the products reshipped to points in Washington.....	41,055		
		$531,119	$1,097,178

Account	Total Applicable Aug. 1, 1933, to Dec. 31, 1933	Total Applicable To Year 1933
(110) **Switching:**		
Switching revenue received on shipments pertaining to (c) and (d) under account 101	1,820	3,610
(143) **Miscellaneous:**		
Wharfage		25,000
Total	$532,939	$1,125,788

The court's basis for finding that all these items of revenues were properly transferred from intrastate to interstate is the testimony of certain witnesses who testified over objection that the same was hearsay and not the best evidence, that they had examined certain records under the G. N.'s control in the state of Washington.

Thus, as to item "a," account No. 101, the G. N.'s witness Brown, testified that he made up that item of $92,580, not from the original records, but as to apples and flour from punch cards in the general office showing shipments of flour and apples from Washington stations to the Seattle dock, and as to all other shipments, from answers to letters written to all stations and ports in Washington asking for statements of billing covering all carload shipments originating in Washington and destined to the Seattle dock. (GN Rec. 175-6.) The witness believed that copies of the way bills from which the data was originally taken were in the hands of the G. N.'s forwarding agents in Washington. (Ab. Rec. 181.) He testified further that the only way the State's attorney could possibly check his figures as to item "a," would be by an examination of those way bills. (GN Rec. 181.)

The G. N.'s witness, Berger, testified that the information regarding item "a" was obtained direct from

the defendant's records in its Seattle dock office, consisting of the expense bills, demurrage records and other accounts kept there. Only one month's records were checked. (GN Rec. 191-2.)

As to item "b" the information was obtained by letter from agents in Seattle, Tacoma, Everett and Bellingham. Witness Brown wrote to the agent and asked him, and the agent wrote back and purported to give him the information asked. (GN Rec. 177-8, 180-181.) This information was shown by the G. N.'s books in Seattle.

As to item "c," the information was taken from copies of way bills and bills of lading and was shown by the G. N.'s books in Seattle. (GN Rec. 192.)

As to item "d," Brown got his information from punch cards the same as in the case of item "a." (GN Rec. 182.) The original records consisting of the expense bills were available in Seattle, and were checked there by the G. N.'s witness, Berger. Only a month's business was so checked. (GN Rec. 192.)

Item "e" was a debit item, transferred from interstate to intrastate. (GN Rec. 182.) The underlying data upon which the same was based was not offered in evidence, and the State, without success, moved to strike the testimony regarding the same on the ground that the same was hearsay and not the best evidence. (GN Rec. 183, 193.)

The information as to item "f" was taken from reports furnished to the G. N.'s witness, Brown, by the Transcontinental Freight Bureau, an agency of all the carriers. The information was contained in way bills located in the State of Washington. (GN Rec. 183.) It

was also shown by the expense bills at Seattle from which Berger purported to make his check. (GN Rec. 193.)

The information as to Account 110, "Switching," was taken from a letter received by the G. N.'s witness, Tower, from the auditor of station accounts, which was his sole source of information. (GN Rec. 185-6.)

The information as to Account 143, "Wharfage," was shown in the station records at the G. N.'s Seattle dock. (GN Rec. 185.)

The record shows that not only was the testimony offered regarding all of these items objected to as hearsay and not the best evidence, but after the same was received appropriate motions to strike were made on the same grounds. (GN Rec. 175-193.)

We respectfully submit that all of this testimony should rightfully have been excluded under the "best evidence" rule. It must be remembered that this showing was made for the purpose of attempting to establish the falsity of the G. N.'s own records and 1933 sworn report. The company's own records would, of course, be the best evidence of what constituted its intrastate revenues. And surely, when it attempted to show that these records and its official report to the State regulatory body were untrue, it should, we submit, if the best evidence rule is ever to be applied, have been required to produce the original records showing these claimed errors. It goes without saying that the State's attorney and witnesses were wholly powerless either to cross-examine or to check the statements of these witnesses as to the justification for these attempted changes.

"It is a general demand of the law that the best possible evidence be produced, and secondary evidence is admissible only when it is clearly made to appear that primary evidence is, for some good and sufficient reason, unattainable, and then only after a showing of diligence."

Kennedy v. Canadian Pac. R. Co., 87 Wash. 134, 135;

Case Threshing Machine Co. v. Wiley, 89 Wash. 301, 303;

Seid Chee v. Sanitary Fish Co., 103 Wash. 345, 348.

"Where the controversy is over the contents of a written document, the document itself is, of course, the best evidence;"

Hoptowit v. Brown, 115 Wash. 661, 669-670.

We are, of course, not unmindful of the voluminous evidence rule which, under certain conditions, permits the introduction of the results of voluminous facts contained in writings. This rule is set forth in *Corpus Juris* as follows:

"Where the results of voluminous facts contained in writings, or of the examination of many books and papers or records are to be proved, and the necessary examination of this documentary evidence cannot be conveniently or satisfactorily made in court, it may be made by an expert accountant or other competent person and the results thereof may be proved by him, if the books, papers, or records themselves are properly in evidence, or their absence satisfactorily explained, the admission of such testimony being a matter resting largely in the discretion of the trial court. It seems, however, that the jury are not bound by the result thus ascertained, but may make their own calculations from the books and papers in evidence."

22 C. J. 1017.

We submit that the admission of this testimony without requiring the production of the books and rec-

ords from which the alleged facts were ascertained for use in cross-examination and making a counter-showing, was palpably unjust to the State in the present case. The G. N., as noted, had reported all of these items of revenue as intrastate in its 1933 report to the D. P. W. This report was made under oath. (Rem. Rev. Stat. Sec. 10416.) The details of this report were, of course, based upon the same way bills, bills of lading, and other writings as were those of the witnesses produced by the G. N. to impeach its own records. Surely, before allowing this company to impeach its own books of accounts and sworn report, it should have required that the company produce its records (all available in Washington) or properly authenticated copies thereof for examination by the court and opposing counsel.

ASSIGNMENT GN-7

(GN 7) The court erred in refusing to strike pages "A" to "F" of G. N.'s Exhibit "11," on the ground that the same was hearsay and based on records available but neither produced nor offered in evidence. (GN Rec. 228-9.)

As already pointed out, pages "A" to "F" were based upon testimony shown under the last assignment to have been clearly inadmissible. For the reasons there urged, we respectfully submit that the motion to strike should have been granted.

ASSIGNMENT GN-8*

COURT'S ERROR IN FINDING THAT THE G. N.'S 1933 INTRASTATE REVENUES WERE OTHER THAN REPORTED TO THE D. P. W.

As shown under Assignment GN-6, there was no competent evidence that the G. N's 1933 intrastate revenues were other than as reported to the D. P. W. Consequently there was no basis for the court's finding that such revenues were other than as so reported.

ASSIGNMENT GN-10

(GN 10) The court erred in finding that in the apportionment of operating revenues received from nterstate freight business to the G. N.'s Washington operating properties, such properties were not entitled to more than a mileage prorate of such interstate freight revenues. (Findings VII-e, GN Rec. 64-7.)

This question has already been fully considered in connection with Assignment NP-11, to which discussion the court is respectfully referred. (*Ante*, pp. 111-118.)

---

*(GN 8) The court erred in finding with respect to the G. N.'s 1933 intrastate operating revenues,—

(GN 8-a) That the total thereof was only $2,179,760, or any sum less than $3,305,548 as reported under oath to the D. P. W. (GN Rec. 268-a);

(GN 8-b) That the amount of such revenues assignable to "Freight," Account 101, were only $1,5[illegible]2,153, or any sum less than $2,599,331;

(GN 8-c) That the amount of such revenues assignable to "Switching," Account 110, were only $38,367, or any sum less than $41,977;

(GN 8-d) That the amount of such freight revenues assignable to "Rents of Buildings and Other Property," Account 142, were only $46,570, or any sum less than $52,205; and

(GN 8-e) That the amount of such freight revenues assignable to "Miscellaneous" were only $28,427, or any sum less than $52,621;

All as shown by the G. N.'s books of account and sworn report to the D. P. W. for 1933. (Findings VI and VII-g, GN Rec. 60-1, 67-8, compared with G. N. Ex. "11," p. 11, GN Rec. 268a.)

ASSIGNMENTS GN-9 AND GN-11 TO GN-16*

COURT'S ERROR IN FINDING THAT G. N. CONDUCTED ITS 1933 INTRASTATE OPERATIONS AT A LOSS.

To support its contention that it lost money on its 1933 Washington intrastate business, the G. N. offered in evidence G. N. Exhibit "11." This exhibit, as heretofore noted, makes two showings as to the results of the G. N.'s 1933 intrastate operations. Pages 1 to 27 are prepared on the assumption that the company correctly entered on its books of account, and correctly reported to the D. P. W. its 1933 interstate and intrastate revenues. We will, for convenience, call this its "book

---

*(GN 9) Having found that an amount of the G. N.'s traffic reported to the D. P. W. for 1933 as intrastate, was in fact interstate traffic to the extent that such 1933 intrastate operating revenues were in fact only $2,179,760 instead of $3,305,348, as reported under oath to said D. P. W., the court erred in finding with respect to G. N.'s intrastate operations for 1933,—

(GN 9-a) That its operating expenses were $1,730,361, or any sum in excess of $1,675,206 (Finding VI, GN Rec. 60-61);

(GN 9-b) That its net revenues from railway operations were only $449,399, or any sum less than $504,554 (Finding VI, GN Rec. 61);

(GN 9-c) That its railway tax accruals were $335,247, or any sum in excess of $211,532 (Findings VI and VII-e, GN Rec. 61, 64-7);

(GN 9-d) That its Joint Facility rent—net debit, was $193,455, or any sum greater than $140,800 (Finding VI, GN Rec. 61);

(GN 9-e) That its net railway operating income was a deficit of $99,269, or any sum less than $132,256. (Finding VI, GN Rec. 61.)

(GN 11) The court erred in finding that the 1933 ad valorem taxes paid on the G. N.'s Washington operating properties should be apportioned as between intrastate and interstate service on the basis of the relative revenues derived therefrom (with only a mileage prorate of interstate revenues apportioned to Washington), or on any basis other than the relative use made by the G. N. of its Washington operating properties as reflected by the only available factors shown by the record, to-wit: relative car and locomotive

showing." But pages "A" to "F" are prepared on the theory that the company's books and official reports were untrue, and that some $1,131,059 of the revenues shown therein as intrastate, were in fact interstate revenues. This we will refer to as the "revised showing." The results of these two sections of G. N. Exhibit "11" are summarized on pages "1" (GN Rec. 258) and "A" (GN Rec. 254) of the exhibit. Page "1" shows the results of the "book showing;" page "A," the results if the company's books and reports were incorrect, i. e., its "revised showing."

---

miles (as between freight and passenger), and relative freight car miles as between intrastate and interstate freight service. (Finding VII-e, GN Rec. 64-7.)

(GN 12) The court erred in finding that the G. N.'s net debit of $794,018 for joint facility rents in Washington for 1933 were assignable to its intrastate business on the basis of relative operating expenses intrastate and interstate, or on any basis other than the G. N.'s relative use of such jointly used properties in its intra and interstate operations as reflected by the only available factors shown by the record, to-wit: relative car miles (as between freight and passenger), and relative net ton miles as between intrastate and interstate freight service. (Finding VII-d, GN Rec. 63-4.)

(GN 13) The court erred in finding that pensions paid were properly chargeable as part of the G. N.'s operating expenses for the purpose of determining its railway operating income for 1933. (Finding VII-j, GN Rec. 69.)

(GN 14) The court erred in finding that the G. N.'s operating expenses incident to maintenance of way and structures and freight car repairs should be determined by taking the annual average for three years instead of for 1933 alone. (Finding VII-l, GN Rec. 68-9.)

(GN 15) The court erred in finding that G. N.'s Exhibit "11" showed the results of the G. N.'s intrastate operations in Washington during 1933 with substantial accuracy. (Finding VII-k, GN Rec. 69.)

(GN 16) The court erred in finding that the G. N.'s intrastate business as a steam railway company was conducted at a loss during 1933. (Finding VIII, GN Rec. 69-70.)

Joint facility rents paid not deductible as an operating expense:

Before analyzing the G. N. computations, let us first consider whether it is the deficit or earnings status of the *property,* or the deficit or earnings status of the *operating company,* which is determinative of whether the occupational tax is a burden on interstate commerce. If the intrastate operations of the operated properties themselves (independent of the question of ownership) show a railway operating income sufficient to pay the occupational tax payable on such operations, can it be said that because the operating company is losing money, the occupational tax must be paid from interstate revenues and is consequently a burden on interstate commerce?

In other words, is the criterion the *earnings of the properties operated* or the *earnings of the operating company?*

It is our position that it is the results of the operations of the particular *properties* operated by the tax-paying company which is the test, and it is not material whether the operating *company* is in fact losing or making money as a result of such operations. In other words, in determining whether the occupational tax is a drain on interstate revenues, it must be assumed that the operating company is the absolute owner of all of the property and interests in property employed in its railway operations. Thus, if a company has the legal title to its operating property, but such property is heavily mortgaged, the interest payable on such mortgages is not to be treated as an operating expense. And if, instead of constructing its own road, a company elects to

rent operating rights over another road, the rentals paid can no more be deemed an operating expense than can the bond interest payments on the portion of its operating property as to which it chances to hold the legal title. The same is true as to the equipment used. It can have no greater right to deduct as an operating expense the rentals paid for the use of the equipment it uses, than it would have to deduct as an operating expense the interest on the equipment trust notes which may be a lien upon its own equipment.

The fact is that the joint facility rental paid is the practical equivalent of interest payments on bonds issued for the construction of the company's own road. Had the G. N. constructed its own line from Seattle to Portland, it would have issued bonds to finance the new construction and would have paid, we may fairly assume, 4% to 5% interest thereon. Instead, it is, under the joint user agreement, required to pay one-third of 4½% on the cost of the property including additions and betterments. Surely this rental can no more be deemed an operating expense than could the interest payments on the company's outstanding bonds.

Moreover, it was the N. P.'s contention that in determining whether that company was making or losing money on its intrastate business, the test figure was "Railway Operating Income" computed by deducting "operating expenses" and taxes paid from "Gross operating revenues." (See NP Ex. "7," p. 1; NP Rec. 158.) In other words, counsel for the N. P. contended that join facility rentals *received* were not to be considered as operating income. (NP Rec. 97-8.) If this be true, we must likewise insist that the joint facility rental *paid*

by the G. N. cannot be deemed an operating expense in determining whether that road is making or losing money on its intrastate business.

The test is, we submit, is the *property* making a profit on intrastate business sufficient to pay the occupational tax imposed? If so, the tax cannot be deemed a direct burden on interstate commerce, even though the operating *company*, because of fixed interest and rental charges, is not making a corporate profit.

The case of *Atlantic Coast Line v. Daughton*, 262 U. S. 413, is, we submit, in point. There the Income Tax Law of North Carolina directed that the "net operating income" of railroads within the State be determined upon the basis of accounts to be kept according to the methods established by the Interstate Commerce Commission, and laid a tax upon the "net income," to be ascertained by deducting from "net operating income" only uncollectible revenue, certain taxes, and amounts paid for car hire, thus treating the railroad property within the State as the thing of which the income is taxed, and taking no account of other income of the corporation owning the railroad and making no deduction of its capital charges such as rent paid for lease of road or joint user rights. It was held that the statute, considering this distinction, did not, in effect, depart from the I. C. C.'s definition of net income, nor, as applied to interstate railroads, did it directly burden interstate commerce.

The same is true of the occupational tax here under consideration. It is the business of operating the particular property which is taxable, and not the individual

or corporation chancing to conduct such operations. Section 2 (2), subdiv. (e), Ch. 191, Laws 1933, provides:

"Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business, as follows:

* * * * * * * * *

"III. Steam railways: one and one-half percent;"

Thus, the tax is measured by the gross income from the operation of the steam railway property, not by the income of the corporation. Just as in the *Daughton* case, the railroad property within the State is the thing of which the income is taxed, and no account is taken of the other income of the corporation chancing to own or operate such property. The following is quoted from the *Daughton* case (262 U. S. 413, 416, *et seq.*):

"Whether the statute is unconstitutional because it fails to include among the deductions from income allowed public service corporations the capital charges, including other rentals paid, is the main question for decision.

* * * * * * * * *

"* * * The contentions are that the statute, in fact, taxes gross income; that the classification as made by it is unreasonable; and that for these, and other, reasons it violates both the federal and the state constitution. All the contentions are, in our opinion, unsound."

After pointing out that the net income is computed by deducting from operating revenues, the operating expenses, uncollectible revenue, taxes paid, and car hire, the court then shows it to be the contention of the contesting railroads that the State should have credited as revenues all of its other corporate income including income from lease of road and joint facility rent income, and charged against such revenues all of its corporate

expenses including rent paid for lease of road and rents paid for joint facilities. Answering this contention, the court continues (p. 419):

"Thus the State takes, as the entity to be taxed, the railroad property operated by the Seaboard within the State. Therefore, it takes, as the primary basis for the tax, only operating revenues; that is, the gross receipts from operating such property. The Seaboard, on the other hand, assumes, as the entity which should be taxed, the company in respect to its North Carolina interests. Therefore the Seaboard takes, as the primary basis for the tax, in addition to the operating revenues of the lines within the State, North Carolina's proportion of the non-operating income of the company derived from other property owned by it, wherever situated. For the Seaboard, like most other railroad systems, is, to some extent, a holding company, as well as an operating company; and, as holding company, receives dividends from other concerns, interest on bonds of other concerns, and rental from property owned but not operated. As the State treats the operated property as the entity, it does not concern itself with interest charges and the rentals paid, just as it does not concern itself with a mortgage upon the real estate when it lays the *ad valorem* tax. On the other hand, as the Seaboard treats the company—the person—as the entity to be taxed, it undertakes to ascertain the net income of the company. This includes as gross income, a proportion of the receipts from property not within the State and includes among the deductions from the gross income of the company, the capital charges.

"That a State may, consistently with the Federal Constitution, impose a tax upon the net income of property, as distinguished from the net income of him who owns or operates it, although the property is used in interstate commerce, was settled in *Shaffer v. Carter*, 252 U. S. 37, 44, 52. There an Oklahoma statute was sustained which laid the tax upon the net income of Oklahoma oil property owned by a citizen and resident of Illinois. * * * It is a common provision in state income tax laws to tax the net income of property within the State which is owned, or operated, by non-residents. The differences between the parties arise, in the main,

not from difference in the method of determining what is net income, but from difference as to what is the subject of the tax. In other words, they differ as to the thing of which the net income is to be ascertained. This will appear from an examination of the several grounds on which the validity of the statute is assailed.

"*First.* The contention that the statute is obnoxious to the commerce clause rests upon the argument that the State's definition of net income differ from that adopted by the Interstate Commerce Commission . . . . A conclusive answer to that argument is found in the fact that the State adopts (without modification) the commission's definition for the net income of that which it taxes. For treating as the entity to be taxed, the railroad property operated by the company within the State, it appears that every item which the railroad claims the statute wrongly disallowed as a deduction is of such a character, that it is either clearly a capital charge (as distinguished from an operating charge) or reasonably may be deemed such as a matter of accounting."

At this point, the Court continues in a note to which reference is made (p. 421):

"To prove that the statute, in fact, taxes some part of the gross earnings, attention is called specifically to some minor items which the statute does not allow as deductions. But these stand in no different position than the major items—interest on funded debt and leased line rentals—discussed above. Prominent among these lesser items is 'joint facility rents' which, in the case of the Seaboard, amounted net to $21,816.81. Joint facility rents paid were $34,480.98; those received (credited as non-operating income) were $12,664.17. This is rental paid for railroad facilities—like tracks, terminals and roundhouses. They are needed by the carrier as a part of the plant and, not being owned, are rented from others. The fact that they are used jointly with others, is, of course, immaterial. This rent, like the rent of a leased line, is paid to secure control of the property operated. Hire of freight cars might have been treated in the same way, but the State, for reasons satisfactory to it, permitted that financial charge to be deducted, and to that extent reduced the tax."

The occupational tax is imposed on the activity of operating the railroad operating property under the control of the G. N. and is measured solely by the intrastate revenues derived from such operation. Clearly, such tax cannot be a burden on the interstate business handled on this same property if the net income from these *properties'* intrastate activities is sufficient to pay the tax imposed.

We submit that the case cited is squarely in point.

IF JOINT FACILITIES RENTS NOT AN OPERATING CHARGE, THE G. N. IS ADMITTEDLY MAKING A SUBSTANTIAL PROFIT ON ITS INTRASTATE OPERATIONS.

In its "book showing" (G. N. Ex. "11," p. 1, line 5; GN Rec. 258) the "railway operating income" from the G. N.'s intrastate operations (after allowance for taxes) was shown to be $491,544. And even assuming the validity of its claim that a portion of the revenue reported and shown on its books as intrastate, was in fact, interstate revenue, its 1933 "railway operating income" from intrastate operations (after allowance for taxes) was $114,152 (G. N. Ex. "11," p. "A," line 5; GN Rec. 254).

Hence, even on its own showing, if joint facility rents are not a proper operating charge, the G. N. admittedly made a substantial profit on its intrastate operations even in so abnormal a year as 1933.

G. N. MADE A PROFIT ON ITS 1933 INTRASTATE BUSINESS THOUGH JOINT FACILITY RENT BE DEEMED AN OPERATING EXPENSE.

This is true, the State contends, because of fundamentally wrong theories followed in the G. N. calculations. Thus:

Duplication of operating expenses—The G. N. charged $79,239 as an operating expense under the head-

ing: "Operating expenses applicable to intrastate revenues (freight proportion) other than account 101 ($150,554 × 51.33%)." (G. N. Ex. "11," p. 7, line "C;" GN Rec. 265-6.) But it clearly appears from Manschreck's testimony (GN Rec. 203-4) that all of the G. N. operating expenses had already been charged in computing its "total freight operating expenses" amounting to $1,334,268 (G. N. Ex. "11," p. 7, line "B;" GN Rec. 265-6) except the item of $21,547 for "switching," (Plff's. Ex. "21," line "E;" GN Rec. 230) and that there was consequently an attempted duplication of expense in the G. N. figures amounting to $79,239 minus $21,547, or $57,692. This correction is on the "book showing" figures. On the "revised showing" (G. N. Ex. "11," pp. "A" to "F;" GN Rec. 254-7) the corresponding reduction would be: all items of intrastate freight revenue other than Acct. 101 "Freight," and Acct. 110 "Switching" (G. N. Ex. "11," p. "B"; GN Rec. 255), or $82,124 times 51.33% (the operating ratio applied by the G. N. See G. N. Ex. "11," p. "C," line "1-b"; GN Rec. 256) or $42,154.

Correction as to taxes—The state contends in the G. N. as in the N. P. case that taxes should be apportioned on the basis of the relative *extent* of use made of the G. N. properties in its intrastate and interstate operations. Thus, apportioning tax accruals on the same basis as we have more fully explained in the N. P. case (*ante*, pp. 123-4) we find that the taxes allocated to intrastate operations for 1933 (based on the G. N. "book showing") should have been $294,318 (Plff.'s Ex. "22," line "S;" GN Rec. 230-232) instead of $511,530 as contended for by the G. N. (G. N. Ex. "11," p. 9, line 5-f;

GN Rec. 267-8), or a reduction in expense of $511,530 minus $294,318 or $217,212. The corresponding reduction in the G. N.'s "revised showing," would be the difference between $211,532 (Plff.'s Ex. "27," line "I," GN Rec. 235-6) and $335,247 (G. N. Ex. "11," p. "C," line 4-c, GN Rec. 256), or a reduction of $123,715.

Correction as to joint facility rents—The G. N. attempts to apportion its net joint facility rentals paid, first as between freight and passenger (both intra and interstate) according to relative operating expenses, and then to apportion the total thus allocated as between intra and interstate according to relative gross revenues received in the two services. (G. N. Ex. "11," p. 9, GN Rec. 267.) The State contends, on the contrary, that these rentals paid should be apportioned (if at all), as between freight and passenger (both intra and interstate) according to relative *extent* of use (*i. e.*, freight car miles as compared with passenger car miles), and that the intrastate freight proportion should be then determined according to relative net ton miles hauled in intra and interstate service, and that the intrastate passenger proportion (there being no other available factor) should be determined on a relative gross revenue basis. (Plff.'s Ex. "23," GN Rec. 232-3.) Following this method, the State reaches a total charge (based on the G. N. "book showing") of $193,027 (Plff.'s Ex. "23," line "M," GN Rec. 233) as compared with $257,427 contended for by the G. N. (G. N. Ex. "11," p. 9, sum of lines 4-g and 4-h, GN Rec. 267), or a reduction in this item of expense of $257,427 less $193,027 or $64,400. The corresponding reduction in the G. N.'s revised showing, would be the difference between $140,800 (Plff.'s Ex.

"28," line "G," GN Rec. 237-8) and $193,455 (G. N. Ex. "11," p. "E," GN Rec. 257) or $52,655.

Elimination of "pensions" as operating expense item—The propriety of charging "pensions" as an item of operating expense in a case of this kind, has been heretofore discussed in connection with the N. P. case. (*Ante*, pp. 125-7.) The evidence shows that if this item be eliminated the G. N.'s net railway operating income (according to its "book showing," G. N. Ex. "11," p. 1, GN Rec. 258) would be increased by $22,066. (Plff.'s Ex. "25," GN Rec. 233-4.)

If, on the other hand, the court finds it to be established by competent evidence that a certain amount of the G. N.'s revenues reported as intrastate, should be transferred to interstate, then its intrastate freight revenue for 1933 would be $1,622,644 (G. N. Ex. "11," p. "B," GN Rec. 255), instead of $2,753,703, as shown by its books and report to the D. P. W. (G. N. Ex. "11," p. 11, GN Rec. 268-a) and this item of $22,066, would have to be reduced to an amount represented by the proportion which $1,622,644 bears to $2,753,703, or 58.92%, making the amount 58.92% of $22,066, or $13,001.

Effect of above corrections—Summaries of the G. N.'s contentions are set forth on pages "1" and "A" of G. N. Exhibit "11." (GN Rec. 254, 258.) As already observed, the summary as to its "book showing" (G. N. Ex. "11," p. 1, line 9) shows that by its own calculations, taking the G. N. books and reports as to its division of intra and interstate earnings at their face value, its "Net Railway Operating Income" (after deducting joint facility rents and equipment rents in addition to taxes) on its Washington 1933 intrastate operations was

$202,458. Corrections as above indicated, however, give the following results:

Net Railway Operating Income as computed by defendant.	$202,458
Plus excess charge by reason of duplication of operating expenses as above indicated	57,692
Plus excess charge for taxes as above indicated	217,212
Plus amount improperly charged for "pensions" (*ante*, pp. —)	22,066
Plus excess charge for joint facility rents paid as above indicated	64,400
Total net railway operating income on G. N. Wash. 1933 intrastate operations as shown by plaintiff's correction of defendant's figures	$563,828

Except as to "pensions," this showing is summarized and the same result reached in a different manner by Mr. Manschreck. (Plff.'s Ex. "24," line 8; GN Rec. 233.)

The summary as to the G. N.'s "revised showing" (assuming certain of its revenues shown in its reports and on its books as intrastate, to be in fact interstate) shows the G. N. "Net Railway Operating Income" (after deducting joint facility rents and equipment rents in addition to taxes) on its Washington 1933 intrastate operations to be a deficit of $99,269. (G. N. Ex. "11" p. "A," line 9, GN Rec. 254.). Corrections as above indicated, however, yield the following results:

Net railway operating income as computed by G. N. on its "revised showing"	$99,269 (red)
Plus excess charge by reason of duplication of operating expenses as above indicated	42,154
Plus excess charge for taxes as above indicated	123,715
Plus excess charge for joint facility rents paid as above indicated	52,655

Plus amount improperly charged for pensions as above indicated	13,001
Total net railway operating income from G. N.'s Washington 1933 intrastate operations as shown by the state's correction of the G. N.'s figures	$132,256

Except as to "pensions," this showing is summarized and the same result reached in a different way by Mr. Manschreck. (Plff.'s Ex. "29," line 8, GN Rec. 238.)

From the foregoing it follows: (1) that if the G. N.'s books and reports are correct, the G. N. confessedly made a substantial profit on its intrastate operations; (2) that if joint facility rents are not deductible as an operating expense, the G. N. confessedly made a substantial profit on such operations, even if allowed to transfer to interstate, some $1,131,059 in revenues reported as intrastate; and (3) that even allowing such wholesale transfer of revenues, and allowing joint facility rents as an operating expense, the company still made $132,256 from such 1933 intrastate operations, were its intrastate expenses properly computed.

We respectfully submit, therefore, that neither the N. P. nor the G. N. has sustained its defense that it lost money on its 1933 intrastate operations and will consequently be compelled to pay its occupational tax out of interstate earnings.

EVIDENCE UNDISPUTED THAT G. N.'S NET EARNINGS WERE AT LEAST $430,134 FROM ITS INTRASTATE FREIGHT TRAFFIC IN 1933.

As in the case of the N. P., the G. N.'s set-ups show its revenues and expenses incident to its intrastate passenger service separately from its revenues and expenses incident to its intrastate freight service. Con-

sequently, the results of its freight service operations alone may be readily calculated.

The revised claimed results of the G. N.'s intrastate operations for 1933, freight and passenger, are set forth in GN's Ex. "11," p. "A" (GN Rec. 254) wherein the following results are shown:

(1) Gross operating revenues	$2,179,760
(2) Operating expenses	1,730,361
(3) Net revenue from railway operations	449,399
(4) Railway tax accruals	335,247
(5) Railway operating income	114,152
(6) Equipment rents—Net debit	19,966
(7) Joint facility rent—Net debit	193,455
(8) Total rentals—Net debit	213,421
(9) Net railway operating deficit (Item 5 less item 8)	99,269 (R)

Now, using this same form of set-up, and showing the corresponding figures incident to freight service alone, we have:

(1) Gross operating revenues from freight service only (GN Ex. "11", p. "B", Col. 2; GN Rec. 255):	$1,622,644
(2) Operating expenses incident to freight service only (GN Ex. "11", p. "C", GN Rec. 256, ln. 1-c)	832,903
(3) Net revenue from railway operations from freight service only (ln. 1 less ln. 2):	$789,741
(4) Railway tax accruals incident to freight service only (GN Ex. "11", p. "C", GN Rec. 256, ln. 4-c—15.38% of $1,622,644):	249,563
(5) Railway operating income from freight service only (ln. 3 less ln. 4):	540,178
(6) Equipment rents incident to freight service only (GN Ex. "11", p. "D", ln. 5-e, GN Rec. 256)—Net debit	16,825
(7) Joint facility rent incident to freight service only (GN Ex. "11", p. "E", ln. 7-e, GN Rec. 257)—Net debit	93,119

(8) Total rentals incident to freight service only (ln. 6 pluss ln. 7)—Net debit		109,944
(9) Net railway operating income incident to freight service only (ln. 5 less ln. 8)		$430,234

NET LOSS CLAIMED BY G. N. ON 1933 INTRASTATE PASSENGER BUSINESS.

Revenues from passenger service (GN Ex. "11", p. "B", 2nd vertical Col., GN Rec. 255)		$557,116
Operating expenses from passenger service other than taxes, car rentals and joint facility rentals (GN Ex. "11", p. "C", item 2-e, GN Rec. 256)	$897,458	
Passenger car rentals (GN Ex. "11", p. "D", item 5-j, GN Rec. 256)	3,141	
Joint facility rentals—Debit (GN Ex. "11", p. "E", item 7-j, GN Rec. 257)	100,336	
Taxes (15.38% of $557,116, See GN Ex. "11", p. "C", calculation line 4-c applied to passenger revenues; GN Rec. 256)	85,684	$1,086,619
Net loss claimed by G. N. on 1933 intrastate passenger service		$529,503
Ratio between total expense and total revenues		195%
Cost of each dollar of revenue received		$1.95

ASSIGNMENT GN-14

(GN 14) The court erred in finding that the G. N.'s operating expenses incident to maintenance of way and structure and freight car repairs should be determined by taking the annual average for three years instead of for 1933 alone. (Finding VII-i, GN Rec. 68-9.)

The propriety of using a three-year instead of a one-year average as the measure of operating expenses incident to maintenance of way and structures and freight train car repairs has already been considered in connection with Assignments NP-19 to NP-21, to which discussion the court is respectfully referred. (*Ante*, pp. 135-6.)

ASSIGNMENT GN-17

(GN 17) The court erred in finding that in proportion to revenue, the G. N.'s cost per unit of doing intrastate business is greater than its cost per unit of doing interstate business. (Finding V, GN Rec. 60.)

This assignment is covered by Assignment NP-30, to which reference is hereby made. (*Ante*, pp. 146-7.)

ASSIGNMENT GN-19

(GN 19) The court erred in finding that a substantial part of the G. N.'s investment in its railways in Washington was made by order of the Washington regulatory bodies. (Finding IX, GN Rec. 70.)

We are unable to find where this finding is substantiated by any evidence in the record. If such exists, the G. N.'s counsel will no doubt favor the court with the proper citations.

ASSIGNMENT GN-20

(GN 20) The court erred in permitting the G. N.'s witness, Burn, to testify over objection, as to the operating ratio in switching seven specified cars at different terminals. (GN Rec.158-9, 230.)

Mr. Burn, the G. N.'s witness, was permitted to testify over the objection of the State's counsel as to the switching cost, revenue and operating ratio in connection with the intra-terminal switching of seven different cars at different terminals of the G. N. (GN Rec. 158-9.) The State's objection and motion to strike were made on the following grounds:

"The ground that unless they are all put in, they are not material. That they might make a considerable revenue on one and no revenue on another. That defendant should not be allowed to detail a few instances

and not give them all. That if that is to be investigated, we will have to open up the whole subject of G. N.'s operating ratio as to switching service." (GN Rec. 158.)

We respectfully submit that the testimony was objectionable for the reasons set forth in the objection and motion to strike, and consequently should be wholly disregarded by this court.

APPENDIX "C"

Evidence Bearing on Appellants' Contention that Their Intra and Interstate Instrumentalities Are Inseparably Commingled.

It is, of course, unquestionably true that both the appellant telephone company and the appellant railroads use the same instrumentalities in carrying on their intra and interstate operations.

But it is equally certain that if either of these appellants proposed to renounce its intrastate business, the purchaser or purchasers thereof would continue to use such appellant's interstate instrumentalities in continuing such intrastate business, with the practical result that there would be no duplication of equipment or operating expense in carrying on the two activities.

Let us first consider the position of the appellant telephone company: As a practical proposition, it cannot, we submit, be assumed that on renouncing its local business, the P. T., less than 10% of whose business is interstate (*ante*, p. 74), would be entitled to interstate rates yielding a fair return on all of its present operating properties. True, the company showed that it uses 92½% of its present property in its intrastate telephone and telegraph service. (PT Rec. 40.) But this does not mean that on surrendering its local business it would be compelled to retain the *exclusive use* of such properties for its long-distance service. It is, of course, inconceivable, that the various communities of Washington are to go without exchange and intrastate long-distance telephone service because of the imposition of this 3% gross earnings tax.

"The Company supplies something the public wants. If by a catastrophe, or series of catastrophies, all that it has was either wiped out of existence or made altogether useless for its present purpose, the people of the state would be deprived of all telephone facilities. The demand that they should be replaced would be general and insistent. To meet it, a new plant would be required." *Chesapeake & Potomac Telephone Co. v. Whitman,* 3 Fed. (2d) 938, 941.

The people would demand and would receive local telephone service. But the P. T.'s renunciation of its local business would certainly not mean a duplication of service in the different communities which it now serves. It must be presumed that such company and any new organizations proposing to furnish the local service so renounced, would proceed like ordinary business men confronted by the same problem. Where local exchange telephone service is supplied by one company, a company furnishing long-distance but not local exchange service to the same community, does not duplicate the local plant, but makes proper joint user arrangements with the local exchange company whereby long-distance messages are sent and received through the local exchange. This is exactly what would happen should the P. T. elect to surrender its local business. It would dispose of that portion of its plant chiefly valuable for handling local business, reserving joint user rights for handling interstate long-distance telephone messages thereover. Consequently, no duplication of equipment or operating property would be required.

It was agreed that the telephone system in Ellensburg is owned by a company independent of the P. T. (PT Rec. 66). With respect to this and other similar independent properties, R. W. Mastick, this company's

chief witness, testified on cross-examination to the following effect:

The Pacific Company makes connections of long distance service between Ellensburg and Seattle. The making of connection between Ellensburg and Seattle differs none at all from the method of making connections between Olympia, where the company owns the plant, and Seattle. The character of the property utilized in the Ellensburg plant differs not at all from the plant in Olympia in making the connection, as far as the exchange plant is concerned. The Pacific Company owns the toll lines between the Ellensburg Company and Seattle. The Ellensburg Company owns the equipment in the toll offices in Ellensburg. It is proper to speak of Ellensburg as a "foreign exchange area" or an "independent exchange." There are 100 or 102 independent exchanges in Washington comparable with Ellensburg. He presumed that all of these 102 companies connect with the Pacific system. And the inter-exchange service, which is the toll service, is handled in exactly the same way between each of these 102 companies and exchanges belonging to the Pacific Company as between stations belonging to the Pacific Company. The P. T. doesn't have any plant and equipment in the independent exchanges. It operates it itself. The P. T. has no duplication of plant and equipment with any exchanges in the state of Washington belonging to another company.. (PT Rec. 66-8.)

Where long distance telephone messages are transmitted from foreign exchanges to exchanges of the Pacific Company, the latter company has certain contractual relations with the company operating the

foreign exchanges. Foreign exchanges get 30% of whatever the Pacific Company is entitled to on originating business. If the message were received by the foreign exchange and originated on the Pacific line, the foreign line would not get anything at all. (PT Rec. 68-71.)

Referring to foreign exchanges as exchanges that are independent not only of the Pacific Company but of the Bell system there would undoubtedly be several thousand of such foreign exchanges in the whole United States. Asked whether, so far as he knew, the operations of the Pacific Company with any of these foreign exchanges located outside of Washington are or are not competitive, he replied that he didn't know of any competitive system on the Pacific Coast. Asked if the P. T. has any competitive system in territory served by the Bell system as far as long distance is concerned, he replied, not to his own knowledge; that he did not specifically know of any case as to any of these foreign exchanges, either within or outside the state of Washington where there is a duplication of service as between the Pacific Company or the Bell system and the independent companies. In each of those cases the arrangement for handling long distance messages as between the foreign exchanges and the Pacific Company is handled as a result of a contract entered into between the Pacific Company and the independent company. What he had said of the relation between the exchange at Ellensburg and the Pacific Company and the transmission of toll messages between Ellensburg and the Pacific Company would apply equally to the transmission of toll messages between the Pacific Company and any one of these foreign exchanges, either within or without

the state of Washington. If the Ellensburg company should sell out all of its operating property to the Pacific Company and the latter should thereafter continue to furnish to Ellensburg the same service, both local and long distance that it now enjoys, he didn't see that the Pacific Company would have to acquire any additional property in order to furnish such service. Should the Pacific Company conclude that it didn't care to operate the Olympia exchange any more as part of the Pacific Company's property, it would be perfectly possible for some independent company to buy the Olympia exchange properties, and to have the same operating agreements with the Pacific Company which the Ellensburg Company has. In that case, the two companies would not have to acquire any additional property in order to carry on the operation in the same manner the property is now being operated by the Pacific Company. That would be true of all local exchanges such as Olympia that are now being operated by the Pacific Company in the state of Washington. In other words, if the two companies were split, one operating the local exchange and one continuing to operate the balance of the system, you wouldn't have to acquire any more property and you wouldn't sell any more in order to continue to function with the same degree of efficiency. (Pt. Rec. 73-6.)

As to all long distance messages transmitted to and from stations in said foreign exchange areas and points reached by the Pacific Company's long distance service, the Pacific Company, by contract with such owning companies, utilizes the telephone equipment of such local companies in the transmission of such long distance messages to and from telephone stations in such foreign exchange areas for which said Pacific Company pays such

other company an agreed service charge or division of the long distance tolls. (PT Rec. 89.)

If the Pacific Company did elect to cease to perform intrastate local or long distance service, and elected thereafter to render only interstate long distance service, as it now performs, and if the company could secure a purchaser for its property principally used for its local service or intrastate service, it could, of course, sell and convey that property to another company, but it wouldn't be doing a solely interstate business that way, because the local exchange does an interstate business over those facilities. If the Pacific Company, having elected to handle only interstate service, did elect to sell its property to some other company, he supposed that by a contractual arrangement it could reserve the right to use that property by a joint user arrangement for its interstate service. And if it did, by a satisfactory arrangement, enter into that sort of contract with the purchasing company, it wouldn't be necessary, then, to duplicate the actual equipment of the two companies, to increase the amount of the equipment of the two companies in handling the two classes of service. And if, on the same hypotheses, it sold out one piece of property, say Olympia property, to one company and its Seattle property to another company, it could make the same joint user contracts with each of those companies. (PT Rec. 90-92.)

There are now in the United States a large number of telephone companies doing a long distance telephone business between thousands of local exchange areas in which the local telephone service is supplied by local telephone companies other than the company or com-

panies doing the long distance business. So far as he knew, in none of those areas does the long distance company handling the long distance messages, maintain separate equipment for long distance use only. But in such cases the long distance companies utilize by joint user agreements, the facilities of such local telephone companies in handling the long distance service. (PT Rec. 92-3.)

APPELLANT RAILROADS:

Obviously the intrastate operations of these roads are even more essential to the people of Washington than those of the appellant telephone company. And it would seem that either of these railroads would likewise, if it chose to dispose of its intrastate business to another company, enter into joint user arrangements with such purchaser, as a result of which the same facilities and employes would be used in carrying on both the intrastate and interstate operations. It is a common practice for two or more companies to use the same rails. Express and sleeping car companies use the facilities of a railroad, as does also the United States mail service. Why could not a separate and distinct company handling only intrastate business, by contract, use the same rails, trains, cars and employes as the company handling only interstate business?

In such case, of course, there would be no duplication of either operating expenses or of equipment.

FILE COPY

Office Supreme Court
JAN 6

No. 544

IN THE

Supreme Court of the United States

OCTOBER 1935 TERM

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Appellant,

VS.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and T. S. HEDGES and T. M. JENNER, as Members of the Tax Commission of the State of Washington,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF AMICI CURIAE

A. C. VAN SOELEN,
Corporation Counsel of The City of Seattle, Washington;
WALTER L. BAUMGARTNER,
Assistant;
Attorneys for The City of Seattle, Washington.

Office and P. O. Address:
515 County-City Building,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

No. 544

IN THE

Supreme Court of the United States

OCTOBER 1935 TERM

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Appellant,

VS.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and T. S. HEDGES and T. M. JENNER, as Members of the Tax Commission of the State of Washington,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF AMICI CURIAE

A. C. VAN SOELEN,
Corporation Counsel of The City of Seattle, Washington;

WALTER L. BAUMGARTNER,
Assistant;

Attorneys for The City of Seattle, Washington.

Office and P. O. Address:
515 County-City Building,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

SUBJECT INDEX

	Page
Prefactory Statement	1
Statement of the Case	3
Abstract of Chapter 191	4
Facts	10
Summary of Argument	12
Argument	13
Notwithstanding appellants' inability to withdraw from intrastate business without also withdrawing from interstate business, the tax imposed upon them by Ch. 191, Laws of Washington, 1933, does not contravene the Constitution	13
Tax is not license but occupation tax	13
State Court's characterization of the tax	15
Federal Supreme Court determines for itself the character of a tax	16
Distinction between license and occupation tax	16
Separable remedial provisions for collection of tax do not void it	19
The Act prescribing no conditions precedent is not an invasion of commerce power	21
Even though a carrier engaged in both local and interstate commerce cannot withdraw from the former without also withdrawing from the latter, the fact that it is earning less than a fair return upon the fair value of its property in its domestic business or the mere fact of financial loss in local business for a limited period does not condemn a State occupation tax as violative of either the commerce or due process clauses	35
Losses in intrastate commerce during 1933 not a fair test of the effect of the tax	37
Evidence of losses in local business is not alone sufficient to establish violation of commerce clause	39
Tax is not a disguised attempt to invade the commerce power	54
Conclusion	56

TABLE OF CASES

Page

Allen v. Pullman Co., 191 U. S. 171, 48 L. ed. 134 ..... 27, 46, 47
Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 58 L. ed. 127 53
Barrett v. New York, 232 U. S. 14, 58 L. ed. 483 ..... 27, 28, 32
Bowman v. Continental Oil Co., 256 U. S. 642, 65 L. ed. 1139 ..... 27, 29, 32
Cascade Tel. Co. v. Tax Commission, 176 Wash. 616, 30 Pac. (2d) 976 10
Chicago & St. Paul etc. Co. v. Hedges, 5 Fed. Sup. 752 10
Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234 13
Cooney v. Mountain States Tel. & Tel. Co., 294 U. S. 384, 79 L. ed. 934 ..... 23, 32
Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649 ..... 44, 45
East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 75 L. ed. 1171 23
Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. ed. 400 ..... 14, 16
Ewing v. Leavenworth, 226 U. S. 464, 57 L. ed. 303 53
Great Northern R. Co. v. State, No. 573 3
Hanley v. Kansas City etc. R. Co., 187 U. S. 617, 47 L. ed. 333 53
Home Ins. Co. v. Augusta, 93 U. S. 116, 23 L. ed. 829 18
Interstate Busses Corp. v. Holyoke St. Ry. Co., 273 U. S. 45, 71 L. ed. 530 ..... 21, 24, 25
Interstate Transit v. Lindsey, 283 U. S. 183, 75 L. ed. 953 22
Kansas City etc. R. Co. v. Botkin, 240 U. S. 227, 60 L. ed. 617 23
Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663 ..... 27, 33, 34

Page

Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672 53
LeLoup v. Mobile, 127 U. S. 640, 32 L. ed. 311 ..... 32, 50
License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497 18
Ludwig v. Western Union Tel. Co., 216 U. S. 146, 54 L. ed. 423 ..... 44, 49
Maine v. Grand Tr. Ry. Co., 142 U. S. 217, 35 L. ed. 994 14
New York ex rel. Steamboat Co. v. Sohmer, 235 U. S. 549, 59 L. ed. 355 53
Northern Pac. R. Co. v. State, No. 529 ..... 3, 15
Ohio Tax Cases, 232 U. S. 576, 58 L. ed. 737 ..... 13, 20, 54
Pacific Tel. & Tel. Co. v. Seattle, 291 U. S. 200, 78 L. ed. 810 2
Pacific Tel. & Tel. Co. v. Seattle, 172 Wash. 649, 21 Pac. (2d) 721 14
Pacific Tel. & Tel. Co. v. State Tax Commission, 180 Wash. 673 3
Pickard v. Pullman Co., 117 U. S. 34, 29 L. ed. 785 27
Portland v. Portland Ry. etc. Co., 80 Ore. 271, 156 Pac. 1058 18
Postal Telegraph Co. v. Adams, 155 U. S. 688, 39 L. ed. 311 24
Postal Telegraph Co. v. Fremont, 255 U. S. 124, 65 L. ed. 545 ..... 22, 40
Postal Telegraph Co. v. Richmond, 249 U. S. 252, 63 L. ed. 590 ..... 22, 40, 43, 48
Puget Sound P. & L. Co. v. Seattle, 291 U. S. 619, 78 L. ed. 1025 2
Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877 ..... 44, 45
Railway Express Agency v. Virginia, 282 U. S. 440, 75 L. ed. 450 22
Raley & Bros. v. Richardson, 264 U. S. 157, 68 L. ed. 615 ..... 27, 33
Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735 18
Schuylkill Tr. Co. v. Commonwealth, ... U. S. ...., 80 L. ed. (Adv. Ops.) 15 16

Page

Sonneborn Bros. v. Cureton, 262 U. S. 506, 67 L. ed. 1095 29

Sprout v. South Bend, 277 U. S. 163, 72 L. ed. 833 ..... 22, 27, 31, 33

St. Louis etc. R. Co. v. Arkansas, 235 U. S. 350, 59 L. ed. 265 24

State v. Aitkin, 61 Neb. 490, 85 N. W. 395 18

State v. N. P. R. Co., 83 Wash. Dec. (Adv. Ops.) 52 ..... 13, 38

State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 Pac. (2d) 91 ..... 9, 13

Supply Laundry Co. v. Jenner, 178 Wash. 72, 34 Pac. (2d) 363 10

Tacoma v. Tax Commission, 177 Wash. 604, 33 Pac. (2d) 899 10

Wagner v. Covington, 251 U. S. 95, 64 L. ed. 157 16

Western Union Tel. Co. v. Attorney General, 125 U. S. 530, 31 L. ed. 790 ..... 20, 21

Western Union Tel. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355 ..... 44, 49

Western Union Tel. Co. v. Richmond, 224 U. S. 160, 56 L. ed. 710 20

Western Union Tel. Co. v. Speight, 254 U. S. 17, 65 L. ed. 104 53

Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275 ..... 22, 43

Statutes:

Washington Laws of 1933, Chap. 191 ..... 3, 19

Seattle Ordinance No. 62662 2

Text Books:

Cooley, The Law of Taxation, Vol. 4 (4th Ed.), § 1688, p. 3396 16

Cooley, The Law of Taxation, Vol. 4 (4th Ed.), § 1716, p. 3434 17

Cooley, The Law of Taxation, Vol. 4 (4th Ed.), § 1717, p. 3436 17

Cooley, The Law of Taxation, Vol. 4 (4th Ed.), § 1800, p. 3534 18

IN THE

Supreme Court of the United States

OCTOBER 1935 TERM

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant*, vs. THE TAX COMMISSION OF THE STATE OF WASHINGTON, and T. S. HEDGES and T. M. JENNER, as Members of the Tax Commission of the State of Washington, *Appellees.*	No. 544

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF AMICI CURIAE

In this suit to enjoin the enforcement of Chapter 191 of the 1933 Session Laws of the State of Washington there is raised the fundamental question whether a state can, consistently with the commerce clause of the Federal Constitution, impose an occupation tax upon the intrastate business of a telephone and telegraph company engaged in both intrastate and interstate commerce by means of the same plant, equipment, facilities and personnel, and regulated by the laws of the State, as a common carrier of

intelligence. If it is found that the State has no such power, it follows, of course, that its political subdivisions are equally without power.

Consequently a motion has been made and submitted herein by the undersigned attorneys for The City of Seattle, that they be granted leave to appear as *amici curiae*, file a brief and participate in the oral argument of this cause, the attorneys for the appellees having consented to the use of a portion of their time for argument. The motion is supported by the affidavit of Mr. Charles L. Smith, Mayor of The City of Seattle, in which the following matters appear:

The City of Seattle is a municipal corporation of the State of Washington and the largest city therein. By its Ordinance No. 62662, as amended, the City levied upon various persons, firms and corporations, including the appellant herein, an occupation tax similar in substance and effect to the taxes imposed by the State of Washington by Chapter 191, Session Laws of 1933. The validity of the ordinance was considered and sustained by this court in a cause entitled *Pacific Telephone & Telegraph Co. v. Seattle*, reported in 291 U. S. 200, 78 L. ed. 810, and in a cause entitled *Puget Sound Power & Light Co. v. Seattle*, reported in 291 U. S. 619, 78 L. ed. 1025.

However, in neither cause was the ordinance assailed as being in violation of the commerce clause, but as appears from the said affidavit, that ground of invalidity is now being asserted against it.

The City's interest in the event of the case at bar is, therefore, obvious.

In a prior appeal of this suit to the Washington State Supreme Court, the decision in which is reported in 180 Wash. 673, the undersigned attorneys for the City of Seattle participated as *amici curiae* both by the filing of briefs and by oral argument. In such prior appeal, the fundamental question here for determination was treated by the parties on its merits, but no decision was then rendered thereon.

While the City has not similarly taxed steam railways, it is nevertheless vitally interested in the questions presented by the appeals in the railway cases companion to this: *Great Northern Ry. Co. v. State*, No. 573, and *Northern Pacific Ry. Co. v. State*, No. 529. For this reason and for the further reason that the three causes have in the course of events become "inseparably commingled" and treated as "mutually dependent", especially by the State's adversaries who make common cause against the statute, we take the liberty of discussing issues presented by the railways. We trust that in so doing we are not exceeding the bounds of the grace of this court by which we have already gained its ear.

STATEMENT

On March 21, 1933, effective immediately, the State of Washington adopted Chap. 191, Session Laws of 1933, levying occupation taxes upon most of the business activities carried on within the State. Pertinent features of the Act follow:

Section 2(2) provides that from and after the

first day of August, 1933, and until the 31st day of July, 1935, there is levied upon and to be collected from every person (defined in Section 1(4) to include individuals, firms, co-partnerships, corporations and other associations) an annual excise tax for the privilege of engaging in business activities, measured by the application of various specified rates against values, gross proceeds of sales, or gross income, as the case might be.

In Section 2, the business activities are broadly classified as (a) extractive function; (b) manufacturing or producing function; (c) wholesaling or jobbing function; (d) function of retail distribution; (e) performing and rendering services.

(a) Extractive functions are taxed as follows: I. Coal, 3/10 of 1% of the value of the coal mined; II. Oil, 1%; III. Natural gas, 1%; IV. Metal, stone, sand, etc., 3/10 of 1%; V. Timber, 3/4 of 1%; VI. Fish and sea foods, 3/10 of 1%; VII. All other extractive products, 3/10 of 1%.

(b) Manuacturing, compounding, etc., 1/4 of 1% of the value of the products.

(c) Wholesaling of tangible property, real or personal, 2/10 of 1% of gross proceeds of sales.

(d) Retailing real or personal tangible property, 5/10 of 1% of gross proceeds of sales.

(e) Performing or rendering of services: I. 4/10 of 1% of gross income; II. Stock brokers, 2%; III. *Steam railways*, 1½% of gross income; IV. Electric interurban and street railways, including urban motor carriers, 5/10 of 1%; V. Light and power companies,

3%; VI. *Telephone and telegraph companies*, 3%; VII. Water companies, 3%; VIII. Gas companies, 2%; IX. Express companies, 2%; X. Car companies, 2%; XI. Highway motor carriers, 1½%; XII. All other public service companies and utilities, 1½%; XIII. Finance companies, 2%.

By a separate paragraph of this subdivision (e), the provisions thereof were made applicable to political subdivisions of the State engaging in any of the activities named.

While this is not a complete list of the activities taxed, it will serve to show the character and extent of the Act.

> "Sec. 3. If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this Act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this Act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this Act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

Section 5 provides that in computing the amount of any tax imposed under certain mentioned subdivisions, including subdivision 2(e) of Section 2, which includes railways and telephone companies, there shall be excluded from gross proceeds of sales or gross income so much thereof as is derived from sales of

property shipped to points outside the State, from sales to the Federal Government or to the State of Washington, or from business which the State is prohibited from taxing by its Constitution, or the Constiution or laws of the United States.

Section 6 provides in part as follows:

> "The taxes imposed hereunder shall be due and payable in monthly installments on or before the fifteenth day of the month *next succeeding the month in which the tax accrued.* The taxpayer, on or before the said fifteenth day of the month, shall make out a return, upon such forms and setting forth such information as the tax commission may require, showing his estimate of the amount of the tax for which he is liable for the preceding month, sign and transmit the same to the tax commission, *together with a remittance for said amount* in the form required by section 20 of this Act."

The section further provides that the tax commission for cause shown may extend the time for making and filing returns for a period not exceeding one month.

Section 7 provides for the making and filing of annual returns, for the deduction from the amount of the tax shown by such return of the amounts paid monthly during the course of the year.

Section 8 provides for the correction of errors and for the making of adjustments, and also for the refunding of any recovery granted by any court in a suit by the taxpayer.

Section 10 provides that in case of failure to make

the required return, the tax commission shall, upon such information as is available to it, make an assessment against the delinquent and add a penalty of 10% for such failure and a further penalty of 1% per month of the amount of the tax for each 30 days of delinquency.

Section 14 provides for a hearing before the tax commission concerning the amount of the tax assessed against any taxpayer and for subsequent appeals to the superior and supreme courts of the State.

Section 15 provides that if any tax, increase or penalty or any portion thereof imposed by the Act be not paid within 15 days after due, the tax commission shall issue a warrant directed either to the sheriff of a county or to an agent of the commission commanding him to levy upon and sell the real or personal property of the taxpayer, or so much thereof as may be necessary, for the payment of the amount shown in the warrant. Filing the warrant with the clerk of the superior court of the taxpayer's county, results in a lien upon the taxpayer's interest in real and personal property.

> "Sec. 16. Any tax due and unpaid under this Act and all increases and penalties thereon shall constitute a debt due the State of Washington and may be collected by court proceedings in the same manner as any other debt in like amount, which remedy shall be in addition to any and all other existing remedies. In case of insolvency or bankruptcy proceedings said tax and all increases and penalties thereon shall have the same pri-

ority as other taxes of the State of Washington in such proceedings."

"Sec. 17. Any person against whom a tax shall have been imposed as herein provided may be restrained and enjoined, upon the order of the tax commission by proceedings instituted by the attorney general in the name of the State of Washington in the superior court of the county in which the taxpayer resides or in which he has his principal place of business, from engaging and/or continuing in any business for which a privilege tax is required by the provisions of this Act, until such tax shall have been paid and/or until such person shall have complied with the provisions of this Act."

Section 21 makes disposition of the tax moneys collected, $12,500,000 per annum thereof to be deposited to the current state school fund.

"Sec. 23. It shall be unlawful for any person to fail or refuse to obtain the license or to fail or refuse to make any return provided for in this Act; * * *"

The remainder of the section penalizes false returns, abetting evasion of the tax, refusal to permit examination of books and records and of property, refusal to testify, etc. Any violation of the section is denounced as a gross misdemeanor and punishable as such.

"Sec. 30. If any clause, sentence, paragraph, subdivision, section or part of this Act shall for any reason be adjudged invalid, such judgment shall not affect, impair, or invalidate the remain-

der of the Act, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. * * *"

In *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 Pac. (2d) 91, the Washington Supreme Court declared the taxes levied as above shown to be excises upon occupations and businesses.

"After an exhaustive study of the cases, we are well satisfied that this is not a property tax, even under the broad and all inclusive terms of our constitution. * * * To hold otherwise would render it exceedingly difficult, if not impossible, to sustain any excise tax.

"It is true that the constitution defines property as anything subject to ownership and, in a sense, one's business and its earnings are owned by him, but the privilege of engaging in business and gainful pursuits under the protection of our laws is something which must and does exist before the business can be established, and something far and away beyond and above the mere ownership of a business. Man in a state of nature gained his sustenance by his strength or cunning, or both, and that which he so gained might, and no doubt often was, taken from him before he could use and enjoy it by someone stronger and more cunning. Hence, the established state enacted laws for the protection of human rights, the rights of property, and to prevent the weak or the credulous from becoming the helpless vic-

tims of the force or fraud of the strong and the cunning.

"Peace officers and courts, among many other things, were established to this end, and every citizen is now measurably safe in pursuing any gainful occupation with the expectation that he will be by the state fully protected and made secure in his property investment, and also in his gains therefrom. This is the privilege, far above mere property, which it is now sought to tax to the end that it may pay, in some part, its fair share of the cost to the state of its creation and continuance.

"* * * These (authorities) seem sufficient to decisively determine that we are now dealing with an excise tax and not with a tax on property."

The Act has been sustained by that court against attacks upon various grounds in *Cascade Tel. Co. v. Tax Com.* 176 Wash. 616, 30 Pac. (2d) 976; *Tacoma v. Tax Com.*, 177 Wash. 604, 33 Pac. (2d) 899; *Supply Laundry Co. v. Jenner*, 178 Wash. 72, 34 Pac. (2d) 363. Moreover, it has been sustained by a statutory three-judge court convoked under Section 266 of the Judicial Code in *Chicago & St. Paul etc. Co. v. Hedges*, 5 Fed. Sup. 752, over the same objections urged here.

The record shows that the Telephone Company's gross operating intrastate revenues for the year 1933 were $9,230,873; its gross interstate revenues, $923,420, total $10,154,294 (R. 106, Ex. 12). Its intrastate revenues are almost exactly ten times as great

as its interstate revenues. Its tax for the last five months of the year 1933, the tax having commenced to accrue only on August 1st of that year, is approximately $112,251 (R. 131-140).

The record in Cause No. 573 shows that the Great Northern's intrastate gross operating revenues for 1933 were $2,179,760; for the last five months of that year, after allowable deductions, $865,889; the tax thereon, at 1½%, $12,988, all as found by the trial court (R. 61, 59).

The record in Cause No. 529 shows that, as found by the trial court, the Northern Pacific's intrastate gross operating revenues for 1933 were $5,685,759 (R. 44); for the last five months of 1933, after allowable deductions, $2,407,747; the tax thereon, $35,116 (R. 34).

The Telephone Company is without competition in its telephone business in the field covered by its lines (R. 68). It concedes in its complaint (Par. VII, R. 4) that it is making a return of 1.75% upon the undepreciated value of its property as shown by its books.

The trial court found that the Northern Pacific sustained a net deficit on its intrastate operations for 1933 of $192,507 (R. 43, 44); the Great Northern a net deficit of $99,269 (R. 60, 61). The State challenges these figures.

The Railroad appellants made no attempt to increase their rates and charges in order to meet the tax (N. P. Rec. 154, G. N. Rec. 200). The failure of the Telephone Company to deny allegations in appellees' answer establishes admission that it sought no increased rates (Ans. ¶ XVI, R. 13).

SUMMARY OF ARGUMENT

Notwithstanding the appellants' inability to withdraw from intrastate business without also withdrawing from interstate business, the tax imposed upon them by Chapter 191, Laws of Washington, 1933, does not contravene the Constitution.

The tax is not a license tax but an occupation tax. Since the Act prescribes no conditions precedent, it is not an invasion of the commerce power.

Even though a carrier engaged in both local and interstate commerce cannot withdraw from the former without also withdrawing from the latter, the fact that it is earning less than a fair return on the fair value of its property in its domestic business or the mere fact of financial loss in local business for a limited period, does not condemn a state occupation tax as violative of either the commerce or due process clauses.

The tax in this case is exacted only on account of intrastate activities, does not discriminate against interstate commerce or those engaged in it, and does not necessarily, as applied to the appellants, directly affect interstate commerce. The appellants' domestic business being in each case substantial and the amount of the tax being graduated according to the business done by taking a small percentage of gross income, the Act is not open to the objection that it is a thinly disguised effort to reach interstate business or property outside the State.

ARGUMENT

Notwithstanding the Appellants' inability to withdraw from intrastate business without also withdrawing from interstate business, the tax imposed upon them by Ch. 191, Laws of Washington, 1933, does not contravene the Constitution.

The Telephone Company, as its sole ground, and the Railroad Companies, upon one ground, maintain that since they are unable to withdraw from local business, either as a matter of law or as a matter of fact, without also retiring from their interstate business, the taxing act operates as an invasion of the commerce power of Congress. Conceding, for the purpose of argument, their inability as claimed, such a challenge demands, first, an ascertainment of the character of the tax and, second, whether it runs counter to the commerce clause.

The tax is not a license tax but an occupation tax

The State Supreme Court held in the cases at bar (83 Wash. Dec. (Adv. Ops.) 52, 55, 67) that the tax is concerned only with intrastate business and measured solely upon the gross revenues from that business.

It is not a property tax.

State ex rel. Stiner v. Yelle, 174 Wash. 402, 406, 25 Pac. (2d) 91;

Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 299, 59 L. ed. 234, 237;

Ohio Tax Cases, 232 U. S. 576, 593, 594, 58 L. ed. 737, 746.

It is not a tax upon gross receipts as such, but one upon an occupation measured by gross receipts.

Maine v. Grand Tr. Ry. Co., 142 U. S. 217, 229, 35 L. ed. 994, 996;

Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. ed. 400.

Speaking of a similar tax in the *Grand Trunk* case, this court said:

> "There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."

It is obviously not a tax on the exercise of corporate franchises, since it applies equally to individuals and co-partnerships.

It is not a license *fee*, because not imposed in the exercise of the police power.

Pac. Tel. & Tel. Co. v. Seattle, 172 Wash. 649, 21 Pac. (2d) 721.

The State Supreme Court there said:

> "A license is granted under the police power; an excise is imposed under the taxing power. The former is essentially not a tax at all. 1 Cooley, Taxation (4th ed.), § 26.
>
> " 'The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, although the purpose is essentially different. The one is made for regulation and the other for revenue. If for regulation, it is an exercise of the police power while if for revenue, it is an exercise of the taxing power.' 1 Cooley, Taxation (4th ed.), § 27."

It is not a license *tax* upon the *privilege* of engaging in business or pursuing a calling but is, rather, a tax upon the exercise of the inherent right to engage in business or pursue a calling. This is so because the act does not require, as a condition precedent, the procurement of a license or the payment of the tax.

The State Court's characterization of the tax is gained from the following excerpts from its opinion:

> "There is a difference between a tax imposed as a license to do business or upon the instrumentality and a tax based upon the gross income. If the tax be a license tax or one upon the instrumentality, it necessarily inheres in the interstate as well as the intrastate business. * * * The tax there (*East Ohio Gas Co. v. State Tax Comm.*, 283 U. S. 465) involved was not one upon the instrumentality or a license tax, but was an excise or a tax upon the privilege of doing business. * * * We do not look upon cases which involve either a tax upon instrumentalities or a license tax as applicable to the law now in question, which imposes, as already indicated, an excise or tax on the privilege of engaging or continuing in business." (Pac. Tel. R. 152, 156, 158.)

The State Court has denominated the tax as one upon privileges. Strictly speaking, it is not a tax upon privileges, because no condition has been imposed which must be fulfilled before commencing or continuing in business; that is to say, the State has not, for the purpose of taxing business activities, declared them to be unlawful unless licensed. It is a

familiar rule in this court that the form given to, or the characterization of, a tax by the state authorities, while entitled to weight, is not binding upon this court. In *Wagner v. Covington*, 251 U. S. 95, 102, 64 L. ed. 157, 167, Justice Pitney wrote:

> "* * * it hardly is necessary to repeat that when this court is called upon to test a state tax by the provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the state, but rather upon the practical operation and effect of the tax as applied and enforced. The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; neither can it render unconstitutional a tax that, in its actual effect, violates no constitutional provision, by inaccurately defining it."

See also:

Schuylkill Tr. Co. v. Commonwealth, ... U. S. ....., 80 L. ed. (Adv. Ops.) 15, 18;
Educational Films Corp. v. Ward, 282 U. S. 379, 387, 75 L. ed. 400, 404.

Judge Cooley, in "The Law of Taxation," Vol. 4 (4th ed.), § 1688, p. 3396, states the distinction thus:

> "License and tax do not necessarily go together; a license may be required when no tax is imposed, and an unconditional license does not exempt the licensee from being taxed upon the privilege it gives him. In this particular, all

valuable privileges stand upon the same footing; they are all liable to taxation at the will of the state, unless the state has bargained to exempt them. As is said in one case, (*Home Ins. Co. v. Augusta*, 50 Ga. 530, 537), 'There is a clear distinction recognized between a license granted or required as a condition precedent, before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in. A license is a right granted by some competent authority to do an act which, without such authority, would be illegal. A tax is a rate or sum of money assessed upon the person, property, etc., of the citizen.'"

And in § 1716, p. 3434:

"When the tax takes the form of a tax on the privilege of following an employment, convenience in collection will commonly dictate the requirement of a license, and the person taxed will be compelled to pay the tax as a condition to the right to carry on the business at all. (Citing *License Tax Cases*, 5 Wall. (U. S.) 462, 18 L. ed. 497). This distinguishes such a case from one of neglect to pay taxes in general; for except where payment is thus made a condition to the right to transact business, a default therein cannot affect the validity of business transactions."

And in § 1717, p. 3436:

"Occupation taxes are sometimes collectible by suit, as a debt, but payment is sometimes required in advance as a condition to the issuance of a license."

The author continues, in § 1800, p. 3534:

> "A license is a privilege granted by the state, usually on payment of a valuable consideration, though this is not essential. To constitute a privilege the grant must confer authority to do something which without the grant would be illegal; for if what is to be done under the license is open to everyone without it, the grant would be merely idle and nugatory, conferring no privilege whatever. But the thing to be done may be something lawful in itself, and only prohibited for the purposes of the license; that is to say, prohibited in order to compel the taking out of a license. This is always the case where that which is licensed was not unlawful at the common law."

This distinction was acted upon in *Portland v. Portland Ry., etc. Co.*, 80 Ore. 271, 156 Pac. 1058, where the Oregon Supreme Court under a city charter provision authorizing the levy of license taxes denied the power of the city to levy occupation taxes without the requirement of a license.

In *License Tax Cases*, 5 Wall (U.S.) 462, 470, 18 L. ed. 497, 500, this court explained the significance of a Federal license tax required by the Government of all persons who operated lotteries or engaged in the liquor business when the license was issued for use in a state which prohibited the activity licensed.

See also:

Home Insurance Co. v. Augusta, 93 U. S. 116, 23 L. ed. 825;

Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735;

State v. Aitkin, 61 Neb. 490, 85 N. W. 395.

The salient features of the taxing act under review have been set forth hereinabove. An examination of the entire act fails to reveal the requirement of a license or the payment of the tax as conditions precedent. The nearest approach is in Section 3 which provides that if any person engages or continues in any business for which a tax is imposed he shall be deemed to have applied for and to have duly obtained from the state a license upon the condition that he will pay the tax accruing to the state, whereupon "he shall hereby be duly licensed to engage in and conduct such business or perform such function."

Section 23 makes it unlawful for any person to fail or refuse to obtain the license or to fail or refuse to make any return provided for in the act. It is not necessary for anyone in order to conduct his business lawfully under the terms of the act to do anything. The penalty for failing to obtain a license which is not required is mere surplusage.

On the contrary, the tax being measured by income from business of the current year, the act presupposes the doing of business and the accrual of income before a return thereon is to be made as provided in Section 6. A return is made showing the business for the previous month and again at the end of the year for the year. Under Section 10, if no return is made, the tax commission, from such information as is available to it, is authorized to assess the amount of the tax.

But it is said that by Section 17 any person against whom a tax has been imposed may be enjoined from continuing in business until the tax has been paid or

until he has complied with the provisions of the act in proceedings instituted by the Attorney General upon the order of the tax commission. However, there is no positive command in the section that such proceedings be had; it merely authorizes them upon order of the commission. But neither such remedy to collect the tax nor any penalty imposed by the act is to be considered here in determining whether the act violates the commerce clause, for the reason that such remedies, if exercised to the point of interference with interstate commerce, may in themselves be invalid, and being separable from the balance of the act, may be disregarded.

Ohio Tax Cases, 232 U. S. 576, 58 L. ed. 737;
W. U. Tel. Co. v. Richmond, 224 U. S. 160, 172, 56 L. ed. 710, 717;
W. U. Tel. Co. v. Attorney General, 125 U. S. 530, 554, 31 L. ed. 790, 795.

In the *Richmond* case, we find this:

> "It does not look as if the penalties in this ordinance (which were heavy) were established with a view to prevent the appellant from resorting to the Federal Courts, nor do we apprehend that an attempt will be made to enforce them with respect to the past. But the penalties are separable from the rest of the ordinance, and if an oppressive application of them should be attempted, it will be time enough then for the appellant to file its bill."

In the case against the *Attorney General, supra*, the United States Circuit Court had granted an injunction, pursuant to the provisions of the statutes of

the State of Massachusetts, commanding the Company to desist from prosecution of the telegraph business until taxes due the state should be fully paid with interest. Ruling that the statute in authorizing injunction in such a case was invalid, this court observed:

> "The injunction in this case though ordered by a Circuit Court of the United States, is only granted by virtue of Section 54 of Chapter 13 of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decree of the court awarding it, the injunction is erroneous.
>
> "In holding this portion," of Section 54, "to be void as applicable to this case, we do not deprive the state of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment — executions, sequestration and any other appropriate remedy in chancery."

The act prescribing no conditions precedent is not an invasion of the commerce power.

> "The burden is upon appellant to show that enforcement of the act operates to prejudice interstate carriage of passengers." *Interstate Busses Corp. v. Holyoke Street Ry. Co.*, 273 U. S. 45, 51, 71 L. ed. 530, 534.

Unlike a charge which is a direct burden on inter-

state commerce (*Interstate Transit v. Lindsey*, 283 U. S. 183, 186, 75 L. ed. 953, 965) in which case the presumption of validity seems not to obtain and unless the invalidity of the act is apparent upon its face, the burden of proving it so devolves upon its assailants.

Railway Express Agency v. Virginia, 282, U. S. 440, 444, 75 L. ed. 450, 452;

Postal Tel. Co. v. Fremont, 255 U. S. 124, 65 L. ed. 545;

Postal Tel. Co. v. Richmond, 249 U. S. 252, 63 L. ed. 590;

Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275.

To meet this burden, both the Telephone Company and the Railroad Companies assert that they are unable to withdraw from their local activities without also withdrawing from their interstate activities. This, they say, is true because under the State Constitution and laws they are compelled to furnish local service and because their intra and interstate businesses are inseparably commingled and mutually dependent, being conducted by the same instrumentalities, facilities, equipment and personnel. They have failed to show, however, wherein the taxing act, conditions precedent absent therefrom, results under those circumstances in a burden upon interstate commerce. With the Railroads' assertion of losses in intrastate operations, we deal later.

We think, however, that they misconceive the office of the rule upon which they rely, which stated broadly in *Sprout v. South Bend*, 277 U. S. 163, 171, 72 L. ed.

833, 837, and repeated in similar form in *East Ohio Gas Co. v. Tax Com.*, 283 U. S. 465, 470, 75 L. ed. 1171, 1174, and *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U. S. 384, 79 L. ed. 934, is as follows:

> "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; *and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.*"

It is admitted, of course, that the tax in hand meets all of the tests so stated except the last. We admit, only for the purposes of the argument, that the appellants are, as alleged, unable to withdraw. Even under the assumption we submit that the tax is valid, for that under the circumstances, and aside from assumed losses by the Railroads, the statute is not to be condemned by the application of any artificial rule. Mr. Justice Hughes, in *Kansas City, etc., R. Co. v. Botkin*, 240 U. S. 227, 233, 60 L. ed. 617, 619, wrote:

> "We have recently had occasion (*Baltic Min. Co. v. Mass.*, 231 U. S. 68, 83, 58 L. ed. 127, 133 * * *) to emphasize the necessary caution that 'every case involving the validity of a tax must be decided upon its own facts;' *and if the tax purports to be laid upon a subject within the taxing power of the state, it is not to be condemned by the application of any artificial rule,*

but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

The application of the ability to discontinue rule, as contended for by the appellants, is certainly artificial without a further and sufficient showing of the adverse effect of the act upon interstate business. The procurement of a license or the payment of a tax as a condition precedent to engaging in or continuing a lawful intrastate business is in a constitutional sense an infringement upon the jurisdiction of Congress under the conditions here assumed, for in such a requirement the State seeks in effect to outlaw, and to compel the discontinuance of, both kinds of commerce.

Corporate franchise taxes may be exacted by a state if properly measured, it is said in *Postal Teleg. Co. v. Adams*, 155 U. S. 688, 696, 39 L. ed. 311, 315, "if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

St. Louis etc. R. Co. v. Arkansas, 235 U. S. 350, 364, 59 L. ed. 265, 272.

In *Interstate Busses Corp. v. Holyoke St. Ry. Co.*, 273 U. S. 45, 71 L. ed. 530, this court sustained a law of Massachusetts requiring as conditions precedent to the intrastate operation of motor passenger carriers a license and certificate of convenience and necessity as applied to a motor bus operator carrying passengers both locally and interstate. It carried both classes of passengers in the same busses and over a part of its route conducted its business similarly to that of a

25

street railway, thus coming in competition with the Holyoke street railway, which continually interfered with the operation of the busses by having the agents and employees arrested and prosecuted for violation of the said law. The suit was for an injunction to restrain the railway company from further interference, the main contention being that the law transgressed the commerce clause. Mr. Justice Butler, speaking for the court, said:

> "If as applied it directly interferes with or burdens appellant's interstate commerce, it cannot be sustained, regardless of the purpose for which it was passed. * * * No licenses from local authorities or certificate of public convenience and necessity is required in respect of transportation that is exclusively interstate. * * * The burden is upon appellant to show that enforcement of the act operates to prejudice interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying intrastate passengers without license over that part of its route which is parallel to the street railway. Its right to use the highways between Springfield and Hartford is not in controversy. While it appears that in Massachusetts both classes of passengers are carried in the same vehicles, it is not shown what part of the total number are intrastate or interstate. The record contains no information as to the number of persons, if any, traveling in interstate commerce on appellant's busses over the part of the route competing with the street

railway. It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried efficiently and economically in busses used exclusively for that purpose, or that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employees. The appellant relies on *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190, and *Pullman Co. v. Kansas*, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232. But there the state was using its authority as a means to accomplish a result beyond its constitutional power.

"There is no support for the contention that the enforcement of the act deprives it of its property without due process of law." (273 U. S. 50, 51)

The appellants in the case at bar have made diligent effort to present records which are not lacking in the essentials above mentioned, deeming the decision conclusive of the fate of the tax. They overlook the controlling consideration in that case—that if the two classes of business were inseparable, the State could not in enforcing conditions precedent compel the discontinuance of the local business without also interfering with that which was interstate.

Similar in legal effect are:

Pickard v. Pullman Co., 117 U. S. 34, 29 L. ed. 785;

Allen v. Pullman Co., 191 U. S. 171, 48 L. ed. 134;

Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663;

Barrett (Adams Express) v. New York, 232 U. S. 14, 58 L. ed. 483;

Bowman v. Continental Oil Co., 256 U. S. 642, 65 L. ed. 1139;

Raley & Bros. v. Richardson, 264 U. S. 157, 68 L. ed. 615;

Sprout v. South Bend, 277 U. S. 163, 72 L. ed. 833.

The *Barrett* case, *supra*, is an instance where the City of New York, by ordinance, required licenses for engaging in the express business, the fee five dollars per annum per wagon, and licenses of drivers of licensed vehicles at fifty cents per year. A bond of one hundred dollars was also required for every licensed vehicle. In number of packages, the company's business was 98% interstate and 2% intrastate, carried indiscriminately by the same wagons and men. Previous to the suit, the company had secured licenses for twenty wagons and drivers in one year and for forty wagons and drivers for a number of years without prejudice to its claim of entire immunity. Labor troubles having arisen, the city officials undertook to enforce the ordinance against unlicensed drivers and to put off the streets all unlicensed vehicles. They asserted the right to enforce the ordinance against all vehicles, whether engaged in interstate commerce or

not, upon the ground that the regulations imposed were police and such as were proper for a state to adopt. The Circuit Court held a portion of the ordinance void, but valid as to the payment of the license fees. This court, upon appeal, reversed and sent the cause back with instructions to enjoin enforcement of the ordinance with respect to the company's *interstate* business. The present Chief Justice wrote the court's opinion, in which he emphasized that the ordinance, as construed and enforced by the city officials, licensed the entire business of express companies, measuring the fees by the number of vehicles, regardless of their employment in interstate commerce. He stated (232 U. S. pp. 32, 34):

> "The right of public control, in requiring such license, is asserted by virtue of the character of the employment; but while such a requirement may be proper in the case of local or intrastate business, it cannot be justified as a prerequisite to the conduct of the business that is interstate. * * * It would seem to follow, necessarily, that the annual license fees prescribed by § 308 (*ante* p. 205, Note) cannot be exacted, so far as the interstate business is concerned. * * * The sums fixed 'for each express wagon' and 'for each driver' measure the amount to be exacted for the granting of the license required for the carrying on of business. And it is difficult to see how the payment can be enforced as to the interstate business if the taking out of the license therefor can not be compelled. * * * We conclude that the complainant was entitled to an injunction re-

straining the enforcement of the ordinances in question against the company with respect to the conduct of its interstate business and its wagons and drivers employed in interstate commerce."

We see no comfort in this case for the appellants, since the local business was small and could have been abandoned without any effect upon interstate commerce. On the contrary, it sustains the proposition that a license may not be required where its exaction interferes with commerce among the states.

Bowman v. Continental Oil Co., 256 U. S. 642, 65 L. ed. 1139, *supra*, relied upon by the appellants, lends further support to our proposition. There, the State of New Mexico required of distributors and dealers in gasoline an excise tax of two cents for each gallon of gasoline sold or used and an annual *license tax* of fifty dollars for each distributing station or place of business. Because the state, in the enforcement of the act, could discriminate between the gasoline sold in original packages (the original package doctrine as here applied was abandoned in *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 67 L. ed. 1095) and that sold after breaking of the package, the gallonage tax was approved. The license tax upon the distributing stations was held void because both interstate and intrastate business was there conducted. Mr. Justice Pitney stated for the court (256 U. S. 647, 648):

"The act, in its second section, requires every distributor of gasoline to pay an annual license tax of $50.00 for each distributing station or place of business or agency; *requires it to be paid*

in advance; and renders it unlawful to carry on the business without having paid it. Section 8 declares that any person who shall engage or continue in the business of selling gasoline without a license shall be deemed guilty of a misdemeanor and, upon conviction, be punished by fine or imprisonment, or both. The subject taxed is not in its nature divisible, as in the case of the excise tax. The imposition falls upon the entire business indiscriminately; and so does the prohibition against the further conduct of business without making the payment. By accepted canons of construction, the provisions of the act in respect of this tax are not capable of separation so as to confine them to domestic trade, leaving interstate commerce exempt. (Citing cases.)

"No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the

statute—that is to say, without authority of law. Hence, it cannot be enforced at all."

Application of the *Sprout* case, 277 U. S. 163, 72 L. ed. 833, *supra*, prized by the appellants, sustains the Washington tax. It appears that South Bend prohibited the operation on its streets of any for-hire motor bus unlicensed by the city. Sprout regularly operated a bus, capacity twelve persons, between South Bend, Indiana, and Niles, Michigan. He refused to apply for a city license, for which he was prosecuted, and defended on the ground that the ordinance was void as applied to him, because, among other things, it violated the commerce and equal protection clauses. Upon appeal to the State Supreme Court, his conviction was affirmed. Before a license could issue, a fee of fifty dollars a year was required and other regulations must be complied with. The ordinance made no discrimination between busses engaged exclusively in interstate commerce, those in intrastate commerce and those in both classes of commerce. It seems that Sprout resorted to subterfuge to escape local regulations by requiring all passengers from South Bend to pay the fare to some Michigan point, but let them off at points in Indiana. Nevertheless, he was not a local carrier exclusively, his business being largely interstate.

The State court did not consider whether Sprout's interstate carriage would be affected by his engaging also in intrastate business, but sustained the ordinance as a proper police regulation.

This court holding that upon the record the exac-

tion of the state license fee could not be sustained, either as an inspection fee or as an excise for the use of the streets, considered whether it could be sustained as an occupation tax, but because the Supreme Court of the State assumed that the ordinance applied to busses engaged exclusively in interstate commerce, denied its validity as such a tax, for the reason that the State may not condition the right to engage in that commerce on the payment of a tax.

Quite similar to the license tax considered in the *Sprout* case is the Montana tax the validity of which was denied by this court in *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U. S. 384, 79 L. ed. 934. There, the State as a condition to the conduct of the telephone business, required the payment of a license tax measured by the number of telephone instruments in use, and furthermore prohibited the company from passing the tax to its customers. Mr. Chief Justice Hughes, speaking for the court, upon an analysis of the statute, determined that it was not only a tax upon the business, both interstate and intrastate, but was also measured by instrumentalities used in both kinds of business. The right of the state to require the payment of occupation taxes of one engaged in both domestic and interstate commerce was stated and many authorities cited in support thereof. The court did not find it necessary to apply the ability to discontinue rule. In its legal aspects, the case is indistinguishable from many other cases of like character decided by this court, such as *Barrett v. New York*, 232 U. S. 14, 58 L. ed. 483; *Bowman v. Continental Oil Co.*, 256 U. S. 642, 65 L. ed. 1130; *LeLoup v. Mobile*, 127 U. S.

640, 32 L. ed. 311; or from *Sprout v. South Bend*, 277 U. S. 163, 72 L. ed. 833.

The decision in *Raley & Bros. v. Richardson*, 264 U. S. 157, 68 L. ed. 615, sustained a Georgia license tax in the flat sum of one hundred dollars upon brokers or commission merchants, despite the objection that it interfered with interstate commerce. The complainants were extensively engaged in interstate business but also did some intrastate business and were taxable upon the latter. Said Mr. Justice Sutherland:

> "That the former (intrastate) was small in comparison with the latter (interstate) makes no difference; nor does the fact that both were carried on at the same time and in the same establishment. If the two were not distinct, but the former a mere incident of the latter, the burden was upon complainants to furnish the proof; in which case a different question would arise. *Kehrer v. Stewart*, 197 U. S. 60, 69, 49 L. ed. 663, 668, 25 Sup. Ct. Rep. 403."

In the *Kehrer* case, just cited, this court sustained a license tax of two hundred dollars per annum imposed by the State of Georgia upon resident managing agents of nonresident meat packing houses, regardless of the fact that the greater portion of the business of the complainant was interstate in its character, the state court having confined the operation of the tax law to the doing of local business. Doing of business without the payment of the fee or tax was prohibited. Contention was made that the local business was merely incidental to its interstate business. The

court pointed out, however, that the record failed to show what proportion of the business was interstate and what proportion domestic and stated that

> "If the amount of domestic business were purely nominal as, for instance, if the consignee of a shipment made in Chicago, upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business and in reality a part of it, as we held, in *Crutcher v. Kentucky*, 141 U. S. 47, * * * but if the agent carried on a definite, though a minor, part of his business in the state by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. * * * The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business." (197 U. S. 69)

From a consideration of the foregoing cases, of others to be discussed herein, and of still others which could undoubtedly be brought to bear, it is plain that the mere inability, whether because of law or of facts, to withdraw from domestic business without also discontinuing interstate business, is immaterial in respect of the tax in question and its relation to the commerce clause. The tax falls only upon the doing of local business. It is measured only by the revenues from that business, which are divisible. It imposes no condition precedent, the failure to comply with which would place the state in the position of putting

a stop to interstate commerce by compelling discontinuance of the domestic commerce—a necessary concomitant of the former.

Even though a carrier, engaged in both local and interstate commerce, can not withdraw from the former without also withdrawing from the latter, the fact that it is earning less than a fair return upon the fair value of its property in its domestic business, or the mere fact of financial loss in local business for a limited period, does not condemn a state occupation tax as violative of either the commerce or due process clauses.

For present purposes, we concede that appellants are unable to discontinue their domestic business, that the Telephone Company is earning less than a fair return upon the fair value of its property in its local operations, and that the Railroads sustained deficits for the year 1933 in their intrastate operations.

It will be recalled that the Telephone Company concedes in its complaint that it is earning about 1.75% upon the value of its property as shown by its books in its local operations (R. 4); that its gross operating revenues in that business for 1933 were $9,230,873, compared with its gross interstate revenues of $923,420 (R. 106). It will further be recalled that, as found by the trial court, the Northern Pacific sustained a net deficit for the year 1933 of $192,507 on its intrastate operations, the gross revenues from which totaled $5,685,759 (R. 43, 44), and that for the same year the Great Northern sustained a net deficit of $99,269 on its intrastate operations, the

gross operating revenues from which totaled $2,179,760 (R. 60, 61); that the trial court further found that neither Railroad has been able as a practical matter to increase revenues from local business, and that whether they could do so in the future was a matter of great uncertainty and, attended by long and expensive litigation, which if successful, would have no bearing upon income for the year 1933 or for many years subsequent thereto and that they have done all they can do to increase revenues (G. N. R. 73, 74; N. P. R. 50, 51). On the other hand, the trial court found that both had applied for increases in rates, been refused by the Washington Department of Public Works, and that they have another application for increases pending before both the Interstate Commerce Commission (Ex Parte 115) and the said Department of Public Works (Finding XIII, G. N. R. 73; Finding XVIII, N. P. R. 50). But the court did not find that either had attempted in any way to increase rates to meet this small 1½% tax. It could not make such a finding for the reason that the record discloses that no endeavor in that direction had been made "because none (occupation tax) had ever been levied against the railroad, much less collected, and we don't think any will be collected, either" (N. P. R. 154; G. N. R. 200). Appellants were not in want of time in which to take the necessary steps for rate increases. The act became effective March 21, 1933, but the tax did not begin to accrue until August 1, 1933.

The results of operations for the year 1933 (commonly conceded to be the worst year of the depression) would not seem to be a fair test of the effect of the

statute in review. This finds support in the record. As to the Northern Pacific, the trial court found (N. P. R. 34, Finding V):

> "Financial results of operation of defendant's railway system and of the portion thereof within the state of Washington for years prior to the year 1932, because of difference in revenues and operating costs, and for other reasons, are not representative of financial results of operations for the years 1932, 1933 and at the date of the trial of this case. * * * It is not possible for defendant to further reduce operating expenses for the year 1934. The tendency in the year 1934 is towards substantial increase in operating expenses and decreased net revenues. Increased cost of operation will be still greater in 1935, especially in the large item of labor cost. Gross revenues for 1935 cannot be predicted, further than that there is nothing apparent at this time to suggest an increase. Facts known at this time suggest decreased net income for 1935 due most largely to greatly increased labor costs and rising cost of materials and supplies."

In respect of the Great Northern, the trial court found (G. N. R. 68):

> "(i) In figuring expense of maintenance of way and freight car repairs the preceding findings of the court are based upon the average cost for three years, rather than upon costs incurred in the year 1933. The method used is correct, for the following reasons: Maintenance is not an evenly recurring annual item. It is in part

due to use, but in greater part due to wear and wastage of the property. The necessity for maintenance accrues regardless of whether money is available to provide it. For this reason the maintenance expense actually incurred in any given year is unlikely to be representative of the normal. It is customary in railroad accounting to use a longer period than one year, either five years or three years, in computing normal maintenance. The court finds that the three years' maintenance figures used are correct. Plaintiff's witness offered an exhibit in which maintenance was figured on the basis of but one year, namely, the year 1933. This witness did not state that one year was a proper period for computing maintenance. The court finds that it is too short and cannot be used."

In dealing with the question of losses, the State Court in its opinion (Tel. R. 159, 160) said:

"But it is said that the intrastate business is being conducted at a loss, and this loss must be borne by the interstate business and therefore is a burden upon interstate commerce. There is an expression in the case of *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, that would appear to support this contention, even though the question was not necessarily involved in that case; and further, in that case there was not involved an excise tax based upon gross income, as here.

"In this state, if the respondent's intrastate business is conducted at a loss, the Legislature has provided a remedy, first, by application to

the Department of Public Service, with the right of review by the Superior Court and an appeal to this court. From the findings, it appears that an application has been made and denied by the Department and that another application is pending. It does not appear, however, that the respondent has exhausted the relief granted by the statute and until it does so it cannot be said that, even though the intrastate business is being conducted at a loss, it is such a burden upon interstate commerce as would justify holding the law unconstitutional.

"The facts in the case of *Postal Telegraph-Cable Co. v. Fremont*, 255 U. S. 124, presented a similar question, and it was there held that, where the state law affords a means to prevent the tax from burdening interstate commerce, through an application to increase intrastate rates, the tax will not be held void, in the absence of a showing that the company had exhausted the remedy afforded by an increase of the rates on intrastate business. We see no just or legal reason why the respondent should not comply with Chapter 191, as all other businesses in this state are required to do." (83 Wash. Dec. (Adv. Ops.) 52, 61)

In other words, the State Court's view is that an act of the sovereign state will not be held to be an invasion of the commerce jurisdiction of Congress, unless the state act by its *necessary* operation upon an instrumentality of commerce in fact encroaches upon that jurisdiction. That seems also to be the view entertained by this court.

Postal Tel. Co. v. Fremont, 255 U. S. 124, 65 L. ed. 545, found a municipal license tax in the flat amount of $60.00 a year upon the doing of an intrastate telegraph business consistent with the commerce clause, notwithstanding losses in that business which the Company claimed must be made up from its interstate business. It appears that the Company was bound to carry on local business. Its receipts from such business in 1914 in Fremont were only $108.28, for the year 1915, $83.96, and its expenses, exclusive of the tax, for 1914, $185.56 and for 1915, $154.26. The state court held that proof of loss for two years without showing the volume of business available at Fremont or what portion was done by the Company or what its facilities were for handling business, was insufficient to show that the tax of $60.00 on intrastate business in a city of 8000 inhabitants was unreasonable. As did the Washington court, the Nebraska court stated that the remedy for overcoming the losses was by an application for an increase in rates under the State's statutes. Upon appeal to this court, the only contention made by the Company was that the tax was, in effect, an imposition upon its interstate business, and relied upon the decision in *Postal Tel. Co. v. Richmond*, 249 U. S. 252, 63 L. ed. 590. Answering the contention, this court said (255 U. S. 127, 65 L. ed. 548):

> "We cannot assign to that case the determining force that counsel attribute to it. The case clearly declares that a license tax may be lawfully imposed on a telegraph company for the right to do business within the borders of the munici-

palities of a state. The power, of course, has its limitations, and must be exercised with due relation to the company's interstate business. *That relation is always to be considered, but it is not disposed of by the simple assertion of a loss.* The cause of it or the condition of it is to be considered. In this case the tax is $60.00 a year. It certainly cannot be said that it is repellant from its amount, and there is no pretense that its imposition 'is a disguised attempt to tax interstate commerce.' The Postal Company, when it entered the city, the ordinance levying the tax then being in existence, did not declare against its legality, or complain of its detrimental operation. Indeed, for the privilege of entering the city, it subjected itself to further regulaton, licensing and taxing. And it paid the tax from that time until 1914. The allegation in its answer that it paid the tax 'through the mistake and inadvertence of' its 'clerical force' we are not disposed to accept, without more, as an explanation.

"The Supreme Court expressed the view that mere proof of loss for two years, *which may have been exceptional,* determined nothing in the absence of a showing what business was available to the company, or what facilities it had or used, and also held that, the city being an agent of the state, any deficit arising from the tax imposed on the intrastate business of the company can be prevented from becoming a burden upon the company's interstate business by an applica-

tion to the State Railway Commission under the provisions of § 7409, for an increase of its intrastate rates. And the suggestion is pertinent. The company, as we have seen, cites § 7408 as a compulsion upon it to engage in intrastate business and at designated rates. From the rigor of the requirement § 7409 provides a mode of relief, and until it is denied, the company cannot complain under the circumstances presented by this record. In other words, if § 7408 is imperative upon the company to continue intrastate business, § 7409 affords a means of obtaining relief from burdensome obedience. The sections are counterparts. If submission to § 7408 results in insufficient revenue and a burden upon interstate commerce, it is made the duty of the Railway Commission, by § 7409, upon complaint of the Postal Company, to raise the intrastate rate 'fixed' in § 7408. No attempt to secure relief under § 7409 appears to have been made."

We see then that even though the force of the Postal Company's plea was materially diminished by its having for a number of years paid the tax in question, still there was undoubtedly a burden upon interstate commerce for the period shown, but that the effect of the tax was not necessarily an interference with interstate commerce, since the Company apparently had made no endeavor to increase its rates.

In the case at bar, the Telephone Company in respect to its low earning rate, and the Railroads in respect to their losses, are in very much the same position as the Postal Company found itself.

In *Williams v. Talladega*, 226 U. S. 404, 57 L. ed. 275, it appears that Williams, agent of a telegraph company, was convicted of doing company business in the city without taking out, and paying for, a license imposed in the flat amount of $100.00. Since the ordinance failed to except from its operation telegraph business done for the Federal Government, it was held bad. The assertion of the Company that the tax was unreasonable because of its effect upon interstate commerce was denied, for the reason that a net loss of 86c from its operations in the city over a period of eleven months was "not a sufficiently accurate representation of the business of the company conducted at Talladega to render the tax void." "With this view," said this court, "we agree, and we are not satisfied that the tax is such as to impose a burden upon interstate commerce and therefore make it subject to attack as a denial of Federal right."

Postal Tel. Co. v. Richmond, 249 U. S. 252, 63 L. ed. 590, relied upon by the Company in the *Fremont* case, held valid a municipal license tax of $300.00 per annum imposed upon the doing of a telegraph business within the City of Richmond, excluding interstate and Government service, despite an asserted loss from local business. The Company in its plea for relief alleged that the cost of doing the intrastate business transacted at Richmond was greater than the receipts from it and that since the taxes must be paid, if at all, from receipts from interstate commerce, they constitute a burden upon that commerce. It was shown that the Company was obligated by the laws of the State to transmit all messages tendered upon payment of the

usual charges. This court held that the State may lawfully impose a license tax restricting the right to do local business where the tax does not burden or discriminate against interstate commerce and "where the local business purporting to be taxed, again as in this case, is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce." Wrote Justice Clark further (249 U. S. 258):

> "This requirement that the appellant shall engage in intrastate business, construed with the ordinance imposing the license tax, results, it is argued in imposing a burden upon its interstate business, for the reason that the net receipts from the intrastate business are insufficient to pay the tax, and therefore payment, if compelled, must be made from interstate receipts. If the facts were as thus asserted, it well might be that this tax would be invalid (*Pullman Co. v. Adams*, 189 U. S. 420; *Williams v. Talladega*, 226 U. S. 404, 416, 417); but a careful examination of the record fails to convince us that it contains that clear and convincing evidence that the tax thus falls upon interstate commerce which is necessary to justify a finding that the ordinance is unconstitutional and void."

We pause here to review, briefly, *Crutcher v. Ky.*, 141 U. S. 47, 35 L. ed. 649; *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877; *Western Union Tel. Co. v. Kan.*, 216 U. S. 1, 54 L. ed. 355; and *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146, 54 L. ed. 423,

which the appellants advance as decisive of the case at bar.

In the *Crutcher* case, decided in 1891, there was declared repugnant to the commerce clause a statute of Kentucky which, under penalty, required the agent of a foreign express company to take out a license before carrying on any business, either local or interstate. The difficulty with the statute was that it applied indiscriminately to both local and interstate carriage. The court felt that the fact of local carriage was not sufficient to obviate the difficulty, for it said:

> "We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the State of Kentucky. This is probably quite as much for the accommodation of the people of the state as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not, they operate as such. *But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection.*"

In *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed.

877, decided in 1903, it appears that Mississippi levied a tax on each sleeping car company carrying passengers from one point to another within the state, in the sum of $100 and 25c per mile for each mile of track over which the company ran its cars. In an action for the recovery of taxes paid, the company pleaded (according to the statement of facts given by the state court in 78 Miss. 814, 30 So. 757) that the receipts from its local carrying business never equalled the expenses chargeable against the same and that, by operation of the constitution, it was compelled to do local business, and that since the statute required payment of the tax as a condition precedent, the losses must of necessity fall upon its interstate revenues. But the state court having construed the constitution as not requiring local service, as the result of which the company could, if it saw fit, withdraw from local business, this court held the statute valid. Mr. Justice Holmes, who wrote the court's opinion, said (189 U. S. 421, 422):

> "If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, *we assume without discussion that the tax would be invalid.* For then *it would seem to be true* that the state constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in *Crutcher v. Kentucky*, 141 U. S. 47."

In *Allen v. Pullman Co.*, 191 U. S. 171, 48 L. ed. 134, decided in 1903, two taxing acts were involved. The first exacted from sleeping car companies en-

gaged in both classes of commerce an annual tax of $500 per car. Both because it made the imposition upon companies doing interstate business and because the amount of the tax was measured by instrumentalities engaged in both classes of business, the statute was struck down. The second statute imposed an annual tax of $3000 upon sleeping car companies carrying one or more local passengers within the state and was held valid in view of the company's freedom to discontinue local business if it saw fit. In the opinion, this passage occurs (191 U. S. 181):

> "Granting that the right exists whereby a state may impose privilege or license fees upon business carried on wholly within the state, it is argued that the tax of $3,000 per annum, collected for carrying one or more local passengers on cars operating within the state, is assessed upon traffic which bears such small proportion to the entire business of the company within the state that it could not have been levied in good faith upon purely local business, and is but a thinly disguised attempt to tax the privilege of interstate traffic. If the payment of this tax was compulsory upon the company before it could do a carrying business within the state, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection. Upon this proposition we are unable to distinguish this case from *Pullman Co. v. Adams* * * *."

In that case, it will be noted that the company did

not rely upon losses in local business but relied entirely upon the amount of the lump sum tax of $3,000 required in every case, whether few or many passengers were carried. No such objection can be urged against the tax in the case at bar, for it is measured by a small percentage of the revenues from local business.

We see no inconsistency between the *Adams* and *Allen* cases and the *Fremont*, *Richmond* and *Talladega* cases, heretofore discussed. The latter apply the rule of the former, but place upon the companies the burden of proving that the statute *necessarily* operates to trammel interstate commerce. Indeed, in the *Adams* case the court only assumed that the tax would be invalid because "it would *seem* to be true that the constitution and statute combined would impose a burden on commerce between the states." Since the Pullman Company was able to withdraw both from Mississippi and from Tennessee, it was not necessary for the court to consider further whether the company could forestall the burden on interstate commerce by increasing its local revenues.

We are in a zone of doubt as to the deficiencies of the record referred to by the court in the *Richmond* case when it said that "a careful examination of the record fails to convince us that it contains that clear and convincing evidence that the tax thus falls upon interstate commerce which is necessary to justify a finding that the ordinance is unconstitutional and void." This doubt, we think, is dispelled by the court in the *Fremont* case, when it insists that the complaining utility asserting local losses should show it

had made an unsuccessful attempt to prevent the force of the taxing statute from colliding with the commerce clause.

Western Union Tel. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, and *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146, 54 L. ed. 423, deal with similar statutes: One, a Kansas statute; the other an Arkansas statute. The Kansas law exacted from a foreign telegraph company a so-called charter fee, measured by a percentage of its entire authorized capital stock, as a condition of continuing in its local business in that state. The act was held to be at cross purposes with both the commerce and due process clauses, as it necessarily amounted to a burden and tax on interstate business and on property outside the state. Failure to pay the tax would entail a forfeiture of authority to do local business in the state. The following excerpts from the opinion of this court are apt in the present case:

> "If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business." (216 U. S. 27)
>
> "Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the telegraph company, as a charter fee, of a given per cent *of its authorized capital*, representing, as that capital clearly does, all of

its business and property, both within and *outside of the state*, a *condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the state, but a burden and tax on the company's interstate business and on its property located or used outside of the state." (216 U. S. 30)

After considering the case of *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, the court continued:

"So, in the case now before us, the exaction, as a condition of the privilege of continuing to do or doing local business in Kansas, that the telegraph company shall pay *a given per cent of its authorized capital stock*, is, for every practical purpose, a tax both on the company's local business in Kansas, and on its interstate business, or on the privilege of doing interstate business; for the statute, *by its necessary operation*, will accomplish precisely the result that would have been accomplished had it been made, *in express words*, a condition of doing local business, that the telegraph company should submit to taxation upon both its interstate *and* intrastate business and upon its interests and property everywhere, as represented by its capital stock. * * * But as already said, what part of the fee exacted by Kansas is to be attributed to intrastate business and what part to interstate business the state has not chosen to ascertain and declare. It has seen proper to exact a specified per cent *of* the authorized capital of the telegraph company,

representing, necessarily, all its business, interstate and intrastate, and all its property interests in and out of the state." (216 U. S. 31, 32)

"We repeat that the statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the state, contribute to the support of the state's schools. *Such is the necessary effect of the statute*, and that result can not be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise, is to allow form to control substance. * * * We can not fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done, or can generally be better and more economically done, by such interstate companies, rather than by domestic companies organized to conduct only local business." (216 U. S. 37)

The court then recognized the state's power, thus:

"That the Western Union Telegraph Company is engaged in both interstate and intrastate com-

> merce is no reason, in itself, why Kansas may not, in good faith, require it to pay a license tax strictly on account of local business done by it in that state. * * * This court, while recognizing, as former cases had done, the exclusive right of Congress to regulate interstate traffic, said that: 'The corresponding right of the state to tax and control the internal business of the state, although thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness'—Citing *Osborne v. Florida*, 164, U. S. 650." (216 U. S. 42, 44)

The appellants herein, by an application of the principles controlling the decision just quoted from, attempt to convict the State (by asserted failure on their part to make a fair return upon local business and by asserting losses therein) of exacting tribute from earnings and property beyond its borders. Now, of course, it does not follow that, because money was not made or losses were sustained by them in 1933, the deficiencies must be made up from interstate earnings. So far as the record shows, they may have other earnings from businesses in the State; they may have accumulated from intrastate carrier business during the fat years of 1928, 1929, 1930 and other years a comfortable surplus, and the time is at hand, if it has not already arrived, when they will again enjoy profits in local enterprise. The *Kansas* decision, not only recognizes the difficulty of conducting a local telegraph business divorced from the interstate telegraph business, but also, and even in view

of that fact, recognizes the power of the state to exact from the local business a tribute to the sovereign.

It is not amiss to call attention briefly to *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, *Ewing v. Leavenworth*, 226 U. S. 464, 57 L. ed. 303, and *New York ex rel. Steamboat Co. v. Sohmer*, 235 U. S. 549, 59 L. ed. 355, in which State taxation was found not to be infringing upon national jurisdiction, although the taxes did, as a matter of fact, fall upon interstate commerce. In these cases, the transportation taxed commenced and terminated in the state but crossed states lines en route. On the other hand, in *Hanley v. Kansas City, etc., R. Co.*, 187 U. S. 617, 47 L. ed. 333, and *Western Union Telegraph Co. v. Speight*, 254 U. S. 17, 65 L. ed. 104, *regulation* of like transportation was denounced as an interference with interstate commerce. While in the three cases first mentioned, the tax bore directly upon interstate commerce, it was held that the interstate transportation was within the purview of the State's power to tax.

In *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 86, 58 L. ed. 127, 134, dealing with taxation of franchises of foreign corporations, Mr. Justice Day, as the Court's spokesman, said:

> "An examination of the previous decisions in this Court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its *necessary* effect was to burden interstate com-

merce, or to tax property beyond the jurisdiction of the State."

The facts and the decision in the *Ohio Tax Cases*, 232 U. S. 576, 58 L. ed. 737, have been sufficiently adverted to in the brief of counsel for the State (Brief, pp. 17, 18, 19). Counsel for appellants to the contrary, nevertheless this case sustained the validity of a state tax upon occupations carried on by corporations, copartnerships and individuals, as appears from the statement of the case made by Mr. Justice Pitney. It was urged strenuously by counsel for the Ohio railroads that the tax, measured by four per cent of gross revenues, violated the due process, equal protection and commerce clauses. It was urged especially that the taxing act, as disclosed by its legislative history, was an effort by indirection to reach earnings from interstate commerce. However, these contentions were given no weight. The case seems to be of great force here because of the close similarity between the Ohio tax and the Washington tax.

The foregoing considerations on this branch of the case lead to the conclusion that a tax in terms cast upon commerce internal to the state will not be condemned unless (1) it is but a cloaked endeavor to strike at interstate commerce, or (2) it is convincingly proven that its necessary operation measurably invades commerce among the states or with foreign nations. As applied to the appellants, Chapter 191 falls into neither of these categories. It is not within the first of them because—

1. Practically all occupations and pursuits are within its reach, including such activities commercial

in character as are engaged in by the State's subdivisions;

2. Only activities wholly within the State are within its operation;

3. There is no discrimination against those engaged in interstate commerce;

4. Unlike the lump sum tax, this tax, graduated in accordance with a percentage of revenues received, must ever be in proportion to the amount of business done. The rates fixed cannot be said to be, upon the face of things, unjustly large;

5. Rivals, such as railroads and motor carriers, are treated alike;

6. The act is the result of a bona fide readjustment of the general scheme of taxation in the State;

7. Those affected by it have enjoyed substantial reductions in ad valorem taxes by reason of the so-called 40-mill law limiting taxes upon property to forty mills upon the assessed value thereof, which is fifty per cent of its true value;

8. Public necessity, induced by the terrific drain upon the State's resources due to the depression, called it into existence.

It has not in its effect upon the appellants been shown to fit into the second category for they have disavowed any attempt to pass to or share with their customers its burden and the proofs of scanty earnings and of deficits over a short period do not reasonably demonstrate that interstate commerce is burdened.

Each of the appellants' local businesses, conducted in a state having, according to the Federal census, a

population in 1930 of 1,563,396, is in each instance, as we have seen, substantial and sufficient to warrant the taxes imposed to assist the State in defraying the cost of protecting their property and business transactions.

CONCLUSION

The State has by Chapter 191, general in the range of business activities affected, levied an occupation tax (not a license tax) upon the exercise of the right to conduct businesses or pursue callings under the protection of an organized society. No conditions precedent to the exercise of that right have been prescribed. Efforts to exact obedience cannot, as in the case of enforcement of conditions precedent, interfere with or trammel interstate commerce which cannot reasonably be carried on separate and apart from internal commerce.

The State cannot justly be charged with a covert design by action within its admitted jurisdiction to reach into the national jurisdiction or to pick the pockets of interstate commerce. That it has drawn within the scope of the act some, such as the appellants, who in the conduct of intra- and interstate commerce, from the former of which they cannot escape without renouncing the latter, and who during a brief period of abnormalcy have either fallen short of earning a fair return or suffered a temporary loss of earnings, which they made no attempt to avoid by means at hand, does not place it within the domain reserved exclusively for national action.

For the reasons advanced in the brief of appellees and those appearing herein, we respectfully submit that the judgment of the Supreme Court of the State of Washington should be sustained.

Respectfully submitted,

A. C. VAN SOELEN,
Corporation Counsel of The
City of Seattle, Washington;

WALTER L. BAUMGARTNER,
Assistant;

Attorneys for The City of Seattle, Washington, Amici Curiae.

Office and Postoffice Address:
515 County-City Building,
Seattle, Washington.

TRANSCRIPT OF RECORD

CLERK'S COPY

151

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 529

NORTHERN PACIFIC RAILWAY COMPANY,
APPELLANT,

vs.

STATE OF WASHINGTON

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED OCTOBER 19, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 529

NORTHERN PACIFIC RAILWAY COMPANY,
APPELLANT,

vs.

STATE OF WASHINGTON

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

	Original	Print
Record from Superior Court of Thurston County	3	1
Complaint	3	1
Answer	10	7
Exhibit "C"—First supplemental findings of fact and order of Dept. of Public Works, No. 6484	18	14
Exhibit "D"—Senate Bill No. 18	20	16
Reply	21	17
Findings of fact and conclusions	39	32
Judgment	65	54
Proceedings in Supreme Court of Washington	66	54
Opinion of Court	66	54
Dissenting opinion, Steinert, J.	77	63
Dissenting opinion, Holcomb, J.	81	66
Judgment	82	67
Petition for appeal	83	68
Order allowing appeal	86	70
Assignment of errors and prayer for reversal	88	71
Original citation and acceptance of service (omitted in printing)	91	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 10, 1935.

—7213-C

	Original	Print
Cost and supersedeas bond.....(omitted in printing)..	93	
Præcipe for transcript of record.....	96	73
Rules of Court:		
Rule VI—Abstracts	98	74
Rule VI—Abstracts of records (as amended).....	99	75
Rule VII—Supplemental abstracts	100	75
Rule VIII—Contents and style of briefs (subdivisions 1 and 2)	101	76
Rule XVI—Exceptions to findings of fact and conclusions of Law	102	77
Appellant's abstract of record from Superior Court of Thurston County	103	77
Complaint .....(omitted in printing)..	107	
Answer .....(omitted in printing)..	113	
Reply .....(omitted in printing)..	124	
Motion for judgment on pleadings.....	133	77
Motion to strike paragraph V of answer.....	134	78
Statement of evidence.....	134	78
Plaintiff's Exhibits 1 and 2—Interrogatories to defendant and answers thereto	136	78
Plaintiff's Exhibit 3—Supplemental answer to interrogatories	140	83
Plaintiff's Exhibit 4—Second supplemental answer to interrogatories	141	83
Testimony of E. V. Peterson	142	84
W. W. Judson	219	144
W. C. Pinger	226	150
M. G. Crawford	229	152
C. R. Lonergan.....	231	153
T. M. Jenner	233	155
Recital as to Defendant's Exhibits 5 and 6.....	236	157
Defendant's Exhibit 7—Operating statistics	237	158
Statements as to Defendant's Exhibits 8 to 22-b, inclusive	260	168
Testimony of C. R. Lonergan (recalled).....	267	172
E. V. Peterson (recalled)	280	182
C. A. Manschreck.....	281	184
A. S. Edmonds	301	199
E. V. Peterson (recalled)	306	203
Statement re Plaintiff's Exhibit 23.....	316	211
Plaintiff's Exhibits:		
24—Findings of fact and order in Cause No. 6172, Dept. of Public Works.....	317	211
25 to 28 inclusive—Statements showing revenues and operating expenses.....	319	212
29—Computation of taxes, etc.	323	215
30—Computation of operating income, etc., 1933	325	216
31 to 34, inclusive—Corrections of N. P. Exhibit 7	326	217

	Original	Print
Appellant's abstract of record from Superior Court of Thurston County—Continued.		
35—Computation of operating ratio, etc., 1933..	331	219
36—Correction of N. P. Exhibit 7.....	332	219
37 to 44, inclusive—Statements as to operating expenses taxes and revenues.....	334	221
Statements re Exhibits 45 to 51, inclusive.....	344	227
52—Drawing	347	228
Defendant's Exhibit 53—Statement showing results of intrastate operations, year 1933.....	348	229
Defendant's Exhibit 54—Excerpts from testimony of W. M. Burn	352	231
Affidavit of C. A. Manschreck	355	232
Exhibit "B"—Restatement of N. P. Exhibit 7..	365	241
Affidavit of E. V. Peterson.....	366	242
Testimony of E. V. Peterson (recalled).....	369	245
Findings and conclusions.....(omitted in printing)..	379	
Judgment .....(omitted in printing)..	404	
Appeal	405	252
Defendant's Exhibit 8—Annual report of N. P. Ry. Co., 1932	406	253
Defendant's Exhibit 9—Annual report of N. P. Ry. Co., 1933	563	269
Defendant's Exhibit 11—Terminal cost studies.....	719	285
Defendant's Exhibit 12—Analyses of engine hours and cost per car, etc.	739	300
Defendant's Exhibit 13—Statements showing cost of switching, etc.	749	310
Defendant's Exhibit 46—Annual report of N. P. Ry. Co., 1931	761	315
Docket entries	833	323
Appellee's præcipe for transcript of record	834	324
Clerk's certificate .....(omitted in printing)..	836	
Statement of points to be relied upon and designation as to printing record	837	325
Appellee's designation of additional portions of record to be printed	841	325

[fols. 1-3] [File endorsement omitted]

IN SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 15415

STATE OF WASHINGTON, Plaintiff,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant

COMPLAINT—Filed Feb. 28, 1934

Comes now the plaintiff, and for complaint alleges:

(1) That at all times herein mentioned defendant was and now is a corporation organized and existing under the laws of Wisconsin and was and is engaged in and continuing in the business within the state of Washington of owning and operating steam railways as a common carrier for hire, and was and now is engaged in and continuing in the business in the state of Washington of a light and power, a telephone company, a telegraph company, and a public service company, all as defined in Session Laws of Washington for 1933, Chapter 191, section 2, subdivision (2), subdivision (e), sub-sub-subdivisions III, V, VI and XII.

(2) That defendant, as such common carrier, is now, and for many years has been, subject to the Interstate Commerce Act, and as such has for a long number of years, and at all times herein mentioned, kept its accounts and made its reports to the Interstate Commerce Commission, the Tax Commission of the State of Washington, and the Department of Public Works of the State of Washington, by the uniform system of accounts prescribed by the Interstate Commerce Commission for steam railway corporations. That in and by such method of accounting, defendant's receipts are now, and for many years last past have been,

classified both by number and name according to the source of such receipts. That defendant's receipts from its said operations are now, and for many years last past have been, classified in its income account as Account No. 501, denominated "railway operating revenues," and that said Account No. 501 is now, and for many years last past has been, sub-
[fol. 4] classified as to the particular character of such revenues according to the following account numbers and designations:

Rail-line transportation revenue as follows:

Account number	Name of account
101	Freight
102	Passenger
103	Excess baggage
104	Sleeping car
105	Parlor and chair car
106	Mail
107	Express
108	Other passenger-train
109	Milk
110	Switching
111	Special service train
112	Other freight-train
113	Water transfers—Freight
114	Water transfers—Passenger
115	Water transfers — vehicles and live stock
116	Water transfers—Other

Water-line transportation revenue as follows:

Account number	Name of account
121	Freight
122	Passenger
123	Excess baggage
124	Other passenger service
125	Mail
126	Express
127	Special service
128	Other

Incidental revenues as follows:

Account number	Name of account
131	Dining and buffet
132	Hotel and restaurant

[fol. 5]

133	Station, train and boat privileges
134	Parcel room
135	Storage—Freight
136	Storage—Baggage
137	Demurrage
138	Telegraph and telephone
139	Grain elevator
140	Stockyard
141	Power
142	Rents of buildings and other property
143	Miscellaneous

Joint facility operating revenues as follows:

Account number	Name of account
151	Joint facility—Cr.
152	Joint facility—Dr.

(3) That all of the railway operating revenues included in said accounts set forth in paragraph (2) hereof (except said account numbers 106 and 125, "Mail", said account number 138, "Telephone and Telegraph", and said account number 141, "Power") which were received by, or accrued to, defendant during the months of August, 1933, to December, 1933, inclusive, as a result of business transacted wholly within the state of Washington, constituted the gross income of defendant in the state of Washington as defined by Section one, of said chapter 191, and that defendant is taxable under the provisions of said chapter 191 in an amount equal to one and one-half per cent of such railway operating revenues. That the exact amount of such gross income for said months, or any of them, is unknown to plaintiff, but that plaintiff is informed and believes, and therefore states the fact to be, that the amount thereof for said respective months and the several amounts of taxes payable by defendant by reason thereof under said

chapter 191, are not less than as shown by the following table:

[fol. 6] Column 1 Month	Column 2 Gross income	Column 3 Amount of tax
August, 1933	$479,343.55	$7,190.15
September, 1933	499,681.96	7,495.23
October, 1933	478,715.41	7,180.73
November, 1933	506,751.16	7,601.27
December, 1933	550,000.00	8,250.00
Total		$37,717.38

That amounts not less than the several respective sums set forth in said Column 3 became due and owing to plaintiff from defendant on the 15th day of the month next following the month named in said Column one set opposite said respective amounts; that no part of said taxes have been paid, and that the same are now due and owing to plaintiff from defendant, together with interest thereon at the rate of one per cent. per month from the several dates when the same became due, together with a penalty of ten per cent. on the amount of said unpaid taxes.

(4) That all of the railway operating revenues included in accounts numbers 138 and 141 which were received by, or accrued to, defendant during the months of August, 1933, to December, 1933, inclusive, as a result of business transacted wholly within the state of Washington, constituted gross income of defendant in the state of Washington as defined by Section one, said chapter 191, and that defendant is taxable under the provisions of said chapter 191, in an amount equal to three per cent. of such railway operating revenues. That the exact amount of such gross income for said months, or any of them, is unknown to plaintiff, but that plaintiff is informed and believes, and therefore states the fact to be that the amount thereof is a substantial amount and greatly exceeds $200.00.

(5) That defendant has heretofore instituted a suit in the United States District Court for the Western District of Washington, Southern Division, the same being Equity Cause No. 514, against T. S. Hedges and T. M. Jenner, the same being all of the present members of the tax commission of the State of Washington, wherein defendant, as the

plaintiff in said suit, alleges that said chapter 191 is un-
[fol. 7] constitutional and void as to the defendant herein, and praying that said Hedges and Jenner, and each of them, and their agents and employes, be restrained and enjoined from taking any action against the defendant herein, or its employes, for failure to make a return under said chapter 191, and from making any assessment against said defendant for any tax collectible thereunder, or any part thereof, and from issuing any warrant directed to the sheriff of any county in this state commanding him to levy upon and sell any real or personal property of said defendant within his county and directing him to levy upon and sell any real or personal property of said defendant within his county and directing him to file said warrant with the clerk of the superior court, and taking any action whatever against said defendant for the collection of any tax imposed under said chapter 191; and from in any manner proceeding against said defendant under Section 23 of said chapter 191, or otherwise, for failure or refusal of said defendant to obtain any license to do business in this state, or for failing or refusing to make any return provided for in said Section 23, or for failure or refusal to pay such tax, or any part thereof, claimed to be due or payable under said chapter; and further praying that plaintiff have a temporary interlocutory and final injunction restraining said defendant and its agents and employes from doing any of said matters or things aforesaid pending the trial of said cause No. 514.

That no restraining order or interlocutory injunction or permanent injunction, or restraining order or decree of any kind has been entered in said cause No. 514 and that no final hearing of said defendant's application for said interlocutory injunction or application for said permanent injunction has as yet been had in said cause No. 514.

(6) That in said cause No. 514 defendant alleges in its verified complaint, among other things, (a) that the amount in controversy therein exceeds, exclusive of interest and costs the sum or value of $3,000; (b) that defendant owns and operates a system of steam railways in Washington and other states, as a common carrier, and as such, does both interstate and intrastate business, and for a long time has made no net income from its intrastate business but

has lost money thereon, and if required to pay the tax imposed by said chapter 191, it will be compelled to pay the [fol. 8] same from its receipts from interstate business; (c) that it is not permitted by law to retire from its intrastate without also retiring from its interstate business carried on in Washington, and cannot lawfully be taxed for the privilege of conducting a business from which it is not at liberty to retire; (d) that its interstate and intrastate freight and passenger traffic is carried on the same trains and over the same rails, and by means of the same equipment, and that should it surrender its intrastate business, its operating expenses would not be appreciably reduced and would necessitate an increase of its interstate rates; and (e) that the definition of "gross income" as set forth in section one of said chapter 191 is too vague and indefinite to afford the basis for the computation of a valid tax for any amount whatever, for all of which reasons the tax attempted to be imposed on defendant by said chapter 191 is alleged by said defendant to be void and unconstitutional as against defendant, as an unlawful burden on interstate commerce, and violative of the commerce clause and 14th Amendment of the United States Constitution, and that defendant has no plain, speedy, and adequate remedy at law.

Wherefore, plaintiff prays judgment against defendant (a) for $37,717.38, and such other and further amounts of taxes as the court shall find upon the trial of this action to have become due and owing from defendant to plaintiff under the provisions of said chapter 191, by reason of gross income received by said defendant between August 1st, 1933, and December 31st, 1933, inclusive, (b) for ten per cent. of the amount of such unpaid taxes as and for a penalty for the non-payment thereof when due, (c) for interest at one (1) per cent. per month on the several amounts of such taxes from the dates when the same became due and payable, (d) for its costs of suit herein, and (e) for such other and further relief as to the court may seem meet and equitable in the premises.

Plaintiff further prays that an order be forthwith entered by this court staying any further proceedings by said Hedges and Jenner, or either of them, or their agents or employes, against said defendant or its agents or employes,

under or by virtue of said chapter 191 pending the final determination of this action.

G. W. Hamilton, Attorney General; R. G. Sharpe, Assistant Attorney General, Attorneys for Plaintiff.

[fol. 9] *Duly sworn to by G. W. Hamilton. Jurat omitted in printing.*

[fol. 10] [File endorsement omitted]

Received Mar 17, 1933. Attorney General's Office, Olympia

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ANSWER—Filed March 17, 1934

The defendant, Northern Pacific Railway Company, makes answer to plaintiff's complaint as follows:

I

Admits Paragraph (1), except denies that it is engaged in the business of a light and power, telephone or telegraph company.

II

Admits Paragraph (2).

III

Denies all of the allegations of Paragraphs (3) and (4).

IV

Admits Paragraphs (5) and (6).

[fol. 11] VI

(a) Defendant's railroad was constructed and equipped in this state long prior to the enactment of said Chapter 191, Laws of 1933, at a cost of more than one hundred million dollars, to provide adequate facilities for both interstate and local business. Long after said railroad was con-

structed by said Northern Pacific Railroad Company and conveyed to defendant, as aforesaid, there was enacted Chapter 81, Laws of 1905, followed by Chapter 117, Laws of 1911, known as the Public Service Commission Law, and thereby, and by Art. XII, Secs. 13, 14 and 15 of the Constitution of Washington, there is imposed on defendant an obligation to devote its railroad to the service of the people of this state in the transportation of passengers and property in local commerce, from which it cannot withdraw while continuing to carry on its interstate commerce. Defendant's railroad system comprises 10,521.30 miles of line of which 3,285.47 miles are in the State of Washington. Said railroad is taxed in this state by virtue of Chapter 130, Laws Special Session of 1925, on its fair market value, considered as a going concern, and including all of its property used in the operation, maintenance and equipment of said railroad. Ad valorem taxes so levied for the year 1933, payable in the year 1934, are approximately two million dollars. Defendant is also required by Chapter 107, Laws of 1929, to pay to the Department of Public Works one-tenth of one per cent of its gross revenue as an inspection and supervision fee. Said inspection fee, payable for the year 1933, will be approximately $7,000.00. The tax of 1½% of gross income imposed by said Chapter 191, Laws of 1933, is not a property tax, nor in lieu of a property tax, nor an inspection or supervision tax, but is an excise tax imposed solely for the privilege of doing local business.

(b) Defendant, as an interstate carrier, subject to the acts of Congress regulating interstate commerce, keeps its accounts as required by the Interstate Commerce Commission.

[fol. 12] (c) Results of operation of defendant's railway system and of the portion thereof within the State of Washington for years prior to the year 1932 are not representative of results of operation for 1932, 1933 and at the present time. System net railway operating income for the years 1932 and 1933 is as follows:

1932	$1,990,389.21
1933	5,975,972.63

(d) Defendant's gross railway operating revenues and expenses within the State of Washington for both local and

interstate business, ad valorem taxes in Washington and inspection fee paid to the Department of Public Works of Washington for the years 1932 and 1933 are as follows:

1932:

Revenues	$12,845,325.62
Expenses	12,336,818.64
Ad valorem taxes	2,464,967.00
Inspection fee	6,481.32

1933:

Revenues	12,064,954.32
Expenses	11,145,042.19
Ad valorem taxes	2,002,000.00
Inspection fee	5,700.53

(e) Defendant's gross railway operating revenues from local and interstate business in the State of Washington for the years 1932 and 1933, separately stated, are as follows:

1932:

Local	$6,613,958.99
Interstate	6,231,366.63

1933:

Local	5,802,530.12
Interstate	6,262,424.20

(f) Revenues assigned to the State of Washington comprise the entire revenues accruing from business local to the state plus a mileage proportion of interstate revenue, as is customary in apportioning revenues to states by carriers subject to the interstate commerce act, and includes also the entire revenue from switching and demurrage accruing in the state, whether from local or interstate business. The expenses assigned are those incurred in the state that are wholly applicable to the local business plus a mileage proportion of expenses which are applicable to all traffic, whether state or interstate, and which cannot be localized. This apportionment is also in accordance with [fol. 13] the method prescribed by the Department of Public Works of the State of Washington and has been followed for more than twenty years and is as accurate as is

possible in view of the inseparable nature of the two classes of business.

(g) Expenses incurred in the State of Washington cannot be mathematically divided between local and interstate business because of the inseparable nature of the two kinds of business which are carried on the same lines of railroad, in the same trains and cars operated by the same employees, but local business is relatively short haul, incurs two terminal expenses within the state, while interstate business incurs but one terminal expense; local business uses more expensive terminal facilities in its handling from large distributing centers; clerical and warehouse expense is greater; damage to freight is greater; an excess of equipment is used for loading and unloading; car and engine miles per day are less; local trains are lighter and the wear and tear on the equipment is greater because of frequent starting and stopping; there is more switching, resulting in increased cost and greater damage to equipment; local trains are on the road more and consume more coal per mile; local short hauls are irregular and the facilities are used to less capacity. While the revenue per ton mile of local business is as 142 is to 100, the expense of doing the local business per unit of freight is much more than 42% greater than the cost of doing interstate business, and the expense of said local business is in excess of the revenue received therefrom.

[fol. 14] VII

(a) Defendant's interstate and local business is inseparably commingled and mutually dependent. For the year 1932 defendant's gross freight revenue (Account 101 of the Uniform System of Accounts) for business done in this state was $10,570,610, of which $5,497,482 was from local and $5,073,128 from interstate business. For said year the local revenue ton miles were 326,000,000 and the interstate revenue ton miles in this state were 427,000,000 in round numbers. For the week March 25th to 31st, 1932, a representative period, defendant's local revenue net ton miles were 6,824,237 and interstate revenue net ton miles were 7,601,845, or 47.30% and 52.70% respectively; and of the local revenue net ton miles 3,022,719 were eastbound and 3,801,518 were westbound, and of the interstate reve-

nue net ton miles 5,175,941 were eastbound and 2,425,904 westbound. Both classes of business, eastbound and westbound, were transported by defendant over the same lines of railroad, in the same trains, operated by the same employees, and with the same facilities, and it is not possible, practically and economically, or at all, to carry local separately from interstate freight business by different lines of railroad, in different trains, or by means of different instrumentalities or employees. Defendant's gross income from transportation of passengers in this state (Acct. 102) for the year 1932 was $943,250.73, of which $379,715.40 was from local and $563,535.33 from interstate business; the number of revenue passengers carried during said year in this state was 280,521 of which 145,061 were carried locally and 135,460 interstate; the number of revenue passenger miles was 42,735,770, of which 18,739,808 were local and 23,995,962 interstate. Much the larger part of said passengers were carried on interstate through trains East and West bound and on interstate through trains North and South bound. It is not possible to carry said local and interstate passengers on separate lines or by separate trains and the facts with respect thereto are identical with the [fol. 15] facts alleged in respect to defendant's freight traffic. Defendant does not now have statistics for the year 1933, but they will be approximately the same as those for the year 1932 above stated.

(b) If defendant could and should abandon its local freight business it could and would reduce its train service and would thereby reduce its expenses approximately $870,-088 and reduce its car mileage in trains not discontinued and save approximately $601,535, a total reduction of expense applicable to its local and interstate Washington freight business of approximately $1,471,623, but would lose its entire gross revenue from local freight business of $5,497,482. These figures are based upon operations for the year 1932, but will be approximately the same for 1933. Defendant cannot reduce its passenger service nor the expenses attributable thereto, and would lose its entire gross revenues from local passenger transportation of $379,-715.40. The net result of abandonment by defendant of its local pasenger and freight business in order to escape the

tax involved by said Chapter 191, Laws of 1933, is as follows:

State of Washington

Operating Revenues—Local 1932

Freight Revenues—Acct. 101	$5,497,482.00
Passenger Revenues—Acct. 102	379,715.00
Other operating revenues	736,762.00
Total	$6,613,959.00
Estimated Reduction in operating expenses	$1,471,623.00
Net loss of income	5,142,336.00
Interstate gross income	6,231,366.63
Expenses (as reduced)	10,865,195.64
Washington taxes	2,464,967.00
Loss on interstate business	7,098,796.01

(c) Therefore, if defendant could and should abandon its local freight and passenger business in order to avoid said tax the entire burden of maintaining and operating its interstate system of railroad constructed and equipped to handle both classes of business would fall on interstate business, and would necessitate an increase of rates and fares greater than the same could bear as a practical mat-
[fol. 16] ter, or at all, and would result in the destruction of an essential instrument of interstate commerce and transportation of the mail, troops and munitions of the United States, and of the value of defendant's property to the amount of more than one hundred million dollars. The tax imposed by said Chapter 191, Laws of 1933, on the pretext of a tax or fee for the privilege of doing local business in Washington is in reality a tax and burden upon interstate commerce, and upon the gross revenues received by defendant therefrom and is a tax upon defendant's business done and upon income earned in other states and upon property located outside the State of Washington.

VIII

Defendant alleges that the amount which would be payable as a tax of 1½% of its gross income is approximately as stated in its complaint for the months of August to November, 1933, and is approximately the sum of $6,611.44

for the month of December, 1933. Defendant's railroad is well located and economically managed. It serves the principal cities and towns of the state. The operation of defendant's railroad in local business is essential to the people of this state. Defendant cannot raise many of its local rates because of competition of other kinds of transportation. Under the law of this state it cannot do so without the consent of the Department of Public Works. Defendant has heretofore applied for an increase of certain local rates and said application was denied by said Department of Public Works, as appears from a copy of its order hereto attached, marked Exhibit "C", and made a part hereof. Since defendant filed the suit in the District Court of the United States for the Western District of Washington, referred to in the complaint, Senate Bill 18 was introduced at the special 1933 session of the legislature of this state, which bill was prepared and enactment urged by attorneys for the State of Washington for the purpose of relieving defendant from the obligation of doing local business and to meet de-
[fol. 17] fendant's contention in said case and in this case that it is so obligated, but said bill was rejected by the legislature. A copy thereof is hereto attached, marked Exhibit "D", and made a part hereof.

IX

By reason of the matters and things alleged in paragraphs VI, VII and VIII thereof, said Chapter 191, Laws of 1933, as applied to defendant, violates Article I, Sec. 8, the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States and the acts of Congress regulating interstate commerce, particularly Sec. 1 (18) to (21), Sec. 13, Sec. 15a and Sec. 19a thereof, and the Emergency Railroad Transportation Act, 1933, and is null and void.

Wherefore, defendant prays that this action be dismissed with costs.

L. B. daPonte, Robert S. Macfarlane, Attorneys for Defendant.

Duly sworn to by L. B. daPonte. Jurat omitted in printing.

[fol. 18] EXHIBIT "C" TO ANSWER

Before the Department of Public Works of Washington

No. 6484

In the Matter of the Application of Common Carrier Railroads for Fifteen Per Cent Increase in Freight Rates in the State of Washington

First Supplemental Findings of Fact and Order

On December 17, 1931 the department entered an order providing for emergency increases in intrastate freight rates and charges in Washington to expire March 31, 1933. The increases ordered were in conformity with increased rates and charges authorized by the Interstate Commerce Commission, hereinafter called the Commission, in Ex Parte 103, 178 I. C. C. 539, and 179 I. C. C. 215, for the same period. On January 13, 1933, the applicants filed with us a supplemental petition requesting authority to continue in effect the emergency rates and charges so authorized until September 30, 1933. The Commission on March 7, 1933 issued a mimeographed report authorizing extension to September 30, 1933 of the emergency interstate rates and charges. A hearing was held by the department in Seattle April 12 and 13, 1933.

Testimony and exhibits were presented by the applicants showing that their financial condition has not improved since the emergency charges were given effect and that for the calendar year 1932 their income decreased substantially compared with the previous year. The applicants while turning over the proceeds of the so-called surcharge to the Railroad Credit Corporation have received no assistance from nor availed themselves of the credit facilities afforded by that corporation.

Since January 4, 1932, the basic rates covering innumerable individual point to point items of traffic, many of which move in volume, such as iron and steel articles, canned goods, sugar, petroleum and its products, cement, lumber, pulpwood, paper, etc., have been substantially reduced and in a great many instances the surcharge has been eliminated for the purpose of meeting the competition of highway carriers and other modes of transportation. Applicants have by no means uniformly adopted this practice. In other

words, the surcharge has been removed upon the movement of a particular commodity between specific points, but it has been retained upon the same commodity between other points. Applicants have declined to remove the surcharge on certain commodities moving freely over the highways. The record shows a considerable and ever increasing movement of coal produced in King and Pierce Counties by truck, but producers interested in maintaining the rail movement from western Washington mines have been unable to induce applicants to waive the surcharge on their traffic to retain it for rail movement.

We are of the opinion and find that this rate adjustment policy generally indulged in by the applicants between January 4, 1932 and March 31, 1933 resulted in undue preference and advantage to certain persons and localities and subjected other persons and localities to undue prejudice and disadvantage prohibited by section 21 of the public service laws of Washington. Protests were made by witnesses as to the continuance of the surcharge on coal, lumber and other commodities. The record before the Commission and the decision of that body were made a part of the record in the instant proceeding. That record shows that vigorous opposition was offered by the witnesses representing basic commodities as well as many other lines of traffic. We are entirely in accord with the attitude of the four dis- [fol. 19] senting members of the Commission and are of the opinion that continuance of the surcharge even for a few months longer will be burdensome and irritating to the public, of no real benefit to applicants as to revenue results therefrom and will tend to deflect more traffic from the applicants' facilities to other modes of transportation. It is a matter of common knowledge that the present level of rail rates is too high to permit freedom of movement by rail. Pursuant to petitions from shippers of basic commodities throughout the United States, the Commission has recently ordered under its Docket 26000 a general investigation in the matter of rates and charges of carriers by railroad, subject to its jurisdiction, to determine what reductions may be made in them.

The surcharge authorized does not apply on any of the important agricultural products carried in Washington. Its voluntary removal by the applicants on many other commodities which move in volume indicates that the pre-

ponderance of Washington intrastate traffic will be either unaffected by, or not susceptible to its application.

We find that a continuance of the effectiveness of the emergency freight rates and charges authorized by our order dated December 17, 1931, to expire March 31, 1933, is not necessary to prevent injury to the interests of the public or to the applicants under existing conditions.

Order

Wherefore it is ordered That the application herein be and the same is hereby denied.

Witness the Department of Public Works of Washington, this 27th day of April, 1933.

Department of Public Works of Washington, E. K. Murray, Director; W. D. Lane, Supervisor of Transportation; Frank Purse, Supervisor of Public Utilities.

[fol. 20] EXHIBIT "D" TO ANSWER

In the Senate—By Senator Mehner

Senate Bill No. 18

State of Washington, Extraordinary Session, 1933

December 8, 1933, read first and second time, ordered printed, and referred to Committee on Public Utilities.

An Act permitting public service companies engaged in interstate commerce to withdraw from certain kinds of business, and providing that this act shall take effect immediately

Be it enacted by the Legislature of the State of Washington:

Section 1. That any public service company engaged in interstate commerce, including any steam railway company, electric railway company, light company, power company, telephone company, telegraph company, express company, car company, or company engaged in transporting freight or passengers for hire upon the public highways of this

state, is hereby permitted to renounce and withdraw from the whole (but not a part only) of that part of its business carried on in the state of Washington which does not constitute interstate commerce. The word "company" as used in this act shall mean any individual, firm, copartnership, joint venture, association, corporation, trust or any other group or company acting as a unit, whether mutual, cooperative or otherwise.

Sec. 2. The renunciation provided for in section one hereof shall be in writing, signed and acknowledged by such company or its duly authorized agents and filed with the department of public works of the state of Washington, and shall declare that the said company elects to renounce all local business in the state of Washington after the date set forth therein. After the date so fixed, it shall be unlawful for said company to carry on any business whatsoever in the state of Washington other than interstate business, without the consent of the officers of the state of Washington and of the United States having power to authorize the same.

Sec. 3. This act is necessary for the immediate support of the state government and its existing public institutions and shall take effect immediately.

[fol. 21] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

REPLY—Filed May 5, 1934

Comes now the plaintiff and replying to the allegations of defendant's answer—

(1) As to paragraph V (a) thereof, admits the enactment of an Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route," the adoption by Congress of a joint resolution approved March 1, 1869 (15 Stat. L. 346) purporting to authorize the Northern Pacific

Railroad Company to issue bonds, etc., and the adoption by Congress of a joint resolution approved May 31, 1870, (16 Stat. L. 378) purporting to authorize said company to issue certain bonds, but denies any knowledge or information sufficient to form a belief as to the other allegations therein contained.

As to paragraph V (b) thereof, denies any knowledge or information sufficient to form a belief as to the allegations therein contained.

As to paragraph V (c) thereof, denies any knowledge or information sufficient to form a belief as to the allegations therein contained.

As to paragraph V (d) thereof, denies that defendant at any time became entitled to any of the immunities or rights or franchises of the Northern Pacific Railroad Company or that defendant at any time became subject to any of the obligations of the Northern Pacific Railroad Company either by any decree or decrees or deed or deeds or at all. [fol. 22] As to the other allegations of said paragraph V (d), plaintiff denies any knowledge or information sufficient to form a belief.

As to paragraph V (e) thereof, denies each and every allegation, matter and thing therein contained, except that plaintiff admits the enactment and adoption of the Act of Congress and joint resolutions hereinabove referred to.

As to paragraph V (f) thereof, denies any knowledge or information sufficient to form a belief as to the allegations therein contained, and particularly denies any knowledge or information sufficient to form a belief as to any one of the following allegations: the amount of revenues received by defendant for hauling mail from January to October, 1933; either the tonnage of freight transported by defendant for the United States during said period, either in carload lots or less than carload lots, or the revenues received by defendant therefrom.

(2) As to Paragraph VI (a) thereof, plaintiff admits that defendant's railroad was constructed and equipped in the State of Washington at a cost of more than $100,000,000 and prior to the enactment of Chapter 81, Laws of 1905. Plaintiff denies any knowledge or information sufficient to form a belief as to the miles of line either of defendant's system or of defendant's railroad within the State of Washington. Plaintiff admits that defendant's railroad in

Washington is taxed by virtue of Chapter 130, Laws Special Session of 1925, on its fair market value, and that the ad valorem taxes levied thereon for 1933 are approximately $2,000,000, and that defendant is also required by chapter 107, Laws of 1929 to pay to the department of public works one-tenth of one per cent of its gross revenue as an inspection and supervision fee, and that the tax imposed by Chapter 191, Laws of 1933, is not a property tax, but denies each and every other allegation, matter and thing therein contained.

As to paragraph VI (c) to Paragraph VI (f) inclusive thereof, plaintiff denies any knowledge or information sufficient to form a belief as to the allegations therein contained and particularly as to any of the following allegations: the [fol. 23] amount of defendant's system net railway operating income for either the year 1932 or the year 1933; the amount of defendant's gross railway operating revenues from both local and interstate business for either the year 1932 or the year 1933; the amount of defendant's railway operating expenses for both local and interstate business for either the year 1932 or the year 1933; the amount of defendant's gross railway operating revenues from local business in the State of Washington for either the year 1932 or the year 1933; the amount of defendant's gross railway operating revenues from interstate business in the State of Washington for either the year 1932 or the year 1933. For the reasons hereinafter alleged plaintiff avers that defendant's method of apportioning railway operating revenues and expenses to defendant's properties in Washington as alleged in said paragraph is unfair, unjust and inequitable to said properties in Washington, and does not show the true revenues and expenses apportionable to said properties.

As to Paragraph VI (g) thereof, plaintiff admits that expenses incurred in the State of Washington cannot be mathematically divided between local and interstate business, and admits that the revenue per ton mile of local business in Washington is at least 42% greater than the revenue from defendant's interstate business apportioned to Washington on a mileage prorate, but denies each and every other allegation, matter and thing therein contained.

(3) As to Paragraph VII (a) thereof, plaintiff denies any knowledge or information sufficient to form a belief as

to any one of the items of statistical data therein set forth; denies that defendant's interstate and local business is either inseparably commingled or mutually dependent; denies that the week March 25th to 31st, 1932, was a representative period for comparing defendant's local revenue net ton miles with its interstate revenue net ton miles, or making any other comparison as to local and interstate traffic; denies that it is not possible or practicable to carry local freight business separately from interstate freight business; and denies that it is not possible to carry local and interstate passengers on separate trains.

[fol. 24] As to Paragraph VII (b) thereof, plaintiff denies any knowledge or information sufficient to form a belief as to any of the following allegations thereof; the amount defendant's expenses incident to haulage of freight would be reduced should it abandon its local freight business; the amount which defendant would save by such abandonment by a reduction of its car mileage in trains not discontinued; the amount defendant would lose by such abandonment in gross revenues from local freight business; the amount defendant would lose by such abandonment in gross revenues from local passenger transportation; and as to whether or not defendant could, by such abandonment, reduce its passenger service or its expenses attributable thereto.

As to paragraph VII (c) plaintiff denies each and every allegation, matter and thing therein contained.

(4) As to Paragraph VIII thereof plaintiff denies that the operation of defendant's railroad in local business is essential to the people of the state of Washington, denies that there are any of defendant's local rates which defendant cannot raise sufficient to cover the amount of said occupation tax either because of competition of other kinds of transportation or for any other reason; denies that defendant has ever applied to the department of public works for an increase in local rates because of its being required to pay such occupation tax; denies that the enactment of Senate Bill 18 was urged by attorneys for the State of Washington for any purpose whatever, and denies that said bill was rejected by the legislature, but alleges, on the contrary, that said bill was never voted upon by either the senate or house of representatives.

(5) As to Paragraph IX thereof plaintiff denies each and every allegation, matter and thing therein contained.

[fol. 25] As and for a first affirmative reply to the matters set forth in defendant's answer, plaintiff alleges:

(1) That the defendant has never applied to the department of public works of the state of Washington for permission to renounce its interstate business in the state of Washington.

As and for a second affirmative reply to the matters set forth in defendant's answer, plaintiff alleges:

(1) That the defendant has never applied to the department of public works of the state of Washington for permission to increase any of its rates or tariffs on the transportation of either freight or passengers between points within the state of Washington, or any of its other rates or tariffs, on the ground that its operating expenses would be or have been increased by reason of the occupation tax imposed on defendant by the provisions of chapter 191, Session Laws of the state of Washington for 1933.

As and for a third affirmative reply to the matters set forth in defendant's answer, plaintiff alleges:

That the total value of all the taxable property in the state as found by the state board of equalization for 1933 was the sum of $2,259,852,124, and the total assessed valuation of such property as fixed by the county assessors was $993,248,450, and total assessed valuation was found by said board to be 43.9519223 per cent of said total actual value of said taxable property.

That the total assessed valuation of said taxable property as fixed by the state board of equalization for the purpose of levying taxes for state purposes was $1,129,926,062, or 50 per cent of its actual value.

That in Table "A" are set forth in column (a) the various "funds" or divisions of expense incident to the support of government of the state of Washington for which, under the laws of the state of Washington, revenues are required to be raised by ad valorem taxes levied by the state board [fol. 26] of equalization on the taxable property within the state of Washington.

That in column (b) of said table are set forth the several sums required to be raised for each of said "funds" for the support of state government as listed in said column (a), together with the total thereof, as found and determined by the state board of equalization meeting in September,

1933, plus the seventh year delinquencies as found by the state auditor.

That in column (c) of said table are set forth the number of mills in taxes which it would have been necessary to levy upon the assessed valuation of all of the taxable property in the state of Washington for the year 1933 in order to raise the several sums set forth in said column (b) together with the total thereof, had the total amount of such expense been raised by ad valorem taxes imposed on the taxable property of the state.

Table A

Name of Fund:	Amounts necessary to be raised for support of state government:	Millage necessary to raise sums listed in Col. (b)
(a)	(b)	(c)
Current School Fund	7,520,572	6.656 mills
University of Washington	1,702,265	1.506 mills
Washington State College	1,012,900	0.896 mills
Bellingham Normal School	301,333	0.267 mills
Cheney Normal School	254,811	0.226 mills
Ellensburg Normal School	185,028	0.164 mills
General Fund	3,178,395	2.813 mills
Veterans' Compensation	1,129,926	1.000 mills
Bond Retirement	.....	.....
Total of above funds	$15,285,230	13.528 mills
Plus Seventh Year Delinquencies	464,873	0.411
Total	$15,750,103	13.939 mills

[fol. 27] That the total amount of taxes actually levied by the said state board of equalization for the year 1933 upon the assessed valuation of the taxable property within the state of Washington for the support of the state government at the meeting of said board in September, 1933, was the sum of $6,779,556, or a total levy of six mills only upon the assessed valuation for state tax purposes of said taxable property, and that the additional levy necessary to cover the said $464,873.13 of seventh year delinquencies would be 0.411 mills or a total levy of 6.411 mills, or 7.528 mills less than the total millage which would have been actually levied for said year on said property had the entire expense of state government plus such seventh year delinquencies, been raised by the imposition of ad valorem taxes upon the taxable property of the state.

That the Northern Pacific Railway Company is hereinafter referred to as the "N. P."; the Great Northern Railway Company, as the "G. N."; the Oregon-Washington

Railroad & Navigation Company, as the "O-W".; and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, as the "Milwaukee";

That approximately all of the railroads located in Washington handling interstate commerce and now and for many years last past have been owned and operated by said companies.

That the tax commission of the state of Washington is hereinafter referred to as the "Tax Commission", the state board of equalization of the state of Washington as the "state board of equalization", and the state of Washington, as the "state".

That in column (a) of table "B" are set forth the names of said railway companies as above set forth; in column (b) of said table are set forth the values of the operating real and personal property of the companies named in column (a) as found by the state board of equalization for the year 1932; in column (c) of said table is set forth the [fol. 28] value of the operating real and personal property of the said companies named in column (a) as found by the state board of equalization for the year 1933; and in column (d) of said table is set forth the several percentages which the several amounts set forth in said column (c) are of the respective amounts set forth in said column (b):

The valuation shown in said column (b) as to the "N. P." is that found by the court in litigation between said company and the counties in the federal court.

The valuation shown in said column (b) as to the "Milwaukee" is that fixed by the tax commission in a reassessment proceeding in 1933 as to the operating property of said company for 1932 and prior years.

Table B

Name of Company (a)	Valuation found for 1932 (b)	Valuation found for 1933 (c)	Percentages which 1933 valuation is of 1932 Valuation: (d)
N. P.	††$105,000,000	$100,450,000	95.666667%
G. N.	69,574,000	66,100,000	95.006755%
O. W.	43,070,000	39,100,000	90.782447%
Milwaukee	†38,439,000	34,250,000	89.102213%

† As fixed by tax commission in reassessment proceedings in 1933.
†† As fixed by decree of U. S. district court.

That in column (a) of Table "C" are shown the names of said railroad companies; in column (b) are shown the

equalized assessed valuations of the operating real and personal property of the companies named in column (a) as fixed by the state board of equalization for the year 1933 for the purpose of levying taxes thereon for state purposes; in column (c) is shown the total amount of taxes for state purposes which would have been levied against [fol. 29] said operating properties had the total amount of the expense of state government been raised by ad valorem taxation of the taxable property of the state, said amounts being computed by multiplying the assessed valuation shown in column (b) by .013939 representing the total millage heretofore shown in the last line of column (c), Table A; in column (d) are shown the total amounts of taxes for state purposes actually levied against said operating properties for the year 1933, said amounts being computed by multiplying the assessed valuation shown in column (b) by .006411, representing the maximum millage which can be levied for state purposes under chapter 4, Laws of 1933; and in column (e) is shown the several amounts by which the taxes which would have been levied against each said company's operating property for the year 1933 except for the limitations of said chapter 4, Laws of 1933, exceeds the taxes actually levied on said property for state purposes for the year 1933, the same being computed by deducting the figures in column (d) from the figures in column (c).

Table G

Name of Company	1933 Equalized value of company's operating property for state tax purposes	Total tax which would have been levied except for Ch. 4, L. '33 (.013939 x Col. "B")	Total tax actually levied (.96411 x Col. "B")	Amount of reduction in state tax by reason of Ch. 4, L. '33 (Col. "c"–Col. "D")
(a)	(b)	(c)	(d)	(e)
N. P.....	$50,225,000	$700,086	$321,992	$378,094
G. N.....	33,050,000	460,684	211,884	248,800
O–W.....	19,550,000	272,507	125,335	147,172
Milwaukee.	17,125,000	238,705	109,788	128,917

That plaintiff is informed and believes, and therefore states the fact to be that the total amount of the occupation tax which would have been levied against said companies computed at 1½% of the total gross railway operating revenues of said companies for intrastate business for the whole of the year 1933 would have been not greater than [fol. 30] the following amounts: By the N. P.: $90,000; by the G. N.: $46,500; by the O-W: $11,250; and by the Milwaukee, $19,350.

That at the head of columns (a), (b), (c) and (d) of Table "D" hereinafter appearing, is set forth the names of said companies hereinbefore mentioned.

That in line (1) of said table is set forth the total ad valorem taxes payable on each such company's operating property in the state for the year 1932, computed as hereinbefore described.

In line (2) of said table is set forth the percentages of each of said company's operating property's assessed valuation for 1933 of the assessed valuation of said property for the year 1932 computed as hereinbefore described and as set forth in column (d) of Table "B" herein.

In line (3) is shown what each said company's total taxes for the year 1932 would have been had such taxes been based on the 1933 assessed valuation of said company's operating property. Said amounts are computed by multiplying the figures in line (1) by the decimal fractions in line (2) of said Table "D".

In line (4) of said table is shown the maximum total amount of ad valorem taxes which would be payable on each of said company's operating property for the year 1933 determined as hereinbefore set forth.

In line (5) of said table are shown the total amount of occupation tax payable by each computed at 1½% of each of said company's gross railway operating revenues from intrastate business for the entire year 1933, had chapter 191, Laws of 1933, been effective for said entire year.

In line (6) of said table are shown as to each of such company the sum of such company's occupation tax if imposed for the whole of the year 1933, and the ad valorem tax payable on such company's operating property for the year 1933. These amounts are computed by adding the figures in line (4) to the figures in line (5).

[fol. 31] In line (7) of said table is shown the minimum amount saved in taxes by each such company (including both ad valorem taxes and occupation taxes) for the year 1933 as compared with the ad valorem taxes payable by each such company (adjusted to 1933 assessed valuations) for the year 1932. These amounts are computed by subtracting the figures in line (6) from the figures in line (3).

In line (8) of said table is shown the ad valorem taxes which would have been levied on the operating property of each said company for the year 1933 for state purposes

only had it not been for the limitations of the 40-mill limit law (chapter 4, Laws 1933). These figures are set forth in column (c) of Table "C".

In line (9) of said table are shown the actual ad valorem taxes which will be levied on the operating property of each said company for the year 1933 for state purposes only by reason of the limitations of said chapter 4, Laws 1933. These figures are set forth in column (d) of Table "C".

In line (10) of said table are again shown the amount of occupation tax as to each such company as theretofore shown in line (5) of said table.

In line (11) of said table are shown the sum of such occupation tax if imposed for the whole of the year 1933, and the ad valorem state tax payable on such company's operating property for the year 1933. These figures are computed by adding the figures in lines (9) and (10).

And in line (12) of said table are shown as to each such company the amount actually saved in state taxes alone (including both ad valorem taxes and occupational taxes) for the year 1933 as compared with the ad valorem state taxes which would have been levied on such company's operating property for 1933 except for the limitations of said chapter 191, Laws of 1933. (Assuming said occupation tax had been collectible for the whole of the year 1933).

[fol. 32]

Table D

Line No.	Item	N.P. (a)	G.N. (b)	O.W. (c)	Milwaukee (d)	
(1)	Total ad valorem taxes payable on said companies' operating property for 1932	$2,474,397	$1,556,512	$771,847	$825,895	$5,628,651
(2)	Percentage of said companies' operating properties' assessed valuation for 1933 of the same for the year 1932	95.666667%	95.006755%	90.782447%	89.102213%	93.85120%
(3)	Total ad valorem taxes payable on said companies' operating property for 1932 had such properties' assessed valuation been the same for 1932 as for 1933 (Line 2 x Line 1)	$2,367,173	$1,478,791	$700,702	$736,890	$5,282,556
(4)	Maximum total ad valorem taxes which will be payable on said companies' operating property for the year 1933 under new tax plan	$2,011,875	$1,252,960	$609,924	$654,770	$4,529,529
(5)	Total amount of occupation tax payable by them had the same been imposed for the whole of the year 1933	90,000	46,500	11,250	19,350	167,100
(6)	Ad valorem taxes plus occupatien taxes payable by said companies for 1933 (Line 5–Line 4)	2,101,875	$1,299,460	$621,174	$674,120	$4,696,599
(7)	Minimum net savings in total taxes ad valorem and occupation, which said companies will realize in 1933 by new tax plan (Line 3–Line 6)	265,298	179,331	79,528	61,770	$585,927
(8)	Ad valorem state taxes which would have been levied on said companies' operating property for 1933 under revenue laws in force prior to 1933 (unlimited mileage)	700,086	460,684	272,507	238,705	1,671,982
(9)	Ad valorem state taxes actually levied on said companies' operating property for 1933 under 40-mill tax limit act of 1933	321,992	211,884	125,335	109,788	768,999
(10)	Occupation tax (see line 5 above)	90,000	46,500	11,250	19,350	167,100

Table D—Continued

Line No.	Item	N.P. (a)	G.N. (b)	O.W. (c)	Milwaukee (d)	
[fol. 33]						
(11)	Sum of said occupation taxes and said ad valorem state taxes levied on said companies' operating property for 1933 (Line 10 plus Line 9)	$411,992	$258,384	$136,585	$129,138	$936,099
(12)	Net savings in the total state taxes ad valorem and occupation, which said companies will realize as compared with ad valorem state taxes alone which would have been levied on their operating property under old law (Line 8–Line 11)	$288,094	$202,300	$135,922	$109,567	$735,883

[fol. 34] That the net railway operating income of railroad companies as computed by the Interstate Commerce Commission, and as adopted and acquiesced in and reported to the state regulatory body by all railroad companies operating in this state including plaintiff, is computed by deducting revenues from expenses, which revenues and expenses consist of the following items:

Said revenues are computed by adding the following items: Railway operating revenues; hire of freight cars, rent from locomotives, passenger-train cars; floating equipment; work equipment; and joint facility rent income;

Said expenses are computed by adding the following items: Railway operating expenses; railway tax accruals; uncollectible railway revenues; hire of freight cars; rent for locomotives, passenger train cars, floating equipment, and work equipment; and joint facility rents.

Replying to the allegations in defendant's answer that the apportionment to Washington of a mileage prorate of said defendant's revenues received on interstate shipments is the method usually and customarily followed in assigning revenues to the states and is as accurate as is possible in view of the inseparable nature of the business, and is in accordance with the method prescribed by the department of public works of the state, plaintiff avers that this method of apportionment is prescribed by said department of public works only as a basis upon which railroad companies are to make reports to said department, and not for the purpose of determining the true amount of such interstate revenues which should properly be apportioned to Washington in a proceeding in which the true net earnings of defendant's operating properties in Washington are involved. That for the purpose of such a proceeding, the said department would be compelled to, and would, make an exhaustive study of defendant's interstate and intrastate traffic and expenses for the purpose of determining the true and equitable proportion of such interstate revenues and expenses which should properly be apportioned to [fol. 35] Washington.

That the apportionment of revenues from interstate shipments to Washington on the basis of a mileage prorate does not apportion to defendant's Washington operating properties their fair and equitable proportion of such interstate revenues for the following, among other reasons:

That the operating properties of both the N. P., the G. N., the O-W., and the Milwaukee located in Washington constitute in each case the western terminal properties of transcontinental systems with their western termini at Puget Sound and other parts of the Pacific Coast, and their principal eastern termini are in the case of the O-W., at Omaha, Nebraska, in the case of the Milwaukee, at St. Paul and Minneapolis, Minnesota, Milwaukee, Wisconsin and Chicago, Illinois, and in the case of the G. N. and N. P., at said St. Paul and Minneapolis, and via the lines of the Chicago, Burlington & Quincy Railroad Company (of which company said N. P. and G. N each own approximately one-half of the capital stock) Denver, Colorado, Kansas City, Missouri, St. Louis, Missouri, and Chicago, Illinois. That the principal western termini of said railroads are: As to the N. P., Spokane, Tacoma and Seattle, Washington and Portland, Oregon, as to the G. N., the same cities and in addition: Everett, and Bellingham, Washington; as to the O-W: Seattle, Tacoma and Spokane, Washington, and Portland, Oregon; and as to the Milwaukee: Spokane, Seattle, Tacoma, Bellingham, and Grays Harbor and Willapa Harbor points. That in terminal states such as Washington the expenses of each of said railroads are far greater per car mile, per ton mile and per passenger mile than in the intermediate or bridge states between their principal eastern and western termini by reason of the necessity in the state of Washington, of maintaining numerous branch lines where the density of traffic is comparatively light and of maintaining expensive terminal facilities in the large cities such as depots, docks, warehouses, industrial tracks, etc., for which branches and [fol. 36] terminal facilities must be and are used by said companies for the assembling and distributing of long-haul traffic moving over said companies' transcontinental lines between their respective eastern and western termini. That by the apportionment of revenue from said companies' interstate shipments with exclusive reference to the relative miles of haul within and without the state, the contribution of the track mileage to the earnings of such revenue is alone considered and the important contribution of such terminal facilities to such earnings is wholly ignored and the contribution by the branch lines is largely ignored. That in recognition of the facts set forth in this paragraph

it is customary for the railroads in the western and other portions of the United States, in apportioning the revenues from interline shipments between companies with connecting lines, to apportion to the terminal lines far more than a mileage prorate of such revenues.

That for the reasons aforesaid, in computing the net earnings of defendant's Washington properties, defendant's railroad in Washington is entitled to a greater proportion of the revenues from interstate shipments than a relative mileage of haul prorate thereof.

In response to the allegations of said answer that the figures set forth therein as being the expenses within the state from both intrastate and interstate business, are those incurred in the state of Washington, which are wholly applicable to that state, plus a proportion of such expenses which cannot be localized, plaintiff avers that for the same reasons it is inequitable and unfair to Washington to apportion to defendant's Washington operating property no more than a mileage prorate of the revenues from interstate business, it is likewise inequitable and unfair to apportion to such Washington properties all of those operating expenses which are incurred in such state, and for the further reason that Washington being a terminal state, all of the operating expenses incident to the assembling and distributing of long-haul traffic moving to or from Washington are incurred in that state and by defendant's [fol. 37] method, are charged to defendant's operating property in said state, whereas such terminal expenses should rightfully and equitably be apportioned over the entire mileage which said traffic, both freight and passenger, is hauled. That in a terminal state such as Washington to and from which commodities and passengers are hauled in interstate commerce, the operating expenses per car mile, per ton mile and per passenger mile greatly exceed the operating expenses per car mile, per ton mile and per passenger mile in the intermediate states through which such traffic is hauled between the points of origin and destination, because of the operating expenses incident to loading and unloading, assembling the same into train loads, the maintenance of branch lines on which the traffic is comparatively light, and the maintenance and operation of expensive terminal facilities such as docks, wharves, warehouses, industrial tracks, depots, freight yards, etc., and switching as to the carrier's own traffic for that reason

such terminal expense should be distributed evenly over the entire mileage of haul and not assigned alone to the state in which such expenses are incurred. But that in computing the operating expenses within the state of Washington as to interstate traffic as set forth in said complaint, defendant has assigned all of such terminal expenses to Washington. That such assignment, and the assignment to Washington of only a mileage prorate proportion of defendant's revenues from interstate traffic, for the reasons hereinabove set forth, makes the defendant's statements in its answer as to its revenues and expenses in the state of Washington for the years 1932 and 1933, and other periods both false, misleading and valueless for any purpose.

In response to the allegations in defendant's answer that defendant's intrastate business is relatively short haul and local and is not less expensive in proportion to revenues than the interstate business affiant avers that such allega-
[fol. 38] tion is false and misleading in this: that the revenues received by defendant from its intrastate freight traffic per ton mile are, and were during the periods set forth in said complaint, far greater than those received by the defendant on its interstate business, and, consequently, that the volume of freight handled per dollar of revenue received is far less as to such intrastate business than as to such interstate business.

Wherefore, plaintiff prays judgment against defendant as prayed in its complaint herein.

G. W. Hamilton, Attorney General; R. G. Sharpe, Assistant Attorney General, Attorneys for Plaintiff.

Duly sworn to by G. W. Hamilton. Jurat omitted in printing.

[fol. 39] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS—Filed March 25, 1935

I

This is an action by the State to recover from the Northern Pacific Railway Company a tax of 1½% of gross intra-

state revenues imposed by Chapter 191, Section 2 (2) (e), Laws of 1933, for the months August to December, 1933.

II

Defendant is a Wisconsin corporation. It owns and operates a system of steam railway from a point on Lake Superior, in Wisconsin, through Minnesota, North Dakota, Montana and Idaho to Puget Sound, in Washington, with main and branch lines in twenty-three counties of the state. The railroad was constructed and equipped in this state long prior to the enactment of Chapter 191, Laws of 1933, and prior to the enactment of Chapter 81, Laws of 1905, at a cost of more than one hundred million dollars, to provide, and does provide, adequate facilities for both interstate and local business in this state. At the time of, for a long time prior, and ever since, the enactment of said Chapter 191, Laws of 1933, defendant was engaged in both interstate and intrastate commerce by means of said railroad, and was subject to all provisions of the constitution of the State of Washington relating to railroads and to Chapter 117, Laws of 1911, known as the Public Service [fol. 40] Commission Law, and all amendments thereof and supplements thereto; and as well to the Acts of Congress regulating interstate commerce by railroad, and all amendments thereof and supplements thereto, including the Emergency Transportation Act of 1933.

III

Defendant's railroad system comprises 10,542.97 miles of all track of which 3,298.39 miles are and were in the State of Washington at the time said Chapter 191, Laws of 1933, became effective. Defendant's railroad is taxed in this state by Chapter 130, Laws of Special Session of 1925, on its fair market value, considered as a going concern. Ad valorem taxes have long been levied thereon and for 1933 were $2,005,000.00. The tax of 1½% of gross revenue imposed by said Chapter 191, Laws of 1933, is not a property tax, nor in lieu of a property tax, nor a supervision tax, but is an excise tax imposed on defendant solely for the privilege of doing a "steam railway business' in this state.

IV

Defendant's gross revenue from intrastate "steam railway business" (on which the tax of 1½% is computed),

for August to December, and the amount of the *the* tax, is as follows:

Month	Gross amount	Tax
August	$502,689.04	$7,540.34
September	506,312.53	7,594.69
October	497,551.56	7,463.27
November	530,465.24	7,956.98
December	370,729.26	5,560.94
Total		$36,116.22

These are the amounts shown in defendant's answers and second supplemental answers to plaintiff's interrogatories offered in evidence by plaintiff, less a deduction of $72,351 gross revenue for the five months and tax of $1085.26, as [fol. 41] shown in detail by defendant's Exhibit 7, sheet 4. This deduction is on account of revenue received from switching interstate freight.

It was stipulated in open court that if plaintiff be entitled to recover anything the judgment should be without prejudice to the right of either party to the adjustment and correction provided for by the act. Subject to this stipulation, the court finds that if plaintiff were entitled to recover anything the amount is said sum of $36,116.22.

V

Defendant, as a carrier subject to the acts of congress regulating interstate commerce, keeps its accounts as required by the Interstate Commerce Commission. Financial results of operation of defendant's railway system and of the portion thereof within the State of Washington for years prior to the year 1932, because of difference in revenues and operating costs, and for other reasons, are not representative of financial results of operations for the years 1932, 1933 and at the date of the trial of this case. Defendant's system net railway operating income for the years 1932 and 1933 is as follows:

1932	$1,990,389.21
1933	5,975,973.63

The gross operating revenue for the years 1932 and 1933 was approximately $47,000,000. The increase in net revenue for the year 1933 over 1932 is due solely to decreased

operating expenses. It is not possible for defendant to further reduce operating expenses for the year 1934. The tendency in the year 1934 is towards substantial increase in operating expenses and decreased net revenues. Increased cost of operation will be still greater in 1935, especially in the large item of labor cost. Gross revenues for 1935 cannot be predicted, further than that there is nothing apparent at this time to suggest an increase. Facts known [fol. 42] at this time suggest decreased net income for 1935 due most largely to greatly increased labor costs and rising cost of materials and supplies.

VI

Defendant's gross railway operating revenues and expenses for both intrastate and interstate business, computed in the manner prescribed by the Department of Public Works of the State of Washington and as shown in the annual reports made by defendant to said Department of Public Works, ad valorem taxes in Washington, and fee paid to the Department of Public Works of Washington for 1932 and 1933 are as follows:

1932:

Revenues	$12,845,325.62
Expenses	12,336,818.64
Ad valorem taxes	2,464,967.00
Fee	6,481.32

1933:

Revenues	$12,064,954.32
Expenses	11,145,042.19
Ad valorem taxes	2,005,015.00
Fee	5,700.53

VII

Defendant's railway operating revenues from intrastate and interstate business in the State of Washington for 1932 and 1933, as stated in its reports to the Department of Public Works, are as follows:

1932:

Intrastate	$6,613,958.99
Interstate	6,231,366.63

1933:

Intrastate	5,802,530.12
Interstate	6,262,424.20

VIII

(a) Revenue assigned to Washington in Paragraph VI, supra, comprises the entire revenue from local business and a mileage proportion of revenue from interstate business; that is to say, if the total mileage of an interstate shipment be 1000 of which 200 is in Washington one-fifth of the revenue is assigned to Washington. The mileage prorate method has been used by defendant in all of the [fol. 43] states through which it operates for many years; it is in general use throughout the United States; it is the method prescribed by the Department of Public Works and Interstate Commerce Commission. The court finds that it is the best, in fact the only one available. This question received more attention at the trial than its importance justifies. Its only materiality is that defendant apportions state taxes to its intrastate business on the relation of gross revenue from intrastate to gross revenue from interstate business. To increase the assignment of interstate revenue to the state reduces proportionately the assignment of taxes to the intrastate business. Such increase, if any, would be too small to affect the final result. Plaintiff did not offer any other method; much less did plaintiff attempt to prove the amount by which the assignment of interstate revenue ought to be increased. The court finds that the mileage prorate method is correct.

(b) The expenses in Washington stated in Paragraph VI, supra, were incurred in transacting the entire business, both intrastate and interstate. They are those expenses wholly applicable and capable of direct assignment as having been incurred in the state plus a mileage proportion of common expenses applicable to the system as well as to the state. This method of apportioning expenses is the one used in all of the states in which defendant operates; it is the method prescribed by the Department of Public Works; it has been in use for many years in this state and throughout the United States; nor has any other or different method ever been used. No other method has any support in precedent nor was any other suggested by plaintiff. It is

necessary that a uniform method be used in all states, otherwise the sum of the expenses in the several states will not be the same as the total system expenses. The evidence affords no reason for departing from the uniform accounting system in this case. The court finds that the ex-
[fol. 44] penses incurred in this state are correctly stated in Paragraph VI hereof.

IX

(a) The uniform system of accounts makes no provision for dividing expenses within a state between intrastate and interstate business. It has been long known and universally recognized that intrastate transportation is much more expensive per unit of freight than interstate. Some of the reasons are the much shorter average haul of the intrastate; lesser traffic density, especially on branch lines most largely used locally; much less tonnage per train; more frequent stops; terminal expense in originating and delivering intrastate freight whereas interstate freight incurs only one or the other in the state. These and other peculiarities of intrastate business make it greatly more expensive per unit of freight than interstate business. While the revenue per ton mile of intrastate freight moving on defendant's railroad in 1933 was 137.32 as compared to 100 for interstate freight, the passenger revenue per mile was for intrastate only 100 as compared to 122.83 for interstate. It is neither possible nor necessary to find the exact percentage of additional cost of intrastate business over interstate, but the court finds that such cost is greater in proportion to revenue than the cost of the interstate.

(b) Because no accounts are kept currently of the expenses of intrastate business separately from interstate business within the state a special study was required. This study was made by defendant's witness, E. V. Peterson, a railroad statistician and accountant of ability and experience. The passenger expense and freight expense are determined separately. For the purpose of the freight expense study the week October 22-28, 1933 was selected, first having been found representative of the entire year 1933. With respect to the test week the court finds that in
[fol. 45] fact it was too favorable to plaintiff, in that it was better than an average week of 1933 and its use results in understatement of the cost of defendant's intrastate

freight business for the year 1933 by approximately $300,000.

(c) Freight Expense.—A special study was made of each train run in the state for the test week, October 22-28, 1933, to ascertain the car miles, gross and net ton miles and kind of freight, whether intrastate or interstate. In this way the train operation expense for wages, fuel, water, lubricants, etc. was ascertained. The actual wages are divided between intrastate and interstate in proportion to the car miles of each class. Fuel and supplies including round house expense on relation of gross ton miles. Expenses of freight car repairs is the average of the last three years in the state of which 7/365ths are assigned to the test week and divided between intrastate and interstate on the relation of car miles during the test period. For freight car depreciation and retirements the cost in 1933 is used. Steam locomotives depreciation and retirements is assigned to intrastate on the relation of gross ton miles. Station employees and supplies for the test week are 7/365ths of the year 1933 and apportioned to intrastate on the relation of tons handled; maintenance of way and structures is the average of the last three years incurred in Washington, of which 7/365ths is assigned to the test week and apportioned to intrastate traffic on relation of car miles in the test week; traffic expense is taken for the year 1933 and apportioned to intrastate business on relation to tons of revenue freight.

(d) The expense of switching in terminals termed "yard expense", was ascertained by a separate study made in the week June 3 to 9, 1934 after determining that the period was representative of the year and of conditions during the week October 22-28, 1933. This study was made by an accepted and widely used method known as the "Coverston-Sauer Formula". This formula has often been used [fol. 46] in important cases before the Interstate Commerce Commission and has the approval of that body. It has been used and accepted in a number of court cases in this state. The basis is the engine hour cost of switching in the several classes of switching work; as for example breaking up and assembling cars into trains; moving cars between the break up yards and industrial tracks. The total cost includes wages, supplies, maintenance of tracks and loco-

motives, and all applicable costs ascertained in detail and segregated by appropriate account numbers in accordance with the uniform system of accounts prescribed by the Interstate Commerce Commission. The details are too voluminous to be set out in these findings. They are fully described in the testimony. Plaintiff offered no evidence to challenge the accuracy of the results shown by either of the cost studies, except in the few particulars to be hereafter noticed.

(e) The total freight operating expenses incurred in conducting defendant's intrastate freight business for the test period October 22-28, 1933 was $75,078.42. These expenses are shown in detail in Defendant's Exhibit 7, sheet 12, as follows:

Train and engine wages	$9,826.25
Fuel for locomotives, water, lubricants, other supplies and engine house expenses	6,683.07
Locomotive repairs (road service)	4,592.71
Yard expenses	9,104.69
Freight car repairs, depreciation and retirements	9,552.01
Steam locomotives, depreciation and retirements	1,187.64
Station employes and station supplies and expenses	9,603.60
Miscellaneous transportation accounts	2,877.65
Miscellaneous maintenance of equipment accounts	1,477.30
Maintenance of way and structures	11,202.01
Traffic expenses	3,086.41
General expenses	5,945.44
Transportation for Investment—Cr.	(60.36)
Total freight operating expenses	$75,078.42

[fol. 47] The details of each item on sheet 12 are shown on sheets 13 to 22 inclusive of Exhibit 7.

(f) Having ascertained the expense incurred in conducting the intrastate freight business during the test week the next step was to ascertain the revenue net ton miles of intrastate freight handled during the period. These revenue net ton miles are 7,629,079, shown on sheet 13 of Exhibit 7. Dividing these revenue net ton miles into the cost of $75,078.42 incurred in making them gives a cost per revenue net

ton miles of .98411¢. To obtain the annual cost the total revenue net ton miles of intrastate traffic in Washington for the year 1933 is multiplied by the cost per revenue net ton mile shown for the test week. These ton miles are reported to the Department of Public Works in the annual report and are official figures. They are 334,493,591 multiplied by .98411¢ gives $3,291,785 as the expense incurred in 1933 in conducting defendant's intrastate freight business. This figure is shown on sheet 6 of defendant's Exhibit 7, as follows:

"Freight operating expense..... $3,291,785."

(g) The court finds that the freight operating expense for the year 1933 shown by said cost studies in the sum of $3,291,785 is approximately correct and as nearly mathematically correct as is possible in view of the manner in which interstate and intrastate business is and must be conducted. The inaccuracy is on the side of understatement of cost, rather than overstatement because traffic in the test week was heavier than in the average week of the year, resulting in a lower cost per net ton mile in the test week than the average week of 1933. The additional cost for the year was estimated by witness Peterson at $300,000. His estimate was not questioned by any witness for plaintiff.

[fol. 48] Intrastate Passenger Expense

(h) Expense of defendant's intrastate passenger business is shown on sheet 11 of Exhibit 7. It is computed in this manner: 1st, the expenses applicable solely to passenger business are ascertained and directly assigned to passenger; 2nd, expenses for maintenance of way and structure in road accounts are divided between freight and passenger on the relation of the cost of fuel for locomotives used in freight and passenger service. Other accounts are divided by the method prescribed by the Interstate Commerce Commission for allocating common freight and passenger expenses. The same method has been long prescribed by the Department of Public Works. No other method is known or has ever been used. The passenger proportion of total operating expense is $3,142,708. This expense is divided between intrastate and interstate passenger business on the relation of revenue passenger miles,

of which 47.76% were intrastate, giving an expense for intrastate passenger business in 1933 of $1,500,957. This expense is out of proportion to passenger intrastate revenue of only $429,635. The explanantion is: 1st, that defendant's assignment to intrastate passenger revenue includes nothing for intrastate mail and express revenue. There should be added for that account $221,359 and equivalent deduction made from the assignment to interstate passenger revenue. This matter is hereinafter discussed. 2nd, the division of common expenses between passenger and freight has not been revised to take account of the disproportionate shrinkage in railroad passenger revenues due to motor vehicles on the highways. It is said that it has been given consideration but no conclusions have been reached. It is of no importance in this case for the reason that whatever is deducted from passenger expense must be added to freight expense and we are here concerned with total expense only, viz., what was the expense of transacting defendant's intrastate "steam railway business" in the year 1933. That expense compared with the income will give the answer with which this case is concerned.

[fol. 49] (i) Plaintiff's witness Manschrek suggests the use of the relation of gross passenger revenues as a basis of division. By the use of this method the apportionment of expense to intrastate passenger business is reduced by about $500,000. The court finds that apportionment on the relation of revenue passenger miles is correct and the gross revenue basis incorrect. Revenue passenger miles, viz., the number of revenue passengers multiplied by the number of miles carried, bears a direct relation to the expenses because the expense is incurred in rendering the service. The gross revenue has no relation to the expense. The expense remains the same regardless of the cost of a ticket, and, of course, regardless of the revenue. Especially is gross revenue incorrect as applied to defendant's business because since about 1929 intrastate short haul passenger fares have been greatly reduced by the necessity of meeting highway competition. Prior to 1929 the intrastate revenue per passenger mile was substantially in excess of interstate revenue. In 1933 the intrastate compares with the interstate as 100 to 123.83. It is a matter of common knowledge that short haul intrastate passenger revenue of railroads is declining almost to the vanishing point. In the use

of gross revenue as a basis of apportionment Manschreck took no account of a proper apportionment of mail and express revenue to intrastate passenger business. This revenue totals $463,000. He repeated defendant's error in this. As the court finds that $221,359 should be added to the intrastate column the grounds of Mr. Manschreck's criticism are met and the discrepancy between the cost and revenue of intrastate passenger business is most largely removed.

(j) The court finds that $221,359 should be added to the intrastate passenger revenue and a corresponding amount deducted from the interstate, and that an apportionment of passenger expenses to intrastate passenger business on the [fol. 50] relation of revenue passenger miles is correct.

Expenses of intrastate passenger business for the year 1933 is correctly shown on defendant's Exhibit 7, page 6, as follows:

"Passenger operating expenses ..... $1,500,000."

The intrastate passenger revenue shown on Exhibit 7, page 7, of $429,635 should be increased by $221,359 and so increased is correctly shown at $650,994.

[fol. 51]

X

Intrastate Revenue

(a) The gross operating revenue for business done within the State of Washington, as reported by defendant to the Department of Public Works, for the year 1933 was $5,802,530. The above figure includes certain revenues classified as intrastate, but which are, in fact, interstate revenues. It has been customary in reporting to the Department of Public Works to include revenue traffic moving from a point within the state to a state port on through bills of lading to interstate and foreign destinations by water as intrastate; and to classify all revenue from switching collected in the State of Washington as intrastate, whether or not said revenue was received for switching intrastate or interstate cars. The court finds that the amount included in said sum of $5,802,530 (reported to the Department of Public Works as gross intrastate revenue), on account of said interstate items is as follows:

Account of foreign or interstate commerce	$369,606
Account switching interstate traffic	161,031
Total	$530,637

The court finds that said sum of $530,637 must be deducted from said sum of $5,802,530 in order to obtain the correct amount of revenue received by defendant for intrastate business in Washington, and said sum, after making said deductions, is $5,271,893.

The court further finds that defendant has deducted the expense of doing said foreign commerce and interstate switching from the expenses incurred in doing its intrastate business for 1933.

XI

Taxes

(a) Ad valorem taxes paid by defendant on its property in Washington for the year 1933 were $2,005,015. The filing fee of 1/10 of 1% paid to the Department of Public Works for the year 1933 was $5,170.00. The federal taxes [fol. 52] chargeable to Washington, consisting of capital stock tax, federal transportation tax and U. S. excise taxes, were $8,066. The system operating revenue for the year 1933 was $47,578,677. The ratio of federal taxes to system operating revenue was .153%. This percentage of .153 of Washington intrastate freight and passenger revenue was $8,066.

(b) The total revenue received in Washington for the year 1933 was $12,064,954 and the total state taxes were $2,005,015, or a percentage of 16.618. The total intrastate revenue for the year 1933 was $5,271,893 and 16.618% is $876,083 and is the amount of state ad valorem taxes applicable to intrastate business. The total taxes paid by defendant for the year 1933 on account of and chargeable to its intrastate traffic are as follows:

Ad valorem taxes	$876,083
Filing fee 1/10 of 1%	5,170
Federal taxes	8,066
Total Washington intrastate tax	$889,319

XII

Apportionment of taxes to intrastate business on the relation of gross interstate and intrastate revenue is a gen-

erally used basis, has been used in rate litigation heretofore occurring in this state, and is correct. The alternative method suggested by plaintiff, viz:—the relation of freight car miles plus passenger car miles, is without precedent, and is incorrect. Plaintiff's contention that ad valorem taxes paid by tenant lines, viz: by other railroad companies using some of defendant's lines in Washington, should be deducted from defendant's taxes is not correct. Taxes paid by said other railroad companies for use of defendant's facilities are included in and a part of the rental paid by said companies. Said taxes are classified as rental by the Interstate Commerce Commission. If, however, a proportion of those taxes should be deducted from taxes paid by defendant the amount is $123,010. It is not sufficient to [fol. 53] affect the result. Plaintiff contends that defendant should credit a part of the mail and express revenue to local business. This revenue is classified as interstate. The court finds that this objection is well taken and that a proportion of mail and express revenue should be credited to revenues earned in the State of Washington. The total amount of mail and express revenue received in Washington by defendant in 1933 is $463,485. This revenue was earned by passenger trains. The intrastate proportion is 47.76% based on the relation of interstate revenue passenger miles to intrastate revenue passenger miles, or $221,359. This amount should be taken from interstate and added to the intrastate passenger revenues for 1933. After crediting the above sum of $221,359, there is a net deficit from defendant's intrastate business for the year 1933 of $192,507. After making these corrections the account is summarized as follows:

Revenues	$5,271,893	
Credit account mail and express	221,359	
Total		$5,493,252.00
Expenses	$4,796,440	
Taxes	889,319	
Total		5,685,759.00
Deficit		192,507.00
Occupation tax		36,116.22
Aug.-Dec. 1933 (if valid).		
Total deficit		$228,623.22

[fol. 54] XIII

(a) In figuring expense of maintenance of way and freight car repairs defendant used the average cost of three years ending December 31, 1933. Maintenance is not an evenly recurring annual item. There was deferred maintenance of defendant in 1933. It is customary in railroad accounting to use a longer period than one year, either five years or three years. Maintenance expense, computed on an average of five years, is greater than for three years. The court finds that the average of three years maintenance expense is correct. Plaintiff's witness offered an exhibit in which maintenance was figured on the basis of but one year, viz: the year 1933. This witness did not state that one year is a proper period for computing maintenance. The court finds that it is too short and cannot be used.

(b) The court finds that no criticisms or suggestions other than as herein noticed, of defendant's methods of accounting were made by plaintiff; and further finds that, with the exception of the item of proportion of revenue from mail and express for which credit has been allowed, defendant's accounting of said revenues and expenses is approximately correct and rather overstates the amount of intrastate revenue than understates the same; and rather understates the expenses chargeable to defendant's intrastate business than overstates the same.

XIV

Capital Expense

(a) The gross intrastate revenue of $5,493,252, as stated in the preceding finding, does not include any part of net joint facility rents. Net joint facility rents is the amount paid by other railroad companies for use of defendant's railroad facilities in this state less amount paid by defendant to other railroads on the same account. By far the largest item is rental paid by the Great Northern Railway [fol. 55] Company and Oregon-Washington Railroad & Navigation Company for use of defendant's track and facilities between Seattle and Vancouver, Washington. This income does not accrue from the business of "a steam

railway." It is strictly a rental item and has always been so classified in the uniform system of accounts. As such it is not taxable under Chapter 191, Laws of 1933, and it is not claimed to be taxable by the State Tax Commission. The amount of these rentals received by defendant in Washington for the year 1933 are shown on page 8 of Exhibit 7 as $1,355,064. The amount assignable to intrastate operations for 1933 is $582,774.

(b) Interest on defendant's funded debt for 1933 was $14,241,028. This item is stable and regularly recurrent. The interest on certain bonds, known as "B" and "C" bonds, which were issued in payment of the purchase price of one-half of the stock of the Chicago, Burlington & Quincy Railroad Company, is not an operating expense and must be subtracted. This interest amounts to $6,792,691. The balance of interest on defendant's funded debt is $7,448,337 and represents the cost of that part of the capital invested in defendant's railroad secured by a lien on its operating property. Defendant also has outstanding capital stock of the par value of $248,000,000. It is not necessary, however, to further refer to that item. Of the bond interest of $7,448,337 the amount properly to be assigned to Washington is approximately 25.09%, or $1,868,788. The freight proportion of that sum should be computed on the basis of the relation of the freight operating expenses in the State of Washington to the total operating expenses in the state in the year 1933 and amounts to $1,341,790. The passenger propo-tion should be computed on the relation of the intrastate passenger operating expenses in the State of Washington to the total expenses in the State of Wash-
[fol. 56] ington, and amounts to $526,998. The Washington intrastate freight proportion of said bond interest, based on the relation of revenue ton miles for the year 1933, amounts to $534,837. The Washington intrastate passenger proportion of said bond interest, based on the relation of revenue passenger miles intrastate to total revenue passenger miles in Washington in 1933 is $251,694. The court finds that the total amount of bond interest correctly chargeable and assigned to defendant's intrastate freight and passenger business is the sum of $786,531. The court further finds that said bond interest is for hire of capital and is an expense of operation and must be taken into consideration in determining the expense of defendant's intrastate busi-

ness in Washington. The details of the computations are shown on defendant's Exhibit 7, sheet 2.

(b) The assessed value of plaintiff's operating property in Washington for the year 1933 was $100,450,000. Said assessed value should be assigned to Washington intrastate business on the same basis as used for bond interest and, so assigned, amounts to $42,277,195. Interest at 6% on said valuation is $2,536,632.

(c) The cost of reproduction new less depreciation of defendant's operating property in Washington, as found by the Interstate Commerce Commission, in Volume 25 of its Valuation Reports, plus cost of net additions and betterments to December 31, 1933, is $167,437,700. Said amount apportioned to defendant's intrastate freight and passenger business on the same basis as bond interest is $70,470,844. 6% of said sum is $4,228,251.

(d) If there be credited to Washington the intrastate proportion of said joint facility rents and intrastate business be charged with its proper proportion of bond interest as above stated, there is a further loss of $203,757 in addition to the loss of $228,618.22 resulting from intrastate business as hereinbefore found. If interest on the assessed value of that part of defendant's operating property de- [fol. 57] voted to intrastate business be used instead of bond interest, the additional loss is $1,953,858. If interest on the Interstate Commerce Commission's cost of reproduction, plus cost of additions and betterments, be used instead of assessed value, the additional loss is $3,645,477. The details of these computations are shown on page 3 of defendant's Exhibit 7.

XV

Dependency of Interstate on Local Business

The court finds that defendant's interstate and local business is inseparably commingled and mutually dependent. For the year 1932, representative of 1933, defendant's gross freight revenue in Account 101 of the Uniform System of Accounts for all business done in Washington was $10,570,609, of which $5,497,482 was from intrastate business and $5,073,127 was from interstate business. For said year the local revenue ton miles, viz: the number of revenue tons carried one mile, were 326 million and the inter-

state revenue ton miles carried in this state were 427 million, in round numbers. For the week of March 25 to 31, 1932, a representative period, a special study made by defendant proves that its intrastate revenue net ton miles were 6,824,237, and the interstate revenue net ton miles carried in the State of Washington were 7,601,845, or 47.30% and 52.70% respectively. Of the local revenue net ton miles, 3,022,719 were eastbound and 3,801,518 westbound; and of the interstate revenue net ton miles 5,175,941 were eastbound and 2,425,904 westbound within the state. Both intrastate and interstate business, eastbound and westbound, were transported by defendant over the same lines of railroad, in the same trains, by means of the same employes, and with the same facilities. It is not possible, practically and economically, or at all, to carry intrastate freight separately from interstate freight by different lines of railroad, in different trains, or by means of different facilities and employes. Defendant's gross income from transportation of passengers in this state included [fol. 58] in Account 102 of the Uniform System of Accounts for the year 1932, and representative of 1933, was $943,250.73, of which $379,715.40 was from intrastate business and $563,535.33 from interstate business. The number of revenue passengers carried during said year in this state was 280,521, of which 145,061 were carried intrastate and 135,460 were carried interstate. The number of revenue passenger miles, viz: revenue passengers carried multiplied by the number of miles, was 42,735,770 of which 18,739,808 were carried intrastate and 23,995,962 were carried interstate. The larger part of said passengers were carried on interstate through trains East and West bound and North and South bound. Passengers carried on local trains operating in local service are relatively few, and those trains also carry some interstate passengers. The court finds that it is not possible to carry said intrastate and interstate passengers on separate lines of railroad or by separate trains, economically and efficiently, or at all, and defendant's intrastate and interstate passenger traffic is inseparably commingled with and mutually dependent to the same extent and in the same manner as the freight traffic. Statistics for the year 1933 could not be prepared in time for the trial of this case, but the evidence shows, and the court finds, that the operation is substantially the same as for the year 1932 hereinbefore stated.

XVI

Result of Abandonment of Intrastate Business

If defendant should abandon its local freight business and continue to do its interstate freight business, it would thereby reduce its train service and expense thereof within this state approximately $870,088 per annum for the year 1932, and would reduce its car mileage in trains not discontinued, and thus reduce its expenses approximately $601,535, a total reduction of expense of freight business [fol. 59] in Washington of approximately $1,471,623, but would lose its entire gross revenue from local freight business of $5,497,482. These figures are shown by a study of operations for the year 1932 found in defendant's Exhibit 15 and were the latest available at the time this case came to trial. The results would be approximately the same for 1933. Defendant cannot reduce its passenger service nor the expenses attributable thereto, but would have to run the same trains on account of its interstate business which it now runs for both intrastate and interstate business and, by discontinuing its local passenger business, defendant would lose its gross revenue from intrastate passenger transportation $379,715.40 received in 1932. This sum would be a net loss to defendant. The result of abandoning the intrastate business is summarized as follows:

Total Operating Expenses (1932)	$12,336,818
Reduction	1,471,623
Expense if local business be abandoned	$10,865,195
Interstate revenue	6,231,366
Loss on interstate business	$4,633,829
Ad valorem taxes	2,464,967
Net loss including taxes	$7,098,796

[fol. 60]

XVII

Defendant's interstate business is absolutely dependent upon its intrastate business and defendant could not, as a matter of fact or as a practical matter, abandon its intrastate business and continue to transact its interstate busi-

ness; and, if defendant should do so, the result would be insolvency and bankruptcy within a short period and destruction of its interstate business and of the value of its property. The entire burden of maintaining and operating defendant's interstate system of railroad, constructed and equipped to handle both intrastate and interstate traffic, would fall on the latter. This would necessitate an increase of rates and fares far greater than the interstate business could bear, as a practical matter, or at all, and the immediate result would be the destruction of an essential instrument of interstate commerce and transportation of the mails, troops and munitions of the United States and of the value of defendant's property, amounting to many millions of dollars. The court finds that the privilege tax imposed by said Chapter 191, Laws of 1933, of 1½% of defendant's gross intrastate income is in reality and as a matter of fact a tax for the right to do both intrastate and interstate business and taxes the revenues received by defendant therefrom and income earned in other states and upon property located outside of Washington not subject to the taxing power of this state.

XVIII

The court finds that defendant's railroad is well located and economically managed and serves all but one of the principal cities and towns of the state. The operation of its railroad in intrastate business is essential to the people of this state. Defendant cannot increase many of its local rates because of competition of other kinds of transportation and for economic reasons. Under the laws of this [fol. 61] state, it cannot do so without consent of the Department of Public Works. Defendant has heretofore applied for an increase of local rates and said application was denied by the Department of Public Works in an order, a copy whereof is attached to defendant's answer, marked "Exhibit C", and made a part of this finding. The court finds that defendant, as a practical matter, has been unable to increase its revenues from local business and further finds that whether it can do so in the future is a matter attended with great uncertainty and could be accomplished only after long and expensive litigation, and such increases, if obtained, would have no bearing upon defendant's income in the year 1933 or for many years subsequent thereto.

There is at this time an application before the Interstate Commerce Commission, known as Ex Parte 115, for increased rates and a similar application before the Department of Public Works. No decision has been made and it is not known what increases, if any, will be allowed by said commission, nor what the attitude of the Department will be in the similar state case pending before it. The court finds that defendant has done all it can do to increase its revenue but is unable to do so.

XIX

The court finds that this suit was originally filed in the District Court of the United States for the Western District of Washington and since said suit was filed Senate Bill 18 was introduced at the special session of the 1933 legislature of this state; that this bill was prepared and enactment urged by attorneys for the State of Washington and by a member of the Tax Commission of the State of Washington; that the passage of said bill was so urged for the stated purpose of defeating defendant's contention in this case that it is obligated under the laws of this state to do intrastate business. Said bill did not pass. A copy is attached to defendant's answer, marked "Exhibit D", and made a part hereof.

[fol. 62] Conclusions

(1) The tax imposed by Chapter 191, Laws of 1933, is an excise or occupational tax as distinguished from a property or other kind of tax. It is imposed for the "privilege of engaging in business activities". As applied to defendant a tax of 1½% is imposed for the privilege of engaging in the business of a "steam railway". In view of the language found in Sec. 5 the prescribed percentage of gross income must be computed only upon the gross income received from intrastate "steam railway business". Income from other business activities in which defendant may be engaged are taxable, if taxable at all, at other rates. This case is not concerned with them. The privilege for which the tax is nominally imposed is for doing intrastate "steam railway business".

(2) A state may require payment of an occupation tax from one engaged in both intrastate and interstate com-

merce. But a state cannot tax interstate commerce or the privilege of engaging in it. Where conditions are prescribed, a license required and a tax imposed on one engaged in both interstate and intrastate commerce certain conditions must be met. One is that the party taxed must be free in law and fact to withdraw from its intrastate business while continuing to transact its interstate business free of the tax. Chapter 191, Laws of 1933, does not meet this condition. The court is of opinion and concludes:

(3) Defendant was not and is not free, under the Constitution and laws of this state, to withdraw from its intrastate business while continuing to transact its interstate and foreign business. It performs an indispensable service for the people of Washington from which it cannot withdraw. Its continued performance of this service is compellable at the suit of the state and of citizens of the state having an interest in such performance.

[fol. 63] (4) Defendant is an interstate carrier by railroad subject to the Acts of Congress regulating interstate commerce. Under several provisions of the Act, especially Sec. 1 (18) to (21) defendant is not permitted to abandon its lines in this state, or any of them, or the operation of said lines or any of them, in either interstate or intrastate business unless it shall have first obtained a certificate from the Interstate Commerce Commission that the present or future public convenience and necessity permit of such abandonment. Obtaining such a certificate is a precedent and indispensable condition of the right of abandonment of operation of any line or part of line of a carrier subject to the Acts of Congress. The prohibition applies to the strictly intrastate business of an interstate carrier by railroad and to every part of its line operated in connection with or as a part of its interstate system. The Interstate Commerce Act, as well by Sections 13 (4), 15a, 19a, and others, as by Sec. 1 (18) to (21), (especially in view of the dependence of defendants' interstate business upon its local business), has forceful application, and is an insuperable obstacle to abandonment of the intrastate business while attempting to continue to transact interstate and foreign business.

(5) Nor can defendant as a matter of fact, or as a practical matter, withdraw from its intrastate business while

continuing to transact its interstate and foreign business. Defendant's railroad was constructed to handle both classes of business. To abandon its intrastate business would throw the entire burden of operating and maintaining the interstate system on interstate commerce. This burden, as a practical matter, it could not bear. Defendant's interstate business would necessarily be destroyed. Its property would be confiscated.

[fol. 64] (6) The court concludes, therefore, that Chapter 191, Laws of 1933, in its requirement of a license (Sec. 3), the making of reports (Sec. 6) and payment of a tax of 1½% of gross income from intrastate railway business as a condition of the right to engage in intrastate railway business violates Art. 1, Sec. 8, and the 14th Amendment to the Constitution of the United States and as well Sec's. 1 (18) to (21), 13 (4), 15a and 19a of the Interstate Commerce Act and the Emergency Transportation Act of 1933, and is void as applied to defendant.

(7) The court is of opinion and concludes that there is another insuperable objection to the validity of Chapter 191, Laws of 1933. As the court finds that defendant's intrastate business was conducted at a loss in the year 1933; that the loss for 1934 is more likely to be greater than less; and that the immediate future does not afford grounds for reasonable or definite expectations of change for the better, the incidence of the tax falls directly upon income of defendant's interstate and foreign commerce, income earned in other states, and income not taxable by said act. Under such circumstances the tax is a burden on interstate commerce prohibited by the commerce clause and as well violates both the due process and equal protection clauses of the 14th Amendment.

(8) Let judgment be entered dismissing plaintiff's action with prejudice and costs to defendant.

Signed in open court this 25th day of March, 1935.

D. F. Wright, Judge.

I hereby acknowledge due service of a copy of defendant's findings of fact and conclusions of law this 20th day of March, 1935.

R. G. Sharpe, Attorney for Plaintiff.

[fol. 65] In Superior Court of Thurston County

No. 15415

State of Washington, Plaintiff,

vs.

Northern Pacific Railway Company, Defendant

Judgment—Filed March 25, 1935

The court having heard the evidence and the argument and having made findings of fact and conclusions of law, and being fully advised, now on motion of defendant's counsel it is Ordered and Adjudged that plaintiff's action be and the same is hereby dismissed with prejudice and with costs to defendant, taxable by the Clerk, in the sum of $—.

Dated the 25 day of March, 1935.

D. F. Wright, Judge.

[File endorsement omitted.]

[fol. 66] In Supreme Court of Washington

No. 25684. En Banc

The State of Washington, Appellant,

v.

Northern Pacific Railway Company, a Corporation, Respondent

Opinion—Filed Aug. 13, 1935

This action was brought to recover the tax on the gross income of the defendant, imposed by chapter 191, Laws of 1933, for the months of August to December, 1933. The cause was tried to the court without a jury, and resulted in findings of fact from which the court concluded that the plaintiff was not entitled to recover. Judgment was entered dismissing the action, from which the plaintiff, the state of Washington, appeals.

The respondent owns and operates a system of railroad extending from a point on Lake Superior, Wisconsin, through Minnesota, North Dakota, Montana and Idaho, into and through a number of counties in this state, with branch lines into the state of Oregon and British Columbia. It is engaged in both intrastate and interstate commerce, carrying freight and passengers. As found by the trial court, the interstate and intrastate business in this state is inextricably commingled, and the intrastate business is conducted at a loss, and it is necessary to make up this loss from the income from interstate business.

Chapter 191 of the Laws of 1933 is entitled an act relating to taxation, and imposes taxes upon the privilege of engaging in business activities in this state. The amount [fol. 67] of the tax is based upon the gross income. In section 2 of the act, it is provided that:

"From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows: * * * (e) Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business, as follows: * * * III. Steam railways: one and one-half per cent. * * *"

It is under this act that the tax in question was sought to be collected by the state and which was resisted by the respondent railway company, as above indicated.

The first question is whether the legislature intended to levy the tax upon the gross income of the respondent, derived from both interstate and intrastate commerce. In the portion of the act quoted, it will be observed that it is provided that the tax is levied upon every person "engaging or continuing within this state in the following businesses." This quoted expression is used, not only in referring to the tax upon steam railways, but upon the other businesses mentioned in the act which are purely of a local nature. If it was the legislative intent to levy the tax upon

the gross income from interstate commerce, it would necessarily, to that extent, be unconstitutional as being repugnant to the commerce clause of the federal constitution. About this there can be no question, as it has been many times so held by the federal supreme court.

In State v. Northern Express Co., 80 Wash. 309, 141 Pac. 757, there was involved an act of the legislature which imposed upon express companies a privilege tax of five per [fol. 68] cent, based upon the gross receipts of such companies. In that case, the expression used was that the tax was imposed for the privilege of "doing business in this state" or on "business done within the state of Washington." It was there held that the expressions used had reference to business begun and ended within this state, and that the tax, being upon intrastate commerce only, did not place a burden upon interstate commerce. It was there said:

"The phrase 'gross receipts of such express company for business done within the state of Washington,' to which the tax is alone applicable, is an expression of the legislative intent to limit this tax to business wholly within this state; that is, business begun and ended within this state."

It will be observed that, there, the expression was business done within this state or within the state of Washington. In the case we are now considering, the expression is "engaging or continuing within this state" in business. It is probably true that the expression used, which was involved in the case cited, more clearly indicates a legislative intent not to impose the tax upon interstate commerce than does the expression used in chapter 191, Laws of 1933. However this may be, when we read the expression used in that chapter, not only as applied to a business which is both interstate and intrastate, but its repeated application to businesses which are purely local, it would seem that the legislative intent was reasonably plain, and that the purpose was not to impose the tax upon interstate business, but upon intrastate or local business only. If it be that the expression used leaves the matter in the zone of doubt, then that doubt should be resolved in favor of the constitutionality of the law. In such a case, the construction will be adopted which will harmonize the statute with the

constitution and avoid a conflict therewith. Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327.

[fol. 69] That a state, through its legislature, has no power to levy a tax which would be a direct burden upon interstate commerce is well known and understood by all lawyers and many laymen. For the court to hold that the legislature, in enacting chapter 191, intended to impose the excise tax therein provided for for the privilege of doing interstate business in this state, would be too great a reflection upon the intelligence of the members of a coordinate branch of the state government. The act, as we view it, was only intended to apply to local or intrastate business.

The next and, as we view it, the important and difficult question is whether the tax may be collected, even though the railway company, the respondent, may not be able to retire from its intrastate business without also discontinuing its interstate. In this connection, it will be assumed (a) that the respondent cannot, as a matter of law, retire from its intrastate business; (b) that it is impractical, as a matter of fact, for it to retire from its intrastate business without also retiring from its interstate; and (c) that the intrastate or local business is conducted at a loss which is taken care of by the receipts from the interstate business. Giving effect to these assumptions, inquiry must be directed then to whether the tax is valid, even though the railway company may not be able to retire from its intrastate business without retiring from its interstate, and that the intrastate business is conducted at a loss.

In the case of Sprout v. City of South Bend, 277 U. S. 163, the court had before it an ordinance of the city, in the state of Indiana, which prescribed license fees varying in amount depending upon the seating capacity of a bus, the bus company being engaged in both intrastate and inter-

[fol. 70] state business and it was there held that "the ordinance is void because of the imposition of the license fee." In the course of the opinion, it was said that a state may, by appropriate legislation, require the payment of an occupation tax from one engaged in both intrastate and interstate commerce, but, in order that the fee or tax may be valid,

"• • • it must appear that it is imposed solely on account of the intrastate business; that the amount exacted

is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

It will be observed that one of the conditions there placed upon the right of a state to impose the tax is that the person or corporation taxed "could discontinue the intrastate business without withdrawing also from the interstate business." This last quoted expression, so far as we are informed, was first used in the case of Pullman v. Adams, 189 U. S. 420, where the tax involved was in a specific amount, levied upon "each sleeping and palace-car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad-track over which the company runs its cars."

In the case of Cooney v. Mountain States Telephone & Telegraph Co., Vol. 79, No. 9, United States Supreme Court Law ed. Advance Opinions, page 498, there was involved a statute of the state of Montana prescribing a tax "for each telephone instrument used in the conduct of the business of operating and maintaining telephone lines and furnishing telephone service in the State of Montana." There, the telephone company, as is the railroad company here, engaged in both intrastate and interstate business, and it was [fol. 71] held that a privilege or occupation tax which a state imposes with reference to both kinds of business, through an indiscriminate "application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid."

It will be observed that in none of the three cases mentioned was the tax based upon the gross income of the intrastate business. There is a difference between a tax imposed as a license to do business or upon the instrumentality and a tax based upon the gross income. If a tax be a license tax or one upon the instrumentality, it necessarily inheres in the interstate as well as the intrastate business. Where the tax is upon the gross income, the income from the interstate business may be segregated from the intrastate and be held valid.

In the case of Bowman v. Continental Oil Co., 256 U. S. 642, the state of New Mexico had imposed an excise tax of two cents for each gallon of gasoline sold or used, and an annual license tax of fifty dollars for each distributing station or place of business. The oil company was engaged in both interstate and intrastate business. It was held that the two cents tax per gallon could be sustained because the income from the intrastate business could be segregated from the interstate, but that the fifty dollar tax was void because no such segregation could be made. It was there said:

"The applicable rule is that laid down in Ratterman v. Western Union Telegraph Co., 127 U. S. 411, where, in response to a question whether a single tax, assessed by a state upon the receipts of a telegraph company derived partly from interstate commerce and partly from commerce within the State, but returned and assessed in gross and without separation or apportionment, was wholly invalid or invalid only in proportion and to the extent that the receipts were derived from interstate commerce, this court unanimously answered that so far as levied upon receipts derived from interstate commerce the tax was void, but so [fol. 72] far as levied upon receipts from commerce wholly within the State it was valid. This case has been cited repeatedly with approval and its principle accepted. Western Union Telegraph v. Alabama, 132 U. S. 472, 476-477; Lehigh Valley R. R. Co. v. Pennsylvania, 145 U. S. 192, 200-201; Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 697; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 31.

"But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void under the authority of Leloup v. Port of Mobile, 127 U. S. 640, 647; Crutcher v. Kentucky, 141 U. S. 47, 58-59; Williams v. Talladega, 226 U. S. 404, 419; and other cases of that character."

In the case of Cooney v. Mountain States Telephone & Telegraph Co., supra, it was distinctly pointed out that the tax there involved was "not laid on revenue derived from

monthly rates as distinguished from toll charges. It is not imposed with respect either to the nature of the revenue, or to the character of the service from which the revenue is derived, or to the manner in which the charges for the services are fixed." From what is there said it would appear to be a reasonable inference that, if the tax were of the character described in the quotation just made from the opinion, the result might be different.

In East Ohio Gas Co. v. Tax Commission, 283, U. S. 465, the state of Ohio imposed upon every corporation engaged in the business of supplying consumers within the state with natural gas for light, heat or power a tax based upon the gross receipts, and the law was sustained. The East Ohio Gas Company which resisted the tax was engaged both in interstate and intrastate business. It brought gas from the states of West Virginia and Pennsylvania over high pressure pipes, and, as stated in the opinion, this was interstate commerce until it reached the distributing pipes which supplied the consumers, and after that it became intrastate and was subject to the tax. In the course of [fol. 73] the opinion in that case, we find the same statement with reference to the conditions precedent to the right of a state to impose a tax upon a person or corporation engaged in both intrastate and interstate business, as appears in the quotation from the case of Sprout v. City of South Bend, supra. In the Ohio Gas Company case, however, the court did not apply the provision that the gas company could not retire from its intrastate business without withdrawing from its interstate business. The facts, as they appear in the opinion, make it plain that, if the gas company had withdrawn from its intrastate business, it would have completely destroyed its interstate business. The tax there involved was not one upon the instrumentality or a license tax, but was an excise or a tax upon the privilege of doing business. The result of the holding in that case, as we view it, would sustain a holding in the case now before us that the tax upon the gross income of the intrastate business was valid, even though the railway company could not withdraw from that business without also withdrawing from its interstate business. We do not look upon cases which involve either a tax upon instrumentalities or a license tax as applicable to the law now in question which

imposes, as already indicated, an excise or tax on the privilege of engaging or continuing in business.

It must be remembered that chapter 191 of the Laws of 1933 applies to every person engaging or continuing in business within this state, with a comparatively few exceptions. The law may be said to be a general one and applies to all business within the state. In this respect, it is somewhat analogous to a property tax which all persons, with comparatively few exceptions provided for in the statute, are required to pay upon the property owned [fol. 74] by them. The state has the authority to tax property which is used in interstate commerce and which is regularly and permanently located within its limits, where the ascertainment of the amount assessed is dependent upon the value of the property within the state, as the property of other citizens is taxed. Leloup v. Port of Mobile, 127 U. S. 640; Western Union Telegraph Co. v. Kansas, 216 U. S. 1.

Even though the respondent in this case cannot retire from its intrastate business without also retiring from its interstate business, we think that the excise tax imposed upon the gross income from the intrastate business is not such a direct burden upon interstate commerce as to require that the tax be held void.

Attention at this point should be called to chapter 4 of the Laws of 1933, which was Initiative Measure 64, and generally referred to as the "40-mill tax limit for taxation" law. In that act, it was provided that the aggregate of all taxes upon real and personal property in the state should not exceed in any one year forty mills on the dollar of assessment valuation, which should be based upon fifty per cent of the true and fair value of the property in money, with some exceptions which are not here material. The respondent, by reason of this law, has been relieved from paying a very large sum of money as taxes upon the property which it owns in this state and which was subject to taxation, even though devoted to interstate commerce. It is a matter of common knowledge that under the 40-mill tax limit law property is now paying about half of what it paid for general taxes prior to the passage of that law; in other words, that by reason of the law limiting the amount to forty mills, the tax burden upon both real and personal property of the state has been reduced approxi-

[fol. 75] mately one-half. Having thus provided for a reduction of taxes upon real and personal property, it was necessary for the legislature to find other sources of revenue, and chapter 191 was undoubtedly passed for this reason.

So far as we are informed, the federal supreme court has at no time distinctly held that an excise tax, such as that of this state, which is imposed upon all businesses, is such a direct burden upon interstate commerce as to render the act of the legislature unconstitutional.

But it is said that the intrastate business is being conducted at a loss, and this loss must be borne by the interstate business and therefore is a burden upon interstate commerce. There is an expression in the case of Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252, that would appear to support this contention, even though the question was not necessarily involved in that case; and further, in that case there was not involved an excise tax based upon gross income, as here.

In this state, if the respondent's intrastate business is conducted at a loss, the legislature has provided a remedy, first, by application to the department of public service, with the right of review by the superior court and an appeal to this court. From the findings, it appears that an application has been made and denied by the department and that another application is pending. It does not appear, however, that the respondent has exhausted the relief granted by the statute and until it does so, it cannot be said that, even though the intrastate business is being conducted at a loss, it is such a burden upon interstate commerce as would justify holding the law unconstitutional.

The facts in the case of Postal Telegraph-Cable Co. v. [fol. 76] Fremont, 255 U. S. 124, presented a similar question, and it was there held that, where the state law affords a means to prevent the tax from burdening interstate commerce, through an application to increase intrastate rates, the tax will not be held void, in the absence of a showing that the company had exhausted the remedy afforded by an increase of the rates on intrastate business. We see no just or legal reason why the respondent should not comply with chapter 191, as all other businesses in this state are required to do.

So far as the opinion in the case of Great Northern Railway Co. v. State, 147 Wash. 630, 267 Pac. 506, is out of harmony with the holding in this case, it will be disapproved.

The trial court in Finding No. 4 specifically found the gross revenue from the respondents' intrastate business and the tax thereon for the period covered by this action. The appellant is entitled to a judgment for the amount as indicated in the finding.

The judgment appealed from will be reversed and the cause remanded, with direction to the superior court to enter a judgment as herein indicated.

Main, J. Beals, J. Geraghty, J.

We concur: Mitchell, J. Tolman, J. Blake, J.

[fol. 77] IN SUPREME COURT OF WASHINGTON

No. 25684

DISSENTING OPINION

STEINERT, J., dissenting:

I do not agree with the majority upon what is said to be the principal question in the case. Having conceded (a) that the respondent cannot, as a matter of law, retire from its intrastate business, (b) that it is impracticable, as a matter of fact, to so retire without also retiring from its interstate business, and (c) that the intrastate, or local, business is conducted at a loss which is taken care of by the receipts from the interstate business, the majority arrives at a conclusion which I think is incorrect and untenable.

The authorities cited in the prevailing opinion establish beyond question, as I view it, that the state may not impose a tax, no matter what its nature or variety may be, that has the effect of burdening or interfering with interstate commerce.

In Bowman v. Continental Oil Co., 256 U. S. 642, the court said:

"No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if

it did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute, that is to say, without authority of law. Hence, it cannot be enforced at all."

In East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, the court said:

[fol. 78] "And, while a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business."

In Cooney v. Mountain States Tel. & Tel. Co., — U. S. —, 55 S. Ct. Rep. 477, 482, the court through Chief Justice Hughes, said:

"Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. Sprout v. South Bend, Ind., 277 U. S. 163, 171, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45; East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 470, 51 S. Ct. 499; 75 L. Ed. 1171."

The other cases cited in the prevailing opinion are either directly, or argumentatively, to the same effect. Under

these cases, one of the essentials to the validity of a tax is that the one who is taxed could discontinue its intrastate business without also withdrawing from its interstate business.

The majority seek to make a distinction between a tax imposed as a license to do business or one upon the instrumentalities used, and a tax on gross income. They concede that a license tax to do business or a tax upon the instrumentality inheres in the interstate as well as in the intrastate business, but they hold that "where the tax is upon the gross income, the income from the interstate business may be segregated from the intrastate and be held valid." The distinction is without substance when the result in a given instance is to burden or interfere with interstate commerce. The federal government having created a field within its exclusive regulatory jurisdiction, the state may [fol. 79] not invade it, nor by any act, direct or indirect, interfere with it.

We have before us four cases, including the instant one, involving the same question. The other three are State v. Great Northern Ry. Co., post p. —, —, P. (2d) —, Pacific Tel. & Tel. Co. v. Tax Commission, post p. —, — P. 2d) —, and Home Tel. & Tel. Co. v. Tax Commission, post p. —, —, P. (2d) —. The questions being identical in all four, the same barrier exists in each against the state's right to tax. That the action of the state will interfere with interstate commerce is, to me, very apparent. If the railroad companies or the telephone companies should be permitted or be compelled to withdraw from their intrastate business, how many trains would continue to run, and how many telephones would remain in place, in this state, merely for the purpose of enabling their users to do an interstate business? Not only would all local service be discontinued, but, with the exception, possibly, of one or two large cities, the people of the state would be without interstate service as well.

If, as a matter of law, the companies may not withdraw from intrastate business, or if, as a matter of fact, it is wholly impracticable for them to do so, then such intrastate business must continue to be operated at the expense of their interstate business. If one state be permitted to impose burdens upon interstate commerce through the med-

ium of taxation, then all states in which the companies operate may do likewise, and the accumulated burdens thus imposed would in the end result in complete strangulation of all their interstate commerce. The sum and substance of it all is that the tax imposed on intrastate business must be borne by the proceeds from interstate business. It is, [fol. 80] therefore, a burden upon, and interferes with, interstate commerce, and for that reason is invalid.

I therefore dissent.

Steinert, J.

[fol. 81] IN SUPREME COURT OF WASHINGTON

No. 25684

DISSENTING OPINION

HOLCOMB, J., dissenting:

I concur in the views stated by Judge Steinert in the above entitled case and as to all the other like cases now pending in this court.

I wish to add, however, that I particularly deplore the indefinite, unnecessary and summary disposition of the case of Great Northern Railway Co. v. State, 147 Wash. 630, 267 Pac. 506. It leaves that case like Mahomet's coffin, suspended midway between Heaven and earth; and, as Mr. Justice Holmes once said in one of his famous dissenting opinions, henceforth, neither bench nor bar can tell whether certain cases alluded to in the majority opinion therein, in much the same way as is the above cited case in the prevailing opinion in these cases, "are to be listed in the *index expurgatorius*" or, are in the category of cases to be used in the future at pleasure.

The above cited case was the deliberate judgment of this court en banc and concurred in by all but two of the then judges of this bench, including the writer of the opinion in the instant case. It followed the decisions of the Federal Supreme Court therein cited. It was based upon the sound principle that a public utility, such as the railway company, the telephone company and the like, is compelled by law to serve and cannot withdraw. To the same effect is North-

ern Pacific Railway Co. v. State, 84 Wash. 510, 147 Pac. 45.

It is manifest that these utilities cannot separate the receipts of their intrastate from their interstate business. If that be true, then it is indubitably true that the taxes in question are burdens upon interstate commerce, contravening the commerce clause and the Fourteenth Amendment of the Federal Constitution to which we are fully bound by oath to conform.

Holcomb, J.

[fol. 82] IN SUPREME COURT OF WASHINGTON

No. 25684

Thurston County No. 15415

THE STATE OF WASHINGTON, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent

JUDGMENT—September 6, 1935

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 6th day of September, A. D. 1935, on motion of G. W. Hamilton Esquire, of counsel for Appellant considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby reversed with costs; and remanded with directions to the Superior Court to enter judgment in favor of The State of Washington and against the Northern Pacific Railway Company, a corporation for Thirty Six Thousand one hundred sixteen dollars twenty two cents ($36,116.22).

And that the said State of Washington have and recover of and from the said Northern Pacific Railway Company, a corporation, the costs of this action taxed and allowed at Eight hundred Thirty dollars and ninety five cents

($830.95) and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings in accordance herewith.

[fol. 83] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed Sept. 13, 1935

To the Chief Justice of the Supreme Court of the State of Washington:

Your petitioner, Northern Pacific Railway Company, a corporation, respectfully shows:

Your petitioner is the appellant in the above entitled cause.

On February 28, 1934, the State of Washington, as plaintiff, brought suit against your petitioner as defendant in the Superior Court of the State of Washington in and for Thurston County, to recover a money judgment for $37,717.38 alleged to be the amount due plaintiff as an occupation tax due under the provisions of Chapter 191, Laws of Washington 1933.

It was the contention of appellant in the trial court and the Supreme Court of the State that as a matter of fact and of law it could not withdraw from its intrastate business in the State of Washington, that its interstate business and intrastate business in Washington was and is inextricably commingled, that the intrastate business in Washington is conducted at a loss, and that the tax levied by said Chapter 191 of the Laws of 1933 would have to be paid from interstate revenues, and therefore the tax levied [fol. 84] by said Chapter 191, Laws of 1933, was a burden on interstate commerce in violation of Article I, Section 8 of the Constitution of the United States, and in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

After hearing upon the merits the trial court on March 25, 1935, entered findings of fact, conclusions of law and

judgment, dismissing the action and concluding that said Chapter 191 of the Laws of 1933 violates Article I, Section 8, and the due process clause of the 14th Amendment to the Constitution of the United States. Thereafter an appeal was taken by the State of Washington to the Supreme Court of the State of Washington, which court, on August 13, 1935, reversed the judgment of the trial court, and upheld the validity of said act as not being in violation of any of said provisions of the Constitution of the United States, and remanded said cause to the Superior Court with directions to enter a money judgment against appellant and in favor of appellee for $36,116.22 and final judgment of the Supreme Court was so entered on the 6th day of September, 1935.

The Supreme Court of the State of Washington is the highest court of said state in which a decision in this suit can be had.

That in said cause there is drawn in question the validity of a statute of the State of Washington on the ground that said statute is repugnant to the Constitution of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates Article I, Section 8, and the due process clause of the 14th Amendment to the Constitution of the United States.

Therefore, in accordance with Sec. 237 (a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was [fol. 85] passed, to-wit, under Sec. 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of Washington, the highest court of said state in which a decision in this

cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of Washington may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Washington, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the cost and supersedeas bond tendered by the petitioner be approved, and that the said appeal may operate as a supersedeas.

Dated this 13th day of September, 1935.

D. F. Lyons, L. B. da Ponte, Robert S. Macfarlane,
Attorneys for Petitioner.

[fol. 86] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—Filed Sept. 13, 1935

The petition of the Northern Pacific Railway Company, a corporation, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated the 6th day of September, 1935, of the Supreme Court of the State of Washington as prayed in said petition, and that the Clerk of the Supreme Court of the State of Washington shall within sixty days from this date make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be

designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

[fol. 87] It is further ordered that said appellant shall have a good and sufficient cost and supersedeas bond in the sum of $25,000.00, that said appellant shall prosecute said appeal to effect and answer all damages and costs if it fails to make its plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceedings in this cause and the enforcement of said Chapter 191, Laws of 1933, against appellant until the final disposition of this cause by the Supreme Court of the United States.

It is further ordered that appellee, the State of Washington, shall have the right to move for increase of said bond if, at any time, it shall deem itself insecure.

Dated this 13 day of September, 1935.

John F. Main, Acting Chief Justice of the Supreme Court of the State of Washington.

[File endorsement omitted.]

[fol. 88] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Sept. 13, 1935

Statement

The Supreme Court of the State of Washington found that petitioner owns and operates a system of railroad from a point on Lake Superior in Wisconsin, through the intermediate states into and through the State of Washington, and is engaged in both intrastate and interstate commerce by means of said railroad. It held that petitioner could not as a matter of law, retire from its intrastate business while continuing its interstate business. It found that it is impracticable, as a matter of fact, for petitioner to retire from its intrastate business without also retiring from its interstate business; and further found that "the intrastate busi-

ness is conducted at a loss which is taken care of by the receipts from the interstate business".

Assignment of Errors

Petitioner, Northern Pacific Railway Company, a corporation, assigns the following errors in the record and proceedings in this cause:

(1) The Supreme Court of the State of Washington having found that appellant is engaged in both intrastate com- [fol. 89] merce and interstate commerce, and having held that as a matter of law it cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(2) The Supreme Court of the State of Washington having found that appellant's interstate business and intrastate business in Washington is inextricably commingled, and that as a matter of fact and as a practical matter appellant cannnot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(3) The Supreme Court of the State of Washington having found that appellant's intrastate business is conducted at a loss which must be borne by the income from its interstate business, erred in deciding that the tax imposed by Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(4) The Supreme Court of the State of Washington having found that appellant's intrastate business is conducted at a loss which must be borne by income from its interstate business or income earned or received in other states, erred in refusing to hold that Chapter 191, Laws of 1933, violates the due process clause of the 14th Amendment to the Constitution of the United States.

(5) The Supreme Court of the State of Washington having found that appellant's intrastate business is conducted at a loss which must be borne by income from its interstate business, erred in holding Chapter 191, Laws of 1933, and the tax imposed thereby, does not violate Article

I, Section 8 of the Constitution of the United States, for the stated reason that appellant has not exhausted its remedy (by writ of review) to obtain intrastate rate increases and because that circumstance is immaterial, not [fol. 90] supported by and is contrary to the facts found in Finding 18.

(6) The Supreme Court of the State of Washington for each of the reasons contained in the preceding assignments erred in reversing the judgment of the Superior Court of Thurston County and in rendering judgment in favor of the State of Washington against appellant for the tax imposed by Chapter 191, Laws of 1933, in the sum of $36,116.22.

Prayer for Reversal

Wherefore, on account of the errors specified herein appellant prays that the judgment of the Supreme Court of the State of Washington in this cause dated the 6th day of September, 1935, be reversed and judgment here entered or directed in favor of appellant.

Dated this 13 day of September, 1935.

D. F. Lyons, L. B. daPonte, R. S. Macfarlane,
Attorneys for Appellant.

[File endorsement omitted.]

[fols. 91 & 92] Citation in usual form showing service on T. W. Hamilton et al., filed Sept. 13, 1935, omitted in printing.

[fols. 93–95] Supersedeas bond on appeal for $25,000, approved and filed Sept. 13, 1935, omitted in printing.

[fol. 96] In Supreme Court of the United States

[Title omitted]

Præcipe for Transcript of Record—Filed Sept. 23, 1935

To the Clerk of the Supreme Court of the State of Washington:

Please prepare the transcript on the appeal of the above case to the Supreme Court of the United States, as pro-

vided by Rule 10 of the Supreme Court of the United States, and include therein the following papers, to-wit:

(1) Complaint;

(2) Answer, omitting all of Paragraph V and Exhibits "A" and "B", but including Exhibits "C" and "D";

(3) Reply;

(4) Findings of Fact and Conclusions of Law of Superior Court;

(5) Judgment of Superior Court;

(6) Opinion of Supreme Court;

(7) Judgment of Supreme Court;

(8) Petition for Appeal to United States Supreme Court;

(9) Order Allowing Appeal to United States Supreme Court;

(10) Assignment of Errors and Prayer for Reversal;

(11) Statement as to Jurisdiction on Appeal;

(12) Original Citation on Appeal and Acceptance of Service;

(13) Cost and Supersedeas Bond;

(14) Acknowledgment of Service of Petition for Appeal Order Allowing Appeal, Assignment of Errors and Prayer [fol. 97] for Reversal, and Statement as to Jurisdiction;

Please advise when the transcript has been completed and ready for forwarding to the Clerk of the United States Supreme Court at Washington, so that we may inspect the same before it is transmitted.

D. F. Lyons, L. B. DaPonte, R. S. Macfarlane, Attorneys for Respondent.

Received Copy Sept. 23, 1935. G. W. Hamilton & R. G. Sharpe, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 98] In Supreme Court of Washington

In the Matter of the Adoption of Rules of Pleading, Procedure and Practice

Rule VI

Abstracts

In every case in which the statement of facts contains over 100 pages, an original and two legible copies of a type-

written abstract of the record shall be filed with the Clerk of the Supreme Court along with the briefs of the party preparing the same. The typewritten abstract shall be in the same form as the transcript in the cause, shall be indexed, and shall contain appropriate references by pages to the transcript or statement of facts. Printed abstracts, bound separately from the printed briefs, but of the same size, type and form as the printed briefs, will be given the same effect by the court as typewritten abstracts. The abstract shall be substantially in the following form:

(Then follows an outline of forms.)

[fol. 99] IN SUPREME COURT OF WASHINGTON

In the Matter of the Adoption of Rules of Pleading, Procedure and Practice

RULE VI

(As Amended)

Abstracts of Records

Rule VI of the rules of the Supreme Court found on page xxxv of volume 159 of the Washington Reports, be and the same is hereby amended by eliminating therefrom all requirements relating to the abstracting of pleadings.

[fol. 100] IN SUPREME COURT OF WASHINGTON

In the Matter of the Adoption of Rules of Pleading, Procedure and Practice

RULE VII

Supplemental Abstracts

1. If the respondent is not satisfied with the appellant's abstract, he may cause to be typewritten, or printed, a supplemental abstract of the matter omitted which he deems essential to an understanding of the questions presented

on the appeal. The supplemental abstract shall follow the form of the original abstract, shall refer to the page of the original abstract where the omitted matter is to be inserted, and shall contain appropriate references to the transcript, or statement of facts, and shall be served on the adverse party; Provided, That if, in the opinion of this Court, the respondent's supplemental abstract was necessary to the consideration of the questions presented, and was made thus necessary by reason of the fact that the appellant's abstract did not fairly state the record or the evidence, the costs of such supplemental abstract shall be charged to the appellant regardless of the termination of the case.

2. The appellant may supplement his original abstract without leave of court at any time before the respondent has filed his brief. Such supplemental abstract shall follow the form of the original abstract, shall contain appro- [fol. 101] priate references to the pages of the transcript or statement of facts where the matter abstracted can be found, and shall show at what pages of the original abstract the new matter is to be inserted. The supplemental abstract shall be served on the adverse party. After the respondent has filed his brief, supplemental abstracts may be filed therein only by leave of the Chief Justice.

Rule VIII

Contents and Style of Briefs

(Subdivisions 1 and 2)

1. Briefs shall be printed throughout in plain, clear type, not smaller in size than eleven point, on unglazed white paper, and shall contain a clear statement of the case so far as deemed material by the party, with reference to the pages of the abstract for verification in all instances where an abstract is required. In other instances the reference shall be to the original record.

2. Each error relied on shall be clearly pointed out and separately discussed under appropriate designated headings. Where there are several assignments presenting the same general questions, they may be discussed together.

[fol. 102] IN SUPREME COURT OF WASHINGTON

In the Matter of the Adoption of Rules of Pleading, Procedure and Practice

RULE XVI

Exceptions to Findings of Fact and Conclusions of Law

1. It shall not be necessary or proper, in order to obtain appellate review thereof, to take or enter an exception to findings of fact or conclusions of law of a court or judge upon a case or part of a case, either legal or equitable, tried without a jury, nor shall it be necessary to take exceptions to the refusal of the court to make proposed findings or proposed conclusions of law.

2. This rule shall apply and be applicable to cases now pending as well as to those which may be hereafter instituted.

[fol. 103] [File endorsement omitted]

[fols. 104-132] IN SUPREME COURT OF WASHINGTON

No. 25684

STATE OF WASHINGTON, Plaintiff and Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant and Respondent

Appellant's Abstract of Record. Filed May 24, 1935

Appeal from the judgment of the superior court of Thurston County. Hon. D. F. Wright, Judge.

[fol. 133] IN SUPERIOR COURT OF THURSTON COUNTY

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

On the 14th day of May, 1935, the defendant filed its amended motion for judgment on the pleadings by reason

of the facts alleged in Paragraph V of its Answer (Tr. 76). Said motion came on for hearing on June 25, 1934, and was granted July 9, 1934, being set by the court for the signing of such judgment (Tr. 78). But on July 3, 1934, defendant filed its written withdrawal of its motion for judgment on the pleadings (Tr. 79).

[fol. 134] In Superior Court of Thurston County

Defendant's Motion to Strike Paragraph V of Its Answer

At the trial of the cause begun October 16, 1934, (St. 5) defendant introduced written evidence and oral testimony in support of Paragraph V of its Answer (St. 7-8, 132-141, 177-8, Def.'s Exs. 5 and 6), but on November 26, 1934, defendant moved that said paragraph V of its Answer be stricken (Tr. 80) which motion was granted by the court (Tr. 81).

In Superior Court of Thurston County

Statement of Evidence

On the 16th day of October, 1935, (St. 4) the cause was tried by the court sitting without a jury wherein the following proceedings were had:

[fol. 135] Plaintiff's Evidence

Plaintiff introduced in evidence without objection Plaintiff's Exhibit "1", being the interrogatories propounded to defendant, Exhibit "2", defendant's answers thereto, Exhibit "3", defendant's supplemental answers thereto, and Exhibit "4", defendant's second supplemental answers thereto (St. 6). Whereupon plaintiff rested (St. 6).

[fol. 136] Plaintiff's Exhibits "1" and "2"

Exhibit "1" are the interrogatories propounded by plaintiff to defendant, and Exhibit "2" are the answers of de-

fendant thereto, verified by W. C. Pinger, defendant's assistant general auditor, who deposes as follows:

"That he prepared the foregoing answers to the interrogatories propounded by plaintiff and made the same for and in behalf of said Northern Pacific Railway Company; that said answers are to affiant's knowledge true and correct."

Said interrogatories and the answers thereto are as follows:

Interrogatory One. State whether or not your books of account showing your revenues and expenses incident to the various kinds of business carried on by you in the state of Washington since and prior to August 1st, 1934, are kept in accordance with the uniform system of accounting prescribed by the Interstate Commerce Commission. (Plff's Ex. "1".)

Answer. Yes. (Plff's Ex. "2".)

Interrogatory two. * * * State how long your books of account have been kept in accordance with such system. (Plff's Ex. "1".)

Answer. Since on or about July 1, 1914. (Plff's Ex. "2".)

Interrogatory Three. State whether or not, in reporting your revenues and expenses to the tax commission of the state of Washington and to the department of public works of the state of Washington for 1932 and prior years you reported such revenues and expenses in accordance with the uniform system of accounting prescribed by the Interstate Commerce Commission, and for what years your revenues and expenses were so reported to said commission and department, by such method of accounting.

Answer. In reporting revenues and expenses to the Tax Commission and Department of Public Works of the State of Washington the method prescribed by the Interstate Commerce Commission for making reports to it has been followed for many years.

Interrogatory Five. State by the following accounts and account numbers (or by such accounts and account numbers as the same appear upon your books of account) the [fol. 137] total amount of the railway operating revenue received by you, or which have accrued, as a result of business transacted by you wholly within the state of Washington

(a) during each of the months, August, 1933, to December, 1933, inclusive, and (b) from August 1st, 1933, to December 31st, 1933, inclusive.

Answer. The railway operating revenues received or accrued from business transacted wholly within the State of Washington during the month of August, 1933, to December, 1933, inclusive, by accounts stated in Interrogatory (5), so far as shown by the accounts kept by the Northern Pacific Railway Company are as follows:

(Here follows a statement of said revenues for said months as shown by the tabulation set forth on the following page. Plff's Ex. "2".)

Acct. No.	Name of Account	August 1933	September 1933	October 1933	November 1933	December 1933
		August to December, 1933, Inclusive				
101	Freight	$472,865.17	$478,675.28	$468,995.02	$490,289.05	$398,372.21
102	Passenger	19,525.91	28,852.09	21,995.85	31,226.70	50,492.63
103	Excess Baggage	133.85	302.84	172.05	313.78	181.77
104	Sleeping car	.....	.....	.....	.....	.....
105	Parlor and chair car	117.06	244.50	238.12	223.05	307.18
106	Mail	.....	.....	.....	.....	.....
107	Express	.....	.....	.....	.....	.....
108	Other passenger train	104.46	35.46	106.96	R243.48	3,877.98
109	Milk	997.43	903.38	614.77	575.59	566.77
110	Switching	19,569.31	16,948.23	21,841.78	19,432.51	16,928.27
111	Special train service	.....	.....	.....	897.00	.....
112	Other freight train	9,866.51	9,143.51	11,129.69	8,980.34	7,228.22
	Total	$523,179.70	535,105.29	525,094.23	551,694.54	467,955.63
131	Dining and buffet	1,762.32	2,040.14	1,596.27	1,924.59	2,911.33
132	Hotels and restaurants	6,180.68	5,917.52	5,691.95	5,351.57	6,984.75
133	Station, train and boat privileges	219.66	242.33	220.53	157.54	311.75
134	Parcel room	428.35	398.55	265.15	244.55	393.55
135	Storage—freight	R 80.28	62.95	178.10	110.58	119.72
136	Storage—baggage	145.86	177.54	148.37	149.70	155.28
137	Demurrage	2,696.00	4,455.00	2,623.00	2,294.00	R 13,241.00
142	Rent of buildings and other property	368.47	373.53	376.37	384.82	394.00
143	Miscellaneous	5,906.02	5,393.25	5,394.25	8,865.50	5,002.02
151	Joint facility—Cr.	R 891.61	R 63.36	R 78.65	142.75	R 1,551.74
152	Joint facility—Dr.	R 254.95	R 1,265.41	739.69	R 507.26	R 290.12
	Total	16,480.52	17,732.63	17,155.03	19,118.34	1,189.54
	Grand Total	$539,660.22	552,837.92	42,249.26	570,812.88	469,144.57

"R" indicates red figure.

[fol. 139] Following the foregoing figures, appears the following as part of the answer to Interrogatory Five:

"The following explanation is necessary with respect to certain of the above accounts:

132—Hotels and Restaurants: The amount shown in this account is for income received from the operation of station restaurants at which employees, the public and passengers are served.

133—Station, Train and Boat Privileges: This account includes revenues from weighing, vending and automatic machines and from advertising in stations and on trains, and includes the privilege of operating newspaper stands, selling papers and the amount received from telephone companies for the privilege of operating pay telephones in the depots. The details of the items in this account are not kept.

135 and 136—Storage of Freight and Baggage: This account represents amount collected from storage of freight and baggage, and it is not known whether the proceeds are collected from the storage of interstate or of intrastate business.

137—Demurrage: This account represents all demurrage paid in the state. No accounts are kept segregating the amount collected as between intrastate and interstate freight.

142—Rents of Buildings and other Property: This account includes revenue received from other companies for the exclusive use by them of certain operating properties owned by defendant.

143—Miscellaneous: This includes revenue from weighing cars for other companies and individuals, revenue from sale of cinders and other miscellaneous revenue.

151 and 152—Joint Facilities—Credit and Debit: These two accounts are applicable to operation of pool trains between Seattle and Portland. Some months defendant collects more than its proportion of the revenue and has to make payment to the other companies and, in other months, the other companies collect more than their proportion and have to make payment to defendant."

[fol. 140] PLAINTIFF'S EXHIBIT "3"

Is a paper described as "Defendant's Supplemental Answer to Interrogatories" filed with the clerk of the lower court on March 22, 1934, and is as follows:

"Comes now defendant and makes the following supplemental answer to the interrogatories served in this cause:

"(5) Defendant states that since the answer to interrogatories was filed herein its attention has been called to the fact that Account 101, freight for each of the months involved, includes revenue received from business originating in the State of Washington and moving to Washington ports, such as Seattle, Tacoma, and other ports, for transshipment to foreign countries, and said traffic is foreign commerce and the revenue therefrom not subject to the tax imposed by Chapter 191, Laws of 1933. Defendant cannot state at this time just what amount is included in said Account 101, as stated in its answers, without an analysis and examination of said account, which has not yet been made."

"The foregoing is signed by L. B. da Ponte and Robt. S. Macfarland, Attorneys for Defendant, and is verified by L. B. da Ponte, attorney for defendant, to the effect "that the foregoing supplemental answer to interrogatories is true and correct to the best of affiant's knowledge and belief."

[fol. 141] PLAINTIFF'S EXHIBIT "4"

Is a paper described as "Defendant's Second Supplemental Answer to Interrogatories" filed with the clerk of the trial court on June 27, 1934, and is as follows:

"Comes now the defendant and referring to its supplemental answer to interrogatories and particularly to Interrogatory No. 5, and states that since said supplemental answer was filed, investigation of said Freight Account No. 101 shows that revenue from foreign commerce referred

to in said supplemental answer for the months of August to December, 1933, inclusive, is as follows:

August, 1933	$ 20,311.18
September, 1933	28,563.39
October, 1933	30,558.70
November, 1933	28,584.64
December, 1933	86,588.31
Total	$194,606.22

"Defendant states that said amounts must be deducted from the amount of gross revenue shown in the original answers to interrogatories heretofore filed herein in computing defendant's gross intrastate revenue for each of said months."

The foregoing is signed by defendant by L. B. da Ponte and Robt. S. Macfarlane, its attorneys, and is verified by L. B. da Ponte, attorney for defendant, to the effect "that the foregoing second supplemental answer to plaintiff's interrogatories is true and correct to the best of affiant's knowledge and belief."

[fol. 142] Defendnt's Evidence

E. V. Peterson, called and sworn as a witness on behalf of defendant, testified as follows:

I reside at St. Paul, Minnesota. I am satistician of the N. P. I have charge of the statistics of the N. P. including the making of annual reports to the Interstate Commerce Commission, the D. P. W. and other commissions. You ask if I am chief statistician of the company. Well, I am not directly in charge of the work, but I have handled the reports and have direct charge of the work. I have engaged in that work more or less in the present position since April of 1927, but more or less familiar with that work for a number of years. I have been accustomed to testifying along statistical lines in hearings before Tax Commissions and the I. C. C. and the courts (St. 9).

The mileage of the system as operated for the year 1933 was 6740.59 miles, and the corresponding mileage as operated in the state of Washington was 1,942.90. All-track mileage operated figure for the system as of December 31, 1933, was 10,542.97 miles and the similar figure for the stat-

of Washington, also as of December 31, 1933, was 3298.39. There has not been any material change in that mileage for the last four or five years. The ad valorem taxes on the N. P. operating property in Washington for 1933 payable in 1934 (St. 10) were $2,005,015, but I would like to state that it is my understanding from our tax Department that that amount is subject to an adjustment by reason of some questions as to the tax. By that I mean that a levy was held illegal for non-high school districts, and my impression is that it was about $30,000. It is my understanding that those taxes are still on the rolls. The N. P. also pays a so-
[fol. 143] called inspection fee to the D. P. W. The amount for 1933 as paid in March, 1934, was $5,170, and for 1932 was $6,481.32 (St. p. 11).

The N. P. is an interstate carrier subject to the Interstate Commerce Act and makes its reports to the I. C. C. regularly. It keeps its accounts in accordance with the requirements of law and of the I. C. C. The N. P.'s net railway operating income for the year 1932 was $1,990,389.00, and for 1933, $5,975,973 (St. 12). The gross operating revenue for 1933 was practically identical with that for the year 1932, being 47,000,000 plus for both years. But the operating expenses in 1933 were greatly reduced below those of 1932 (St. 13).

The figures as stated in Paragraph 6 (d) of the Answer as applying to the revenues and expenses are those as shown in the report to the D. P. W. for the year 1932, covering all operations in the state of Washington. The ad valorem taxes as shown in 1932 are the taxes on operating property for that year, and do not agree with the tax accruals as shown in the annual report. The amount of the N. P.'s taxes for 1932 on operating property was $2,464,967. Those are the taxes paid, not the tax accruals. The inspection fee of $6,481.32, as shown for the year 1932, is the actual amount as paid by the Northern Pacific. For the year 1933 also the revenues and expenses are as stated in the report to the Department of Public Works. The ad valorem taxes were the best estimate at the time that this was filed as to the 1933 taxes on operating property. And this figure of $2,002,000 corresponds with the $2,005,000 which I just quoted as the 1933 figure (St. 14). The inspection fee for 1933 is correctly stated as $5,700.53. Under paragraph 6 (e) the amounts shown for local and in-

terstate revenues are exactly in accordance with the amounts as reported to the Department of Public Works for those years under schedule of railway operating revenue within the state. These figures that I have just testi-
[fol. 144] fied to are made on the report as prescribed by the D. P. W. or on the form for reports which the Department has prescribed. You ask for how long the Department has prescribed this form of report and you have been making reports of revenues and expenses to the Department. My best recollection is that it goes back at least 20 years, but not much less than that. You ask if the Department has issued instructions as to how these reports shall be made out by the carriers. The reports are made out annually in accordance with the requirement of the form. You ask if the Department has ever made any objection to the form of the report as to the figures stated in it. Not to my knowledge. If it had, it would have come to my attention. In assigning revenues to Washington, the revenues that pertained wholly to business moved (St. 15) entirely within the state are classified as intrastate, and those that pertain to two or more states are apportioned to the state of Washington on the relation of the miles either of the freight or passengers carried. That is in accordance with the Department's form. You ask if it is in accordance with the Department's account rules. That is to that extent, yes. You ask if the Department issued a printed pamphlet in which that method was prescribed a number of years ago. It issued a pamphlet back about 1914, I believe. That prescribed how interstate revenues would be apportioned. I have followed their method of apportionment. You ask if that is the method in universal use on the N. P., and generally in the country. It is the general basis used for the purpose of dividing the interstate revenue between states. I mean in reporting to the Department (St. 16). You ask if it is used by all interstate carriers. It is generally used, not by all, but generally used. You ask if the Department ever had any objection to its use in this state. Not in connection with the annual reports, no.

[fol. 145] The revenue assigned to the state includes the entire revenue from switching and demurrage, whether from interstate business or not. In some of the exhibits I have and in the answers to the interrogatories the in-

terstate switching revenue was segregated. In paragraph 6 (e) of the Answer it is alleged that the gross railway operating revenues from local and interstate business in the state of Washington for these two years are as shown there, and those figures are taken from the Department of Public Works reports, and are computed in the manner I have described. In paying this 1/10th of 1% tax that I have testified to, that is computed on the amount of local business in the way I have just described (St. 17). The intrastate business on which this 1/10th of 1% fee is paid is computed in the manner that I have just described. The N. P. pays a gross revenue tax in Minnesota, a percentage of gross revenue in lieu of ad valorem taxes. You ask if that percentage is computed in the same way. No, it is not computed in the same way. The N. P. has been paying that 1/10th of 1% tax for the years since 1929 (St. 18).

The operating expense shown under paragraph 6 (d) of the Answer for 1932 and 1933 represents the total expenses in the state of Washington as reported to the Department (St. 18) of Public Works. You ask the method by which I computed those expenses. The method is thus explained in the annual report: "Charges for expenses contain, first, those expenses incurred in each state that are considered wholly applicable to that state, and in addition some mileage proportion of expenses which cannot be localized in the state." That is, we have two kinds of expenses. One kind we can identify as having accrued in the particular state. You ask if all those expenses are assigned to the state. Not necessarily, no. We have a number of large shops, for instance, where repairs are made on equipment, such as in South Tacoma, Livingston, Brainard and St. Paul, and the repair costs are not assigned to the state in which the work is done, but the repair cost [fol. 146] is divided on a car mileage basis. That is, repairing cars used on interstate business. And in that case we assign the full amount to the various states on the basis of the mileage within the states. There are also other exceptions that might be given, but that is one of the outstanding ones (St. 19). In general, we assigned all of the expenses which are considered applicable strictly to the business within the state to that state, and you have also assigned various proportions of the general expenses which are applicable to all of the business. That method

has been in constant use in this state for at least the last 20 years. That is the method in which the expenses are apportioned to all of the states through which the Northern Pacific operates. It is the method in general use by railroads. You ask if the D. P. W. has ever, to my knowledge, made any objection to the annual report showing expenses so computed. No, there have been no objections made to the form of the report, that I know of. You ask if there has ever been devised any manner or method of dividing expenses within the state as between local business and interstate business. There have been a number of attempts made to do that, and they have always required special studies. I mean we have no figures kept currently for that purpose (St. 20).

(The witness was then asked if it was his opinion that this method of apportioning expenses and revenues as between states is as accurate as it is possible to make it, to which question plaintiff's counsel objected on the ground that the same called for an expert opinion and that the witness was not qualified. The objection was overruled, and the witness then testified:)

I think it is the most equitable plan so far devised. It is true that expenses incurred in the state cannot be mathematically divided as between the interstate and local business. That is because the 2 classes of traffic are so com- [fol. 147] mingled using the same facilitates to a large extent, that it necessarily makes it impossible to keep a separation (St. 21). There are peculiarities of the local traffic which cause it to be more expensive per unit of freight handled than the interstate traffic (St. 22). The average haul on intrastate traffic in Washington is very much below that of the interstate traffic. Other things I have in mind are the fact of the handling of local business ordinarily to a large extent in local trains, which would probably be more expensive, and the matter of the train speed being of course less on the local trains, and other elements that would require several handlings on local traffic but only one on interstate traffic. It would ordinarily be true that on local traffic you have two terminal expenses, one at the point of origin and one at destination (St. 23), and in interstate traffic you have only one such expense. I think the tonnage on the main line train is considerably heavier than on the local train. By "main line train" I mean the

through trains. You say that the answer alleges that the revenue per ton mile of local business is as 142 to 100, and you ask whether or not that difference has any relation to the profitableness of the two kinds of business. No I don't think that the mere comparison of ton mile (St. 24) revenue without due consideration of the average haul involved in that revenue has any particular merit. The rate per ton mile is comparably under or higher for the short hauls than for the long hauls. You ask if this difference in the average ton mile revenue of the two kinds of business is due to the much shorter haul on the local business. That naturally determines your per ton mile rate, yes (St. 25).

No accounts are kept currently of the expenses incurred in transacting local business separately from those expenses applicable solely to interstate business. You ask what was necessary in order to obtain the expenses in doing local business. The steps that appeared necessary was to make a separation of the various freight train runs in the state of Washington for one week, which would be [fol. 148] all that time would permit, and make a complete statement as to the various—consist of the various kinds of the intrastate and interstate traffic. We made a study of the week of October 22 to 28, 1933, first having determined that was a representative period, and made a complete study of the various freight train runs in the state of Washington. October 22 to 28, 1933, was the representative week in the months August to December we had in mind. You ask how I determined that this was a representative week (St. 26). A study was made of the entire year 1933, that is, I mean a comparison by months of the inter and intrastate traffic in Washington in 1933, showing the net ton miles and the revenue and the average haul with the idea of determining that the month of October would be representative as to general movement and also as to the matter of average haul both as to interstate and intrastate, and a comparison was also made as to the number of car miles and ton miles on the two divisions involved. The net ton mile as used, represents the net tonnage in the cars multiplied by the distance the cars are moved, in other words, the ton mile is the net ton in the car. Ten tons moved ten miles is 100 net ton miles. The gross ton miles would represent the car weight added to the net ton weight of the car, but also includes the weight of the return empty movement. Car miles is the distance that

the cars move multiplied by the number of the cars. The train mile is the number of miles the train runs (St. 27). The result was based on the actual inter and intrastate traffic as reported to the D. P. W.

(Counsel for defendant then objected to testimony as to this study as hearsay if the conclusion of the witness was based on entries in the company's books which had not been introduced in evidence. The objection was overruled, and the witness then continued:)

The first study I made was of the movement of the freight traffic in the state of Washington for the year end- [fol. 149] ing December 31, 1933, and in this comparison I considered the ton miles, the freight revenue and the average haul, and in the month of October, 1933, the average haul in Washington on intrastate was 82.64 miles and this compared with an average for the year of 1933, 88.56 miles. For the same item as to the average haul of interstate traffic. In October, 1933, the average haul was, in miles, 252.97 and for the year 1933 was 252.51. The average haul for both intra and interstate traffic was for October, 1933, 142.56 miles and for the year 1933, 145.30 miles, which would indicate to my mind that because of these facts and also the fact as to the revenue and the ton mile being typical that it was a better than average month to compare with a year's business. It was more favorable to both interstate and intrastate traffic, but particularly intrastate. Our expenses in the month of October, 1933, because of the larger amount of traffic, would be less per unit than for the year. You ask if those figures are taken from the reports to the D. P. W. No, the figures I quoted for the month are not reported, but the figures for the year are reported. You ask how I obtained the figures for the month. I had the auditor of the freight receipts make a special compilation from the reports which are compiled every (St. 29) year for the D. P. W. It is compiled during the year and recorded in the annual report sent to the I. C. C. You ask if this account is kept in the uniform system of accounts prescribed by the I. C. C. That would apply to the freight revenue, but not to the other features. I will say that the tons and ton miles are on exactly the same basis as reported to the I. C. C.

(Plaintiff's counsel then moved to strike the testimony of the witness as to the comparative figures for October,

1933, and the total for the year 1933, both with respect to interstate and intrastate and the averages he had testified to on the ground that the same was pure hearsay, based on matters in the books of the company not introduced in [fol. 150] evidence, and were incompetent, irrelevant and immaterial. The motion was denied (St. 30). Whereupon the witness continued:)

The data to which I have just referred was of course compiled in the office of the auditor of freight receipts as a matter of current record. They were compiled from (St. 30) the way bills from the freight agents of the N. P. There are over 500 or 600 of such reporting agents, I would say. For the system, the number of documents involved runs into the scores of thousands. Those are the original records kept by the agents in the way I testified. It would be an almost impossible task to bring in the men who compiled the reports together with the reports. You ask if the method I have followed is common as a matter of practice. That is the usual way of arriving at the representative period. There is no other way of doing it that I know of, but the first step was to ascertain (St. 31) whether the traffic in the particular month and the week we are selecting would be representative. This study was confined to the month of October; in order to go a step further I made a comparison of the loaded car miles of freight and the net ton miles.

(Counsel for plaintiff then stated that he wished it understood that his objection ran to all this line of testimony (St. 32). The witness then continued:)

A comparison was made, as I said, of the car miles and ton miles for the month of October and the week of October 22 to 28, with the idea of determining whether or not only the month was a representative period or better than that, but also that the week was along similar lines and that comparison showed that the relationship of the loaded freight car miles on the Idaho and Tacoma Division which embraces the divisions that are in Washington for the week of October 22 to 28 with 21.6 per cent of the month's figures. The ratio of the net ton miles, revenue and non-revenue miles in the week in October referred to was 21.67 per cent, and loaded freight car miles 21.60%. These percentages of 21.60 [fol. 151] (St. 32) and 21.67 would be comparable to 22.58 per cent based on seven 31st of a month. Likewise computa-

tions as made of loaded car miles and net ton miles revenue and non-revenue for the month of October, 1933, indicates October 9.35 per cent for loaded car miles and 9.27 per cent for ton miles. Now a normal 31-day period of course would be 8.49 per cent which shows that the month of October is slightly above the average. The net result of my investigation was that this test period of one week was better than the average period. It is a period of more traffic and resultant lower cost. If the period is not accurate, the inaccuracy is against the railroad company. You ask what I did to determine the cost of local business in Washington during this representative week of October 22 to 28, 1933, and ask if I made a set of exhibits. I made up an exhibit showing the final result, but of course the details are so multitudinous that they are not in the exhibit.

The first step in proceeding with the study for October 22 (St. 33) to 28, 1933, was to have a record made by the car accountant of all freight trains operating in the state of Washington during the period referred to, and in making this detail he showed the consist of each train run. By that I mean he showed the number of car miles and net ton miles and the gross ton miles and other data in connection; in other words, made a complete analysis of the train movements for one week. Those train movements consisted of the various train runs between terminals between various points in the state. He made that up from the basic data taken from the conductors' reports of car movement. The train conductor is required on each run to keep a record of the consist of his train. The car accountant took these reports and made up a statement of the consist of that train and other data I mentioned. The next step of procedure was to determine the cost of those particular train runs, in order to do that we went through the time report of the engine men, the train men and for each one of these particular [fol. 152] train runs I ascertained the actual wages, I mean the actual amount paid and not the basic rate. Having done that we proceeded to arrive at other (St. 34) elements of cost such as fuel, water, lubricants and other supplies and locomotive repairs on various bases. Locomotive repairs being on the basis of locomotive miles for the individual type of locomotive performing that service. Likewise the fuel was based on the fuel cost per mile for that type of locomotive. Water and other supplies on basis of cost per

locomotive mile. As a second feature of the study it was required we get a statement from the auditor of freight receipts showing in detail the movement of the traffic during the same week, October 22 to 28, 1933. In this statement he gave us a record of the car number, the movement from and to and also the revenue in connection. From this record we then made a study of the switching cost at various large terminals of Washington for the week of June 3rd to June 9, 1934, and the reason that that study was not made simultaneously with the other study was because we could not go back and the switching study had to be made as the result of observation of current operation, therefore the periods are not the same. I have developed here that the two periods for June, 1934, and October, 1933, are very similar in characteristics both as to the engine hours and the cars handled and the cars per engine hour. So I think I can safely say that the cost as developed in June, 1934, would be typical of the October business, and typical of the other weeks of the year, and of the other weeks we selected for study (St. 35).

I made other studies of switching costs in Washington. I made a study of switching in connection with log rates. This is a study commonly made in connection with rate cases. You ask whether this study was made in substantially the same way as the study in the Seattle switching case and Washington log rate cases. As to the terminal study, it would be along the same line as the Seattle switching case and also in similar line with the study in November, 1927, and April, 1931. But we did not go into that detail [fol. 153] in the first case (St. 36). I have gone into more detail here. I have the underlying data from which I made up my exhibits which we are going to offer in evidence presently (St. 37).

I prepared an exhibit of 22 pages to show the cost of doing intrastate business in Washington during the year and this week in 1933. The three bundles which have been brought into court contain the underlying data of the exhibits I am going to discuss. (St. 37). You state that the basic data was made from the conductors' reports and you ask if they are in these bundles. Not in these files, because they are matters of official record, but if they are required they can probably be gotten. They are kept and are all

assembled in St. Paul, and it is my understanding that they are kept in the various offices (St. 38).

Referring to defendant's Exhibit "7", Sheet No. 1 is a summary of the results shown by the succeeding pages 4 to 22 summarized on page 1. The gross operating revenue shown is $5,271,893. The gross operating revenue in the state of Washington for the year 1933 of $5,802,530 minus an adjustment as shown on page 4; this adjustment brings the revenue down to $5,271,893. That figure of $5,802,530 is the figure reported to the D. P. W. From the amount as stated we have made deductions on account of certain items which have been (St. 39) included in 1933 and also in previous years as a matter of accounting practice under intrastate revenue, which it would appear should not have been so shown, and these adjustments are enumerated on page 4. The first being a deduction on account of the amount included in connection with foreign commerce and in this connection I want to state this: While the amount from August to December, 1933, as indicated is the actual figure, that as no exact figures were immediately available from January to July, in the case of foreign commerce, we have estimated it on the basis of $25,000 per month, which seems in line [fol. 154] with the fact. It is the average for the months of August to November, 1933. We did not use December, because it was an exceptional month. The amount that shows for August to December of $194,606, is the amount shown in the answer to interrogatories. That is commerce tendered to the boat lines for shipment to foreign countries, that is the export traffic (St. 40). You ask what the other item of deduction is. In connection with switching revenue as in the case of the foreign commerce referred to, it has been the accounting practice to include as intrastate the full amount of switching revenue for intrastate and interstate commerce because of the difficulty of separation. You ask if there was ever any occasion heretofore to make the segregation as to the switching and foreign commerce, No, not until the present situation arose. Heretofore as a matter of accounting we have lumped all the switching and demurrage into local business. You ask me to explain the switching deduction. In the present case we have eliminated for the months of August to December, 1933, $72,351, which represents the amount as stated in the interrogatory and for the months of January to July 1933, we have taken the ratio of the interstate switching to the total switching

for the months of August to December, 1933, and applied that ratio to the total switching for the months in question and we will endeavor to get the exact figures for that item also. I think it is fairly approximate. The totals for 1933 amounted to $161,031, and that added to the revenue for foreign commerce totals $530,637 (St. 41). The balance of $5,271,893 is intrastate revenue, the figure shown on sheet 1, item 1. That is the revenue we received for business moved within the state of Washington known as strictly intrastate business.

You ask me to explain the second item, operating expense $4,796,440, shown on sheet 1. The details of the operating [fol. 155] expenses appear on page no. 6 showing the assignment on account of the operating expenses, freight and passenger separately. The fruit operating expenses of $3,291,785 was arrived at and shown in my detail on page no. 10. In other words, after having determined for the week of the study the cost per revenue ton mile for the business handled during that week and having in mind that that week was more favorable because of the larger amount than average business handled, we applied that cost to the net ton miles for the year, and in that way built up an annual figure. The figure of .98411 shown as an operating expense per revenue net ton mile is the cost per revenue net ton mile of moving this (St. 42) local business on the trains we studied, and the train and yard costs were arrived at in the method I explained at the outset of my testimony by the study of train runs. I show as the first figure the amount of intrastate operating expenses and that figure of $75,078.42 is the total expense for that week, as developed on the preceding pages. The 7,629,079 is the revenue net ton miles. Dividing one figure into the other I get the operating costs per revenue net ton mile shown as .98411. My next step was to the cost so arrived as to the total revenue net ton miles of the Washington intrastate traffic for the year 1933. That is shown as 334,000,000 plus, and that figure is reported to the D. P. W. That is an official figure. That figure of net ton miles multiplied by that cost (St. 43) per revenue net ton mile gives $3,291,785 shown on sheet 6. The next step is in connection with the passenger expenses and the details appear on page 11 as to the method of arriving at the passenger expenses. The total passenger expense as reported to the D. P. W. for the year 1933, based on the separation between freight and passenger as divided on basis pre-

scribed by the I. C. C., was $3,142,708, and a division of that expense between the intra and interstate on the ratio of passenger miles, that is the number of passengers multi-
[fol. 156] plied by the number of miles carried gives an assignment to the passenger expenses of $1,500,957, as shown on page 6. To secure that figure we have divided the passenger expense in the state of Washington between intra and interstate on the percentage relation of inter and intrastate passenger miles and that it was 47.76 per cent. I assigned to passenger business that percentage of the passenger expense, and that gave me $1,500,957, as shown on page 6 (St. 44). And those 2 figures added give the total operating expenses applicable to Washington intrastate traffic. You ask why I added a small item of $3,698. Due to the adjustment by reason of 2 items, the first being the next deduction of operating expense on account of the elimination of the foreign commerce item I previously referred to. In other words, if we take out this revenue of $369,000 it is proper to take out the corresponding expenses which we have done by the use of the freight operating ratio as indicated in detail on page 4. In the cases of the switching revenue an amount has been added for the operating expenses, because the yard expenses included in our study were limited, to the road haul traffic. I think those figures fairly approximate the actual expenses incurred in the local business.

The operating ratio of 68.06 shown on page 4 is the relation of the figures immediately above there of the operating revenue of $4,836,839 as reported for freight traffic and freight operating expenses of $3,291,785 as previously explained. "Operating ratio" means the relationship of the operating expenses to the revenue (St. 45).

The figures on page 4 headed "Reduction of operating expenses by reason of exclusion of revenue from foreign commerce", means this: That we are taking out $369,606 as revenue which probably should have been shown as interstate and the expenses are considered as intrastate move-
[fol. 157] ment and so charged it seems proper to eliminate the item from the expense feature. The switching is a little different. The costs filed are not on the $161,000 eliminated, but on $210,000 remaining, because as I explained the yard cost developed did not include these switching operations. This $143,185 is the amount of the expense I have added to the local on account of $210,000 intrastate switching revenue

which we allowed to stand in the account (St. 46). You ask if in my opinion that is a fair way of handling that. I think it is quite favorable.

The next step on page 1 is the item 3. Item 3 on page 1 shows the result of the deduction of the operating expenses from the gross operating revenue and indicates a net revenue from railway operations of $475,453.

I had to deduct tax levies on account of the value of the property used in the local operations. The details of that are shown on page 7 and the method applied was as follows: The taxes on operating property in the state of Washington for the year 1933, subject to the modification I referred to this morning was $2,005,015 and there is the relationship of that item of taxes to the total operating revenue in the state of Washington was 16.618%. Applying that percentage to the revenue intrastate freight and passenger produces an assignment in the amount of $876,083.00 (St. 47). To this amount there has been added an amount for the filing fee one-tenth of one per cent. And the reason that this amount slightly disagrees with the amount of five thousand seven hundred and one dollars that I quoted this morning is because this is limited to only certain features of revenues whereas the five thousand seven hundred and one dollars is all for the intrastate revenues. In proper relation the federal taxes of the system have also been added in the relation of the intrastate to the system operating revenue. In other words of the federal tax of $72,797, an [fol. 158] assignment of $8,066 has been made to Washington intrastate traffic. The final figures *are* shown at the bottom of the page are as they appear on page 1.

(The witness was then asked whether that was the customary way of assigning taxes—in proportion of the assigning of revenues. To this question, defendants' counsel objected. The objection was overruled (St. 48). Whereupon the witness answered "Yes" and continued:)

On sheet 1 I have deducted the taxes from the net revenue and leave the net deficit for the year 1933 on account of local traffic in Washington *of local traffic in Washington* at $413,866.

(N. P. Exhibits "8" and "9" were thereupon received in evidence. (St. 49.) Whereupon counsel for defendant

stated that it was his position as a matter of law that the inquiry as to the cost and expenses of local traffic should end with this figure of $413,866 shown as a loss in the final figure, and had made up the statements as to joint facility rents merely as a precaution (St. 50). Whereupon the witness continued:)

Page 2 of Exhibit "7" is a comparison of the result if the proportion of joint facility rent income which accrues in the state of Washington were applied to intrastate traffic and in that event a corresponding charge made for bonded interest also applying to the Washington intrastate traffic and showing that in the first instance the joint facility rent income. The joint facility rent—net is the amount collected by the N. P. from tenant companies for use of lines less the amount which is similarly paid by the N. P. to other lines for rental of their property and the net result is the amount shown under item 1. The item of $582,774 [fol. 159] is more fully set out in detail in the (St. 50) Exhibit on page 8 which shows the joint facility rents net for the state of Washington for the year 1933 and also the assignment to the Washington intrastate in the case of freight we have assigned to Washington intrastate 39.86% on relation of intrastate net ton miles to the total revenue net ton miles. And the passenger has an assignment to Washington intrastate in an amount equal to $47.76% which is based on the separation of the revenue passenger miles between intra and interstate in this state. The total amount appearing on page 2 is $582,774. On page 8 I show the total amount of the joint facility rent in the state of Washington. The chief amount of the credit item would be the rentals paid to the Northern Pacific by the G. N. and O. W. for the lines between Seattle and Vancouver, Washington. All of this amount was earned on lines in Washington. I have divided that between the state and interstate business in the way I have mentioned.

(Counsel for defendant then asked about item 2, on page 2, bond interest. Whereupon defendant's counsel objected on the ground that the same was wholly immaterial (St. 51). The objection was overruled (St. 53). Whereupon the witness continued:)

On page 2 of Exhibit "7" the bond interest shown has been arrived at by taking the interest on funded debt for

the year 1933 of the N. P. and eliminating the interest on Series B and C bonds that were issued for the purchase of the Burlington stock. The balance is $7,448,377. Now we have assigned to Washington a proportion of that, 25.09%, on the relation of the allocation figures submitted before the Washington Board of Equalization as applying to the year 1933 alone, which gives an assignment to Wash- [fol. 160] ington alone of $1,868,788. This amount so arrived at for the state of Washington has been further subdivided between freight and passenger proportions and the relation of the freight operating expenses in the state of Washington in 1933 to the total operating expenses in Washington for that year; and in the case of passenger on the passenger proportion of the operating expenses in relation to the total operating expenses for the year 1933 (St. 53), the percentages being shown as 71.80% for the freight and 28.20 for the passenger. Then the freight amount is broken down to intrastate proportion based on the relationship of the revenue net ton miles of Washington intrastate traffic as compared with the total revenue ton miles in the state, which gives an assignment of $534,837 to intrastate and in the case of the passenger the assignment is based on the relationship of the intrastate revenue passenger miles to the total revenue passenger miles giving the amount as stated $251,694. The total assignment of the bond interest to Washington account intrastate traffic is $786,531, and this sum exceeds joint facility rent by the amounts shown later on page 3, the excess being $203,757 (St. 54).

These lines from which the joint facility rents are received are used in both intra and interstate business, indiscriminately with the other lines of the state (St. 55).

I spoke of a study of the terminal costs. By that I mean the costs of switching. The results of that study figure in my cost of total traffic that I have testified to. In order to secure the terminal expenses in connection with the handling of intrastate revenue traffic, a study was made at the principal points where regular switching service was maintained in Washington during the week of June 3, 1934, to June 9, 1934, and for the purposes of this study [fol. 161] a record was kept at the various points of the individual classes of work done by the switchmen; and also in that connection a very complete record was kept of car

handlings, which extended to the time of the various movements. In order to secure as we thought, greater accuracy, we had a car record kept by yard clerks independent of the record which usually would have been kept by the switch foreman. In other words, the switch foreman kept the record only of the time and the various movements and the (St. 56) car record clerks kept a record of the number of cars that were handled in those movements. We then proceeded to build up a case study for each one of the terminals separately. That is, we first determined the yard expenes that applied to the various points in detail, and after arriving at the net engine hours—and by the way the net engine hours would mean the gross engine hours made in the yard, minus any deductions for so-called overhead, such as meal time or running to round house, and other items of unassigned items.

We determined the cost of net engine hours at the various points, and then proceeded to apply that cost per engine hour to various classes of service in the terminal.

That is, taking Spokane for example, we had a certain amount of gross engine hour expended in classification Yardley Street, and during that time we handled a certain number of loaded cars. We then proceeded to develop the number of loaded cars per net engine hour and by application of the yard costs referred to determined the cost per loaded car in the various elements of service. We then proceeded to make an exact analysis of the cars that are handled in intrastate business for the week of October 22 [fol. 162] to 28, 1933, and with the assistance of the operating department and also the man who had compiled this study, we were able to determine the various moves that the cars would actually receive. And then having the cost for the various individual moves in the yard we applied those costs to the car movements of intra-state traffic, and in that way (St. 57) built up our costs of handling that traffic. You ask how many men or employees figured in that terminal study. Well, it would be measured by the number of yard foremen, the various shifts. I think perhaps one of the other departments could better inform us as to the number of men that were used. There was probably one yard clerk at each of the ten larger points assigned to the study, and of course a considerable amount of detail was required in getting at the engine-hour costs. But the num-

ber of men who actually kept a record of the time they devoted in the various surveys would be determined by the number of yard conductors in that region. The underlying data from which I give my testimony herein is included in the three bundles brought into court. By the "underlying data" I mean the time the individual yards devoted to this class of service and the number of cars devoted to that period. It is a special study, and those bundles contain the complete data on that study. This is the same method as was used in the Seattle Switching case and the Log Rates cases (St. 58). It is a formula that has been used a number of years and has the official sanction of the Interstate Commerce Commission known as the Corriston-Sauer Formula (St. 59).

(The witness then testified over the objection of plaintiff's counsel that the same was immaterial, that the method used is recognized and has been used repeatedly on prev-[fol. 163] ious occasions. The witness was then asked to state the results of what costs he developed in that way, the total yard costs and switching costs, and where it was shown on Exhibit "7". To this question, plaintiff's counsel objected on the ground that the same was purely hearsay. The objection was overruled (St. 59). Whereupon the witness continued:)

These amounts will be found on page 12, Ex. "7", under item of yard expenses, the amount shown being $9,104.69. In other words, that is the expense attributable to the intrastate traffic as determined by an analysis of the movement of each of the cars during the period from October 22, to 28, 1933, and the proper cost applied to each car movement.

(Defendant's Exhibit "7" was then received in evidence over the objection of plaintiff's counsel that the same was hearsay, largely based upon conclusions, based upon estimates not made by a qualified expert; and on the further ground that the apportionments of expenses and revenues are to be made upon an arbitrary basis and do not represent the true and equitable division of either the revenues or (St. 60) expenses. And upon the further ground that the same is wholly incompetent, irrelevant and immaterial; and further that the underlying data, the books of the com-

pany from which a large mass of this data is taken, they have not been introduced in evidence and no opportunity given to examine the books, no opportunity given to examine the persons who compiled the data from which the exhibit was made (St. 61). The witness then continued:)

Sheets 23, 24 and 25, of Exhibit "7", are statements in [fol. 164] connection with the assessment of operating property in the state of Washington and are such as have been offered by the N. P. in hearings before the Board of Equalization. I prepared and submitted them. They are correct in all detail (St. 61).

(Said sheets 23, 24 and 25 were thereupon received in evidence as Defendant's Exhibit "10" over the objection of plaintiff's counsel that the same were wholly immaterial (St. 64-5). The witness then continued:)

Exhibit "11" for identification is a statement of the engine hour costs as developed for the ten terminals as indicated by the headings on the forms in the state of Washington for the period from June 3, 1934 to June 9, 1934. It shows the expense for the test period, the net engine hours, and the cost per engine hour as developed. Exhibit "12" for identification is an analysis of the engine hours and cost per car in connection with the switching operations at the terminals indicated for the same period as shown for the engine hour costs. It is self-explanatory. Exhibit "13" for identification is an analysis of the engine hours and cost per car in connection with the switching operations at the terminals indicated for the same period as shown for the engine hour costs. You ask what I mean by this classification of services. In the various yards necessarily the work done by the switchmen is divided into certain classified lines. Part of the time is devoted to the classification of cars, that is making the breaking up of trains part of the time is industrial switching, and other parts of the time is in connection with transfer movements, and all other services that were considered in the yard movements (St. 70). A transfer is taking a switch trip from one point to another within the yard where the dis- [fol. 165] tance is sufficient to warrant calling it a transfer. "Interchange" would be connecting to an inter-company line. "Freight house" would be largely in connection with movements to the freight house of L. C. L. and so forth.

"Team track" would be, as the name indicates, deliveries on the team track for the benefit of one or more shippers. For each class of service I kept this time separately, and developed the cost for each class. That is, per engine hour. Then we also developed that for the number of loaded cars handled, and in fact we developed the cost per loaded car for the various elements and services, and cost per loaded car is shown on Exhibit "13" and in that way we have built up our costs for the intrastate traffic, as I have explained, and as shown on Exhibit "7". You ask if the reports and underlying data of the men who did this work is contained in the three bundles brought into court. That applies to that feature. The data as to the engine hour costs is not in that detail, but would be developed (St. 71) from other sources. You ask what other sources. Well, we have taken that from the records of the division accountant's office, and things of that kind. That is in the other data that we have with us. So far as the terminal study is concerned the data that applies to the matter of the time and the cars is included in those 3 bundles. The matter of the cost per engine hour was developed from the division accountant's records which is the figure that I made myself. That was not any special study (St. 72).

(Thereupon defendant's exhibits "11", "12" and "13" were received in evidence over the objection of the plaintiff's counsel that the same were pure hearsay, and were [fol. 166] neither competent, material nor relevant (St. 72). The witness was then temporarily excused (St. 73).

I made a study to show how the local business and the interstate business is handled in the state of Washington. In order to arrive at the data to show the degree to which the interstate and intrastate traffic were intermingled and handled together, a detailed study was made for the week of March 25 to 31st, 1932. I prepared 10 illustrating what I did (St. 95). These are marked N. P. Exhibit No. "15" for identification. There are 14 pages all told in this exhibit. The method pursued was as follows: A study was made of the week of March 25 to 31st, 1932, of the freight train movements in the state of Washington and this data was compiled from the conductor's reports. We have shown the information as to the train miles, the loaded car miles intra and interstate, the percentages of the total, and like-

wise revenue net ton miles intra and interstate, and the percentages of total. In addition to the showing just referred to, a further study was made as to what possible trains could be eliminated in the event that the carrier, or that the N. P. had not carried any intrastate traffic in the period of March 25 to 31st, 1932, and an analysis was made by such individual trains showing the consist of the train, and from this statement was computed the wages of the engine men and the trainmen, the fuel and other supplies for locomotives and locomotive repairs, and this was considered as the so-called out-of-pocket expense as (St. 96) applied to the trains that would have been eliminated. The purpose of this study was to show first how the local business and the interstate business was moved, and that [fol. 167] it was moved in the same train and handled by the same employees, the extent of each kind of business, and also as to the eastbound and westbound. My further study was intended to show what amount of expense the N. P. could save if it abandoned its local business, and what therefore would be the balance of the expense which would be incurred if only interstate business was handled (St. 97).

(The witness was then asked to state whether he found that this local business and interstate business was in fact inseparately commingled and handled on the same trains and by the same employees and with the same facilities and over the same lines of railroads, both east and west bound. To this question plaintiff's counsel objected on the ground that it called for a conclusion of the witness and no foundation had been laid. The objection was overruled (St. 98). Whereupon the witness asked defendant's counsel if he was referring to all the traffic in every specified case, or the traffic generally, to which counsel answered: "Generally, yes." The witness then answered: "Generally, yes" (St. 98). Whereupon the witness continued:)

In the year 1932 the gross freight revenue in Account No. 101 for business done in the state, both local and interstate, was $10,507,609, as shown by the exhibit here. Of this, $5,497,482 was intrastate and $5,073,127 interstate. Those figures are shown in the annual report to the Department of Public Works for that year. For the state of Washington the intrastate ton miles in revenue service

were 326,050,387, and for interstate, 427,671,410 or a total for the state of $753,721,797, for that year. Those figures are shown in the reports to the Department in this way, that in the schedule to the Department we show the total ton miles of revenue freight, but as a matter of additional [fol. 168] information we also report the intrastate ton miles so that the other is a matter (St. 99) of deduction. For the week of March 25 to 31st, 1932, the total revenue net ton miles were 14,426,082, of which the intrastate was 6,824,237 or 47.3 per cent, and the interstate 7,601,845, or 52.7 per cent. Of the total local ton miles the eastbound was 3,022,719 and the westbound 3,801,518, a total of 6,824,237. Of the interstate revenue net ton miles the eastbound were 5,175,941, and westbound 2,425,904, a total of 7,601,845. Those ton miles were carried over the same lines of railroad, in the same trains, were handled by the same employes (St. 100) and with the same facilities. We made no attempt to study the passenger traffic because of the difficulties in connection, and of course the passenger service is also intermingled the same as the freight service. The same trains carry interstate and local passengers.

The total passenger revenue in the state of Washington for 1932 was $943,250.73, of which $379,715.40 was intrastate and $563,535.33 interstate, a percentage for the intrastate of 40.26 for the interstate 59.74. In speaking of passenger revenue we are now referring to account 102 passenger tariff revenue. That data is reported to the D. P. W. The revenue passengers carried in the state of Washington for the year 1932 were 280,521, of which 145,061 or 51.71% were intrastate and 135,460 or 48.29 were interstate. The revenue passenger miles were for a total in the state of Washington in 1932, 42,735,770, of which 18,739,808 or 43.85% were intrastate and 23,995,962 or 56.15% were interstate (St. 101).

It was my observation that speaking generally those passengers were carried for the most part on the through east and west trains and the through interstate north and [fol. 169] southbound trains. The N. P. is not carrying passengers on strictly local trains any more, compared to the total. The busses carry those passengers.

Sheet 1, Exhibit "15" is prepared entirely from information reported to the D. P. W., with the exception that I have just mentioned, that the number of tons and ton miles

are shown in total for the state and also the intrastate is shown as a special matter of information, so that the interstate becomes a matter of deduction. It is correct (St. 102). Sheet No. 2 is prepared also from the reports made to the D. P. W. of Washington, and the passenger revenue is exactly as stated in that report. The passengers carried under passenger miles are as stated so far as the intrastate and total is concerned; the interstate being a matter of deduction. It is correct. Sheet No. 3 was prepared to show the difference in the average haul of the intra and interstate traffic in Washington in the year 1932 and for March of 1932, and of course the value of the comparison lays in the fact that it shows that the month of March very closely approximates the average for the year. It also shows the marked difference in the haul between the intrastate and the interstate traffic. It was intended to show that this week in March was a representative period. The figures for March were obtained from the freight accounting department and forms a part of the figures for the year 1932 as submitted. That was not reported to the D. P. W. for the month of March (St. 103), except in the totals for the year, of course, but not for the month. I have the details that were furnished me by the auditor of freight receipts, but I have got no other original sources. Those are made up in St. Paul from the original books of ac- [fol. 170] count. This was not a special study. That sheet No. 3 is correct.

Sheet 4 was prepared with the idea of showing that the month of March, 1932, as well as the period from March 25 to 31st, 1932, was representative of the average situation, and it indicates that the percentage of March to the total year of 1932 of intrastate freight revenue, account 101, was 9.27% (St. 104). I think it speaks for itself in the column showing the percentage figures. I want to say that the figures referred to as freight train miles and car miles are not on a revenue basis. They are taken from the conductor's reports which reflect the operation, but still show a consistency between the month and the year of 1932. Those figures in the first 2 columns showing the intrastate freight revenue and the ton miles are taken from the D. P. W. report. Sheet 4 is a correct statement (St. 105). I wanted to enlarge a little on that in this, that at the bottom of this statement we are going a little beyond the month

of March and showing also the relationship of the period from March 25 to 31st, indicating that the loaded car miles are very close as far as the week is concerned and the month. In other words, if we take the week as used for March 25th to 31st, 1932, and project it to a monthly basis, the amount would be 102.7% of the actual figure for the month, showing that the week is representative.

Sheet 5 is a comparison of the ton miles revenue and of intrastate and interstate traffic in Washington, with the idea of showing that for the year 1932 and March, 1932, and also bringing the best period week up to a constructive month, it would be very uniform as to the percentage of intrastate traffic. In other words, the year 1932 was [fol. 171] 43.26% and March, 1932, was 44,91%, and the test period was 47.35. That shows that the traffic throughout the year was distributed with approximately uniformity (St. 106).

As to sheet 5 the source of the figures for the year 1932 would be from the annual report to the D. P. W. For March, 1932, would be the special information furnished by the auditor of freight receipts which form a part of the freight reports for 1932. The information as shown for the test period will be that which is shown on the preceding exhibit, or rather on the following exhibit, No. 6.

Sheet 6 is a detailed summary analysis of the freight traffic movement in the state of Washington for the week of March referred to, and shows the total loaded car miles divided between intra and interstate, the percentage of intrastate being 44.65. It also shows similarly the revenue net ton miles, the percentage of intrastate being 47.30. It shows how the traffic divides as between eastbound and westbound (St. 107).

Sheets 7 and 8 were made up on identically the same basis except that page 7 covers the eastbound traffic and page 8 the westbound. It shows the number of individual trains run for the week of March 25 to 31, 1932 in the state of Washington, and indicates the number of train miles, the loaded car miles intra and interstate, and total, and the percentages of the total which apply to the interstate and intrastate, the revenue net ton miles, intrastate, interstate and total, and the percentages applying to intrastate and interstate. The information shown on the sheets No. [fol. 172] 7 and 8, is to show that the traffic which is sum-

marized on the preceding sheet No. 6 moved on these particular trains and train runs listed hereon sheets 7 and 8. Sheets 7 and 8 were made from details that were drawn off of the conductors' reports, and these detailed statements show the information that appears on these statements (St. 108). You ask me to explain what conductor's reports are. The conductor makes a report of the consist of his train. He shows the points between which the cars are hand-ed, shows the detailed information which enables the car accountant to figure the train miles and ton miles and car miles and so forth. In other words, the conductor's report shows only the basic movement, and from that they compute the ton miles and car miles. It shows the consist of the train, and to that extent, the kind of traffic it handled, and the origin and destination and the commodity. It is a complete statement of what that train was doing on that run. Each train conductor turns in the report of his run. I think there is a train conductor for each of these movements listed here. It involves the examination of a vast amount of data and reports made by a large number of people. And I want to mention that the details we have (St. 109) of course, are summarized here for the entire week, but we have a report for each day or each one during that week. As far as I know those sheets are correct. They are prepared by our car accountant in a careful way (St. 110) and made in the regular course of business. All of this underlying data was made by employees in their regular course of employment.

Sheet 9 is a summary of the two following pages showing the amount which has been estimated as the possible [fol. 173] reduction by reason of trains that could be discontinued if the intrastate traffic had not been carried during that period. This particular statement shows the train miles, and locomotive miles and car miles that would apply to those particular trains. It shows those train miles and car miles which would not have been run if intrastate business were not carried on these trains that I have listed in my previous exhibit. If the railroad company abandoned its local business, it would not have made these train miles and loaded car miles that would apply to those particular trains, that I have shown here (St. 111). You ask how that was made and what it was based on. After we had secured the data for pages 7 and 8 of this present

exhibit which covered all of the train movements in the state of Washington, this data was submitted with some additional data, which is not on this statement but appears in the details which we have here, as to the number of cars set out and picked up. They were referred to the operating department so that some operating man who was qualified could go through every individual run in detail, and by comparing the consist of the train, the number of cars picked up or sent out, and all of the salient features, to determine whether or not it would be possible to eliminate certain trains without disparagement to the service. And as the result of that study we were furnished with a list of those particular trains. Then having done that we proceeded to have the District Accountant at Tacoma give us the information as to the wages of the engine men and train men as applying to those particular runs. He gave me the cost of the engine men and trainmen's wages on those runs which the operating department thought could be abandoned and still give adequate interstate service. The balance of the information shown on this (St. 112) particular [fol. 174] exhibit as to fuel and locomotive supplies and locomotive repairs was prepared by us on the basis of the showing as to the locomotive miles in those particular trains. That is the locomotive miles which being abandoned as intrastate business were not done, would have cost so much for fuel. You ask if I have computed the costs of that service which would be abandoned. I would not use the word "cost". I would say that that is the amount which would have been saved if that service had not been rendered, rather than cost. (On sheets 10 and 11 I have shown the train runs which could have been abandoned. Sheet 10 is the Idaho division eastbound and westbound, and sheet 11 is the Tacoma division eastbound and westbound. It shows the savings which would have been made if this local business had been abandoned and these train runs listed on sheets 10 and 11 had been abandoned (St. 113). The data contained on pages 10 and 11 is contained in that special study of the week period (St. 114).

As to sheet 12—so far as the movement shown on this particular statement is concerned, the amounts appear on Exhibit 12 here (St. 114) in this manner: The amount that would be saved is shown in detail on the first column insofar as the amounts appear for the week on page 9. The

total for the year is $870.88. That includes also items in addition to what we have on page 9. The amount for the year 1932 as based on the 52 weeks is the exact amount that appears in the first column on page 12 for the first 5 items. You ask how I got the other items shown in the first column of sheet 12. They are more or less of an allocation based on the relationship of the car miles or ton miles of the intrastate traffic in the particular week in [fol. 175] March, 1932, and a comparison was made as to relationship between the total intrastate loaded car miles, and the loaded car miles that could be eliminated by these particular trains being removed, and the amounts were divided on that basis generally (St. 115). I think, in my opinion it is a fair and approximate estimate of the amount which could be saved by the railroad company if this local business carried on the local trains listed on the preceding sheets have been abandoned. You ask how I got my estimate of the amount which would be saved for reduced car mileage as shown in the second column of sheet 12. I must go at that in rather a detailed way. In the matter of fuel for train locomotives, the amount we have for saving by reason of train reduction is shown as $188,050.00, and then the reductions shown where the same train service was retained would be based on the car lines that were not required, even though there was no reduction in the train service. In some instances, as there shown, we would have to continue to run the train for interstate business, but we would reduce our car miles by reason (St. 116) of abandonment of the local business. This is my attempt to estimate the saving because of the elimination of the car miles in local business. The amount of train elimination would account for a certain number of loaded car miles or gross ton miles, and then the balance of the traffic eliminated would also have to be applied on the car mile basis. You ask how I made my estimates of the amount which would be saved by reduction of car mileage in local business, that is, by abandonment of car mileage in local business. In the matter of freight car repairs and train supplies and loss and damage to freight and injuries to persons, I computed an average cost per car mile for a period of years in the [fol. 176] state of Washington. In the matter of the freight car repairs, the amount shown was based on the saving in total car miles of intrastate traffic, and applied to that the

average cost in the state of Washington in 1931 as the cost per car miles for freight car repairs. In the case of loss and damage to freight we applied the average for the five years from 1927 to 1932, that is the average per loaded car mile, and in that way arrived at the amount applying to the saving in car miles. In train supplies and expenses we likewise used the average cost per car mile loaded and empty for the five year period from 1927 to 1932, and applied that to the saving in car miles. In the case of station and yard service the saving that we have was (St. 117) based on the total in this way, that we had the operating department make a study of the saving that could be effected by reason of reduced station service and yard service in the event that we would not be required to handle intrastate traffic, and from this saving for the one week in question we developed an annual figure for the saving as far as the yard service was concerned and the station employees. And that would require considerable detail to go into that question. It was my theory and thought to account for all of the savings which the railroad would make by reason of the abandonment of the local business. The statement is correct to the best of my knowledge (St. 118).

Sheet 13 is a statement for the year 1933 of the same information as was previously shown on page 1 of the (St. 118) present exhibit for 1932, to show that the condition has not materially changed as between the relationship for the intrastate and interstate traffic as applying to tons of revenue freight, ton miles of revenue freight, freight revenue [fol. 177] and it also indicates the total operating revenues. March, 1932, was selected as being typical of that particular year. This particular figure on sheet No. 13 is a recorded figure as to the traffic actually handled. I did not have this figure shown on page 13 when I made my special study, because the year 1933 had not elapsed at that time. The information on page 13 is taken, as I explained previously, for 1932, from the report to the D. P. W., except as to the fact that the net ton miles and the tons of revenue freight are not shown in the report for interstate, but can be arrived at by (St. 119) a process of deduction.

Sheet 14 is a statement for the year 1933 of the passenger statistics for the state of Washington, showing the division of the passenger revenue, account 102, passengers

carried and passenger miles. You ask if sheet 14 is the same for passengers as the preceding sheet, No. 13, is for freight statistics. This exactly corresponds to sheet No. 2 for 1932 (St. 120).

Sheet 15 was prepared to show the change in the situation in the state of Washington in later years as far as the operating or rather the net operating revenue is concerned. The net operating revenue, that is the operating revenues less the operating expenses in the state of Washington for the year 1932 was $2,261,955. The corresponding figure for 1932 was $508,507; for 1933 $919,912. Its purpose is to show that years prior to 1932 are not representative of conditions existing in 1932 and succeeding years. That is entirely taken from the report to the D. P. W., and is a correct statement (St. 120).

(N. P. Exhibit "15" was then received in evidence subject to the objections of plaintiff's counsel to be made later (St. 121). The witness then continued:)

The expenses for 1934 both for Washington and the [fol. 178] system should be very much the same as in 1933 (St. 121). The total operating revenues of the system for the eight months of 1934 were $33,044,301, an increase of $3,311,859 over the same period of 1933. During the same period the total operating expenses were $27,270,562 for the eight months of 1934, or an increase of $1,175,203 over the corresponding eight months in 1933. It can hardly be figured that the revenues and expenses in 1934 will be about the same as in 1933, because the tendency has been rather downward on the earnings, and we all know about the crop situation out in the Dakotas, and any estimate made for the balance of the year would (St. 122) be wholly conjectural. I don't know that it will be better in 1934 than in 1933. I think it will be pretty much the same as 1933. That is only an estimate that I make in the light of what knowledge I now have. As a result of the action of the executives of the Labor Board and others, there has been an increase in the wages of the employees effective on July 1st of 1934, which will have a considerable effect on the expenses for the last half of 1934, and of course will be much more felt in 1935, because while 2½% of the deduction that was made and was effective until June 30, 1934, was discontinued on that date, there will be a fur-

ther deduction of 2½% in this so-called deduction on January 1, 1934, and the full 10% deduction will be reinstated on April 1, 1935. So that the effect will be a tremendous increase in expenses in the year 1935 particularly (St. 123).

I don't think there were any passenger trains that could have been discontinued or any saving of any passenger expense could have been made growing out of the local business, on account of the way the traffic was handled. I think we would have to run the trains in any event. For the year 1932 the intrastate freight revenue was $5,497,482. [fol. 179] The passenger revenues as reflected in account No. 102 was $379,715. The other operating revenues were $736,762, making a total of operating revenue in Washington as applying to intrastate traffic of $6,613,959. In the event that the intrastate traffic had been abandoned and the savings as indicated by page 12 of Exhibit "15" are applied, it would result (St. 124) in a reduction of the total operating expenses in the state of Washington by $1,471,623, but it would, of course, eliminate from Washington the full amount of the intrastate revenues, and the net result would be that applying the reduced costs as referred to, and applying that against the interstate revenue as recorded, and taking in the state of Washington taxes on operating property, would result in a loss on interstate business of $7,098,796, for the year 1932.

(At this point the witness was permitted to testify over the objection of plaintiff's counsel that the same called for an expert opinion, that it would not be possible or a practical matter to operate the N. P. lines in Washington with a result of that kind (St. 125). The witness then continued:)

The figures in paragraph 7 of the Answer are correctly stated (St. 126).

The figures in paragraph 5, subdivision "f" of the Answer as to the revenues received by the N. P. for carrying government business are correctly stated. That, of course, is not local business alone. It is all business in the state (St. 177). Plaintiff's counsel asks if those figures were all before the D. P. W. No, sir, that is, they are included in the figures as reported for the year 1933 in the

annual report, but they are not reported for the individual 10 months as shown. But the figures that I have quoted there for the 10 months, for January to October of 1933, are [fol. 180] the identical figures that are included in the 12 months as reported to the Department.

On Cross-examination he further testified as follows:

You ask what my duties are in connection with my position of statistician of the N. P. Well, the duties are of a general statistical nature, the preparations of various data for rate proceedings, and things of that nature, and the preparation of the annual reports, and general statistical information for the railroads. It has nothing whatever to do with operations. I have occupied that position since April, 1927. My duties include the preparation of the reports of the various regulatory bodies and taxing bodies, including the reports of the Washington D. P. W. and tax commission (St. 183). The operating expenses are not separated between intra and interstate in any reports that we make to the regulatory bodies. The revenues are so divided by the different departments who handle the various revenues. We make certain reports to the regulatory body of Washington. The only operating expenses that we report to the state of Washington are those for the state as a whole, which cover all of the operations within the state, both interstate and intrastate (St. 184). I used those operating expenses so segregated in part in making up the statistical data contained in N. P. Exhibit No. "7". Those operating expenses are apportioned as between freight and passenger expenses. You ask if I, as statistician, determined what items of expense should be charged to freight and what to passenger service. Well, we do in this way, that we have general charge of the preparation of the report, but the actual work is not done by us, the details being handled by the Auditor of Disbursements. The direction [fol. 181] as to how the division shall be made is made by the I. C. C. In other words, the separation that we make of the operating expense between freight and passenger service is made on the same basis as that which is made for the I. C. C. and is based on the rules for the separation of operating expenses between freight and passenger.

You ask if there are rules providing for the division of expenses as to freight and passenger service as to our reports to the D. P. W. The only rules that I know of or

had occasion to refer to are the rules that were issued by regulation adopted December 31, 1914, by the Public Service Commission of Washington. Those rules provide for the apportionment of revenues and operating expenses to the state. I do not recall any provision being made for freight and passenger (St. 188). The only official rules I know of regulating the division of the expenses as between freight and passenger service are ones we are using, which were issued by the I. C. C. We follow the I. C. C.'s rules in reporting to the state in dividing as between operating expenses incident to passenger service and operating expenses incident to freight service. And I might mention, with the result that the report to the I. C. C. is the sum total of the reports we make to the various states. We make these reports on a uniform basis to all the states. Then, we do not follow the rules of the D. P. W. in making those reports. As I said, the rules here make no provision for freight and passenger, and therefore they cannot be followed. There are six main divisions of expenses of operation. The first is: maintenance of way and structures (St. 189). With the exception of superintendence and insurance, stationery and printing and other expenses, I believe these expenses are practically all directly assignable to the state of Washing- [fol. 182] ton. In the roadway accounts, 202 to 226 inclusive, where amounts are shown under "yard", the common charges are divided between freight and passenger on the basis of the locomotive miles in the various individual yards. In the road proportion of accounts 202 to 226 the basis of division between freight and passenger where no direct assignment has been made, is on the basis of the charge to fuel for locomotives, train, freight and passenger (St. 191). The relative dollar value of the coal consumed, not the relative pounds of coal consumed (St. 192). The other accounts are apportioned between freight and passenger in accordance with the I. C. C. rules. We use the same method in apportioning expenses as to each state to which we report. But the I. C. C. rules require that the separation should be, as far as practicable, made by operating or accounting divisions (St. 193). That rule applies to all accounts. You ask what accounts 278 and 279, "maintaining joint tracks, yards and other facilities", consist of: The maintaining joint tracks and terminal debit would represent the amount that the Northern Pacific pays the other railroads for the maintenance feature of joint facilities.

The credit account, of course, would represent, conversely, the account that the Northern Pacific elects from other companies for use of its facilities in joint operation as applied to maintenance of way. On the N. P. line between Seattle and Vancouver, there are two tenants, the O. W. and the G. N., which operate under a contract between those companies and the N. P. They contribute to expenses of maintenance of way and structures on a car mileage and locomotive mileage basis. The N. P. makes all the expenditures for maintaining the right-of-way and structures in the first instance, and it charges the tenants' proportion [fol. 183] back (St. 194). That is shown as a credit in account No. 279. What we pay out is shown in Account No. 278 (St. 195).

The second main division of railway operating expenses is Maintenance of Equipment. You ask how the expenses are apportioned as between freight and passenger service. Well, the allocation to the states is, of course, made in this way, that we have a definite amount of freight (St. 195) or passenger, and it is pretty hard to speak in general of this maintenance of equipment account because there are so many different aspects to the proposition.

The next main division is Traffic Expense. That is apportioned to the states on the basis of the train miles in the various states. That is, we divide the freight which is directly—freight to the various states on the basis of freight train miles, and passenger on the basis of passenger (St. 199) train miles. You ask how we divide it between the passenger and freight expense. Well, that is provided for by the Interstate C. C. as being based on the total amount of the account as finally assigned. For instance, in the state of Washington it will be noted that for the year there is $190,000 shown for traffic expense freight and $195,000 passenger. Well, that would be the basis of the division of the so-called common expenses between freight and passenger. But I want to make this point clear that we do not deal with the state of Washington as one unit. The amounts that are reported to the state of Washington are the sum totals of the divisions within that state. We spend more for the solicitation of passenger traffic than we do for freight traffic as directly assigned, and we only receive 10% or 15% of the revenue from passenger service that we do from freight service. You ask how it is that we spend so much money for soliciting passenger traffic when

[fol. 184] that traffic is such a small proportion of our total revenues. Of course, the main item here is advertising, which we know is a necessity, even though it is charged to the passenger department. It might well be that more should be charged to the freight department (St. 200). I think the I. C. C. rules as to dividing the expenses as between freight and passenger give as nearly a correct result as can be made (St. 202). All of the accounts in "General", where the allocation cannot be made directly, are apportioned between states on a train mileage basis (St. 203).

You ask if it is strictly true that the apportionment of operating expenses to Washngton had been directed by the D. P. W. in the manner followed by us. I believe I stated it was essentially the same. I did not say exactly the same, because I know it is not, because I have compared it account by account. I have said that the D. P. W. has never to my knowledge complained with respect to this apportionment as to the method in which we make the reports. You ask whether the D. P. W. has ever accepted this division of expenses as a proper method of apportionment of expenses in any question dealing with rate making (St. 204). My answer is that I don't know. I have *been* repeatedly been a witness in inquiries before the D. P. W. involving the propriety of given rates (St. 205). I don't recall any objection to the matter of/ ap-ortionment to the various states. There, of course, has been some agitation about the excessive cost in the state of the operating expenses, but not as to the allocation to the state, as I recall it. The following note has appeared on the bottom of page 707 of our report to the D. P. W. for 1933 and all of our reports both to the Tax Commission and the D. P. W. for a number of years (St. 206-7).

[fol. 185] "The statements herein either of revenues or expenses attributed to Washington are misleading unless properly understood. They are necessarily based on arbitrary assumptions as follows:

"Revenues contain (first) the revenues of business wholly local within the State and in addition a proportion of interstate revenues determined by the proportion of mileage which each interstate freight shipment or passenger is carried within the State.

"Charges for expenses contain (first) those expenses incurred in each state, that are considered wholly applicable to that state, and in addition some mileage proportion of expenses which cannot be localized. Apportioning either such revenues or such expenses on a mileage basis is purely arbitrary and has been adopted for want of any other basis."

You ask if I agree with that statement as to the apportionment of operating revenues in Washington. This memorandum was not prepared at my request. It has been put in at the request of the executive Department, but I will say that I can't entirely subscribe to the arbitrary feature of that. I think that the method is probably as fair as can be used. You ask me whether it is my opinion the method I have used of apportioning operating expenses to Washington is the best method of apportioning operating expenses that can be used for the purpose of determining the propriety of rates both in this state and in any of the other states through which this line operates. I think each question there will have to depend largely on the local situation (St. 208). I have testified that I apportioned the N. P. system operating expenses by the same rules and formulas in each of the states through which we operate, and to which we make reports. You ask whether or not, for the purpose of determining the propriety of a local rate in any one of the states traversed by the N. P. the method used in the apportionment of these operating expenses as I have reported them to the state of Washington is the best method that could be used for the purpose of making such apportionment. I would say no. You ask me why. Well, because the conditions are [fol. 186] constantly changing. I think that the present practice of assigning to the (St. 209) state the expenses covered within that state that are considered applying to the state, and an apportion- of the other is the best possible method now known for making this separation.

You ask if I would be satisfied in any rate inquiry in any of the states traversed by the N. P., from the standpoint of the N. P. which I represent, to have the operating expenses apportioned to the particular state in which the inquiry is made, by the same methods and in the same manner as I have reported them to the state of Washington. That is exactly what we are doing. You ask me if I would. No, I say that is exactly what we are doing, we are reporting them all on the same basis (St. 210).

In the division of operating revenues to Washington we first apportion the local revenues to the state, and then apportion certain other miscellaneous revenues such as those from switching, in a certain way (St. 211) and apportion the interstate freight revenues to Washington in the proportion which the mileage haul in Washington bears to the entire mileage of haul. That is true, except as to a small modification of L. C. L. traffic, which probably doesn't change the situation much, but on carload traffic we are dividing the revenue between states on the basis of the movement of the traffic, that is the mileage in Washington and the other states. We divide the interstate passenger revenue on relation of the passenger miles made by the individual passenger.

In computing the relative car miles operated in Washington as compared with the system, in my various exhibits I take the car miles actually operated in Washington and divide them by the total for the system, to get the percentage in Washington. In computing those car miles I com- [fol. 187] pute them only on a station to station movement, and take no account of the movements around in the terminals, in switching operations, etc. In computing relative ton miles hauled in Washington as compared with those hauled on the system, I also use a strictly station to station movement (St. 214). In that case I do not take into account the movements within the terminals. You ask if the same thing is true as to engine miles and locomotive miles. Well, it would not be true if you take the total locomotive miles, because locomotive miles "yard" would include terminal movements and the train switching, and the road haul would include the switching at the local points. But if you were to take in just what we call the principal locomotive miles, then of course it would be just a road haul proposition. We haven't used total locomotive mileage in the state apportionment. We have used car miles (St. 215). In apportioning operating expenses to Washington, I did use locomotive miles in certain instances. Total transportation service locomotive miles were used as to certain expenses, for instance in dividing superintendence, that of course would include the yard movements. When the allocations are made as to the D. P. W.'s report, it would be based on the total locomotive miles, that is total locomotive miles in transportation service, which would exclude work (St. 216) service. But it would include the yard service. Defend-

ant's counsel asks me what on earth any proportion of any such revenue has to do with that gross study except with that one exception of the factor. Nothing whatever except the tax situation. That would be an appreciable amount (St. 217). You ask if in apportioning interstate revenue to Washington, we apportioned on a mileage of haul pro rate. That is true as to each individual shipment with the small [fol. 188] qualification as to L. C. L. That I spoke of above. That is unimportant. In computing our relative mileage of haul upon each shipment, we take a station to station movement. You ask if I believe that revenues should be apportioned with some relation to the service rendered by the company in connction with their haulage. That is the theory behind the division on the basis of the haul. That is, that the revenues compensate for the service rendered. Where included in a line-haul charge, our total revenue from the entire shipment is supposed to cover our entire cost, plus a reasonable profit for the entire service line haul and switching and all the other services rendered by the company. Switching service on interstate shipments, where we do our own switching, is included in the rate that we charge (St. 218). We do not charge any additional sum for our switching service. You ask whether, in using a mileage prorate division of the interstate revenue, we do not consider only the line haul. That is a factor based on the line haul, yes. The company furnishes a large amount of service in connection with the movement of that traffic which is included in the tariff aside from the purely line haul (St. 220). You ask what services are rendered aside from the purely line haul. I will say that it includes the large expenses in connection with switching, also handling of freight at terminals for both classes of traffic, both intrastate and interstate. I would not say that that service is in no way reflected in the apportionment of that revenue on a relative mileage of haul basis. You ask in what respect it is reflected on interstate business. My answer would be that while it would appear that the division of the interstate revenue on the line haul would not make any provision for the so-called terminal expense, it must be remembered [fol. 189] that the line haul in each state is somewhat an important factor to consider, especially the transcontinental traffic, where a state such as Washington would get a very extended haul. In shipping a trainload of traffic from Seattle to St. Paul we traverse Idaho, Montana and North

Dakota. The cars of the commodities would be assembled at Auburn (St. 222). The through train would be longer than the assembling train. Auburn is a general consolidation point. The assembling of the cars into the originating trains would involve some switching, none of which would be reflected in the mileage prorate division. The mileage prorate would include the line haul only. None of this switching involved in the assembling of this trainload at Auburn would be reflected in any way by this relative mileage of haul factor, considering that factor by itself, but with the additional provision I made in previous statements. There is considerable mileage across the tate. When the train reaches St. Paul, then these various carloads are distributed to other points. That involves quite an expenditure for switching involved in terminal service expense. It is an appreciable part of the total amount of the expenses, these terminal services at each end, but not so important if you consider a line haul from St. Paul to Seattle (St. 224). There are a large amount of services rendered at both terminals which are more or less expensive services. But the importance of that service when measured by a haul from St. Paul to Seattle is not so important as it would seem offhand. It is not true that none of that terminal service of that trainload is included in Idaho, Montana or North Dakota. We can't run a train from Seattle to St. Paul without intermediate terminal handlings. You ask to what extent as compared with Seattle. That is an [fol. 190] operating matter. You ask how the expense connected with terminal service in the two terminal states, Washington and Minnesota, would compare with those in the intermediate states. I would say that Washington and Minnesota would exceed the other states. However the intermediate state may have some expenditures that are not actually measured by terminal expenditures. For instance, we have very adverse operating conditions in the state of Montana, and to some extent in Dakota and in Idaho, which might have a considerable bearing on the situation.

The N. P. reports to the regulatory bodies of Oregon and Wisconsin. The states of Wisconsin and Oregon have a considerably higher expense because of the short mileage in the state and the terminal operations in that state. In making its reports to the Wisconsin and Oregon regulatory bodies it used the same basis of allocation to the state as

it did the state of Washington (St. 227). The net revenue from operation in the state shows a deficit for the year 1933 for Wisconsin and Oregon. I know that has been true for a good many years. No, I would not say that the lines in Oregon and Wisconsin are not a valuable part of the N. P. system. You ask if that means that the N. P. is not actually making money from its railway operations in Wisconsin and Oregon. We are making money probably from the operations as a whole, but not necessarily from the operations in that state. It does not mean that the N. P. system would profit by having the portion of its system located in Oregon and Wisconsin eliminated (St. 228). It happens to be that we participate in the expense of the N. P. Terminal Company in Oregon, and in Wisconsin the Lake Superior Transfer Railway Company, and it is just [fol. 191] by that unfortunate circumstance that the expenses are exceedingly large. They are separate terminal companies. You ask if in Washington we bear all of the terminal expense by having our own terminal facilities. No. We share our terminal facilities here with other roads and thereby lessen our expenses to a great extent. You ask if, so far as its own terminal expenses are concerned, the N. P. does not bear them all itself. Well, we have no large terminal companies in Washington (St. 229) with the possible exception of the King Street passenger station. You ask what difference it makes whether we bear a portion of the expenses of an independent company in rendering the terminal service, or bear all of the terminal expenses in these various cities ourselves. Well, I would say that in the final analysis it would not make much difference. I do not know anything about the divisions of interline revenue as between the S. P. & S. and its subsidiaries and the N. P. and G. N. (St. 230). In concluding that these methods of apportioning operating expenses and revenues were proper methods, I did not take into consideration the divisions made between independent companies in interline shipments at all. You ask if I did not think that would have any bearing upon it. I can't see the effect on that. You say that I stated that in the apportionment of revenue no account was taken of the terminal service rendered. My statement was not exactly that nothing was considered beyond the mileage pro rate. My statement was that in using mileage we simply use the mileage with-

out considering yard mileage; that I only considered the line haul mileage (St. 231).

The expenses incident to all terminal services rendered within the state as to both interstate and intrastate traffic are all apportioned directly to the state. In addition to [fol. 192] actual operating expenses that are incident to the terminal services, the N. P. maintains large terminal facilities, such as docks, warehouses, yards, repair shops, depots, and so on in the larger cities of the state of Washington. The cost less depreciation of the N. P. railway operating property in both Seattle and Tacoma is a very large item (St. 232). It would also be rather an important item in other terminal cities such as Everett, Chehalis and Grays Harbor, but not, of course, as important as the larger points. It would be a considerable item in Spokane. The ad valorem taxes that are imposed in the state of Washington cover these extensive terminal properties in these larger cities, in all cities. You ask whether considering the direct apportionment of operating expenses to Washington, and in view of the large investment in terminal facilities in Washington, the mileage prorate apportionment of interstate revenues is fair to Washington. Yes, I think that portion is an adequate one, a fair one, having in mind the fact that it not only applies to the state of Washington, it applies equally to all states and is mandatory in the state of Minnesota, for the purpose of the gross earnings tax, and it is quite obvious to me that you cannot have one basis for one state and several other bases for several other states. It must be uniform (St. 233).

(The witness was then asked if he thought it would be adequate in the determination of what constitutes a fair rate of return on business located within the state. To this question defendant's counsel objected on the ground that it was immaterial; that it had nothing to do with rates. The court sustained the objection (St. 233). Whereupon the witness continued:)

You ask whether or not I think that as to a shipment between Spokane and St. Paul a mileage prorate division of the revenue would be fair to Washington. As applied [fol. 193] to the one shipment it might not be, but my idea is that it is fair to the one shipment when you consider that the offsetting features of the other traffic will prove

a balance wheel for the whole thing. That would be true of all shipments. I would consider that a mileage prorate division would be fair to Washington as to a single shipment from Yakima to St. Paul (St. 136). You ask if I can conceive of any shipment within the state of Washington to points east of St. Paul, for instance, in which the state of Washington would be entitled to less than a mileage prorate (St. 237). Well, that was the point I was making, that so much of the traffic would traverse the entire state, and would be compensating, and all the traffic, of course, would not move to St. Paul. The fact that we have both eastbound and westbound traffic is a compensating circumstance. You ask how that is. My thought was that the state of Washington, by reason of the long haul across the state would benefit to that extent by getting a larger prorate than they would ordinarily (St. 238).

The terminal study of June 3-9, 1934, was made from all the traffic handled, both intra and interstate. The reason is that we started the study, planned for it in June of 1934, and obviously could not go back to October of 1933 for the purpose of a test study of this nature, and therefore we immediately, after the court procedure here on May 20th, as I recall it, arranged for this study to be made in the month of June of 1934. And I will say this; in this connection, that I made a comparison of the week and the month of October of 1933 to June of 1934 (St. 239). I have made a study here as to the cost of engine hours at the various points, the number of cars handled, and the cars [fol. 194] handled per engine hour, and I find that the variation is so slight as to be negligible as to all of these points. In making the October, 1933, study, only intrastate cars were selected. You ask how we determined how many terminal services were required with respect to each of the cars for that particular week. We first developed for each of the ten terminals that we have discussed for the week of June 3rd to 9th, 1934, a cost per engine hour for handling traffic at that particular terminal. We then had the number of cars that we handled in the various classes of service as shown by the exhibit for the various points, and from that we determined the cost per loaded car of the various services that are common to the individual terminals. Then we traced through the cars of intrastate traffic, and (St. 240) determined from the actual record as to

what services would be accorded to those particular cars. You ask if that was as to each particular terminal. As to each particular terminal and each particular car, and each particular car was handled on its own merits and from that study, I might mention this, that we have a code for the various classes of services as shown by the exhibit. And the operative department was instructed to advise us as to the service for each particular car at the various large terminal points, having previously determined the cost of these various units, we then apply the individual cost units to the services performed, and in that way giving us the cost for the intrastate cars. That was our method of determining the cost of the switching service (St. 241).

The first computation on page 13, N. P. Exhibit "7" a determination of the relative car miles operated intrastate and interstate on the two divisions in Washington, Idaho [fol. 195] and Tacoma. The next study is the relative gross ton miles as apportioned between intra and interstate. It includes less than carload lots. In considering the intrastate here, we were confining this to account 101, which did not include the local business for the Northern Pacific Transport Company, and that interstate should probably be qualified to include the Northern Pacific Transport Company. The intrastate shown here refers to the Northern Pacific Transport Company as such (St. 242). The study as to wages of trainmen and enginemen referred to on page 13 is merely a summary of a very complete study made for the week of October 22, 1933. What we did was this: for the purpose of determining the relative movement of the traffic, we made a complete study for the week of October 22 to 28, 1933, in this way, we secured from the auditor of freight receipts a statement of all the revenue cars intrastate, the L. C. L. intrastate, and in that same week a very exhaustive study was made from the conductor's reports and of every train movement within the state of Washington, and we handled these train movements on their own merits; that is, we had, for instance, a run between certain points; we had there the per ton miles and the car miles and the gross ton miles, and we also secured from the time slips the actual wages in connection with that particular run, so that the summarization here is not merely the result of using all the Idaho and Tacoma (St. 243) division figures, it is the result of a very exhaustive and

detailed study of the one week as to each individual train run.

Referring to the first item: "freight car repairs," on page 14, N. P. Ex. "7," you ask why I chose a period of three years instead of choosing it for one year. Because [fol. 196] the average of three years is more accurate for freight car repairs. During the last year or so, particularly for 1933, because of the economic situation, carriers have necessarily had to defer a considerable amount of maintenance that would ordinarily be done, that is where it was not required for the strict (St. 244) operation of the railroad, and at the same time more fair to use a three-year basis for maintenance of freight cars than to use one year, because one year does not necessarily spell very much on those accounts. You ask how I know that in these other preceding years we had the same number of cars in operation that we did in the last year. Well, the freight car repairs is apportioned to the state of Washington on the basis of car miles, and if you take the average cost per car mile, the freight car repairs in Washington for the last three years, and apply that to the car miles that we ran in 1933 in Washington, you will find a figure that is, I think, slightly in excess of the one that we are now using for the three-year basis. You say that the total freight train car miles might have been considerably different for 1931 than for 1933. The number of freight car miles in the state of Washington that I have recorded here for 1931 was 72,756,000; in 1932, 55,130,000, and in 1933, 57,196,000. Now if you take the total expense that was accumulated for the state of Washington for the three years and divide by the total car miles, and multiply by the total car miles (St. 245) that we made in this particular week, which were 2.03% of the year's figures, as I recall it, you will find an amount that would somewhat exceed the amount that we show here for freight car repairs. I then take 1/52nd of that amount and reach a figure of $22,581.58 applicable to one week; and then apportion it as between intra and [fol. 197] interstate on the basis of $42.30, which is the relative car mileage.

Logs are a very low revenue-producing commodity. (St. 248). The various expense items on page 18, N. P. Ex. "7" are apportioned on a relative car mile basis (St. 249).

The N. P. is a creditor road so far as freight cars are

concerned, and I think it is largely true as to other equipment. It appears to be true in 1933 except insofar as passenger cars were concerned. The credit balance for freight cars is a very considerable amount. You ask who pays the expense of ordinary repairs to equipment when it is in the possession of foreign lines (St. 252). The user repairs are paid by the road that uses the car, but the general repairs are taken care of by the N. P. at some later date. In other words, when a car is given to a foreign company, the liability for repairs, except those for general repairs, rests with that company. The general repairs belong to the owning company. The general repairs means the important repairs. We compensate the foreign line making the repairs, for the repairs for which we are liable (St. 253) and for the repairs that they make for which they are liable, no compensation is made. Our system charge for maintenance of equipment includes repairs that we make on our own cars, and also such repairs that are made on foreign lines for which we become liable. This maintenance of equipment expense is apportioned to Washington on a car mileage basis. You ask if I believe that a fair method of apportioning such system maintenance of equipment expense, in view of the fact that we have more equipment than necessary for our own use (St. 254). That is a method prescribed by the Department of Public Works. [fol. 198] You ask if I justify it on that theory. Not necessarily, but I say that the theory is that the only measure we have of determining the relative repairs is the business done in the state.

Referring to page 19, N. P. Ex. "7", I have taken the three year average as to maintenance of way and structures. I did that exactly for the same reasons as I did maintenance of equipment expense. I do not believe a one-year average for maintenance of way is at all representative in connection with any study of this kind. If I had taken the one-year average the amount would have been lower, but that is not the reason I take the three years, because it is the customary basis of arriving at a fair average amount. If I had used the one year with respect to the repair account in maintenance of equipment it would have been lower. You ask what I know about the deferred maintenance on maintenance of way and structures. Nothing. That is purely an operating matter, and would have

to be discussed by the operating department entirely. The same answer applies as to deferred maintenance of equipment. I took the three-year average on my own initiative and not on the advice of any other officer (St. 260). I have included all the items of maintenance of ways and structures in one group on page 19. These expenses include the maintenance of the terminal facilities in Washington. These terminal facilities are maintained for the benefit of all the business the carrier handles, which, of course, would be the local intrastate business, of course (St. 261). You ask if, in my opinion the expense of maintaining the terminal facilities should not be apportioned to the system as a [fol. 199] whole and not localized to the states that happen to be the terminal states containing these particular terminals. That would hardly be the case in the state of Washington with the tremendous amount of intrastate traffic within the state. You ask if a certain portion of the cost of maintaining these terminal facilities should not be apportioned as a system expense, at least to the extent they are used for interstate business and the assembling and distribution of interstate traffic. No, I think that the present method is proper, because it allocates to each state the expense incurred in that state in conducting the business of the state. The N. P. has no terminal facilities in the bridge states, such as Idaho, Montana and North Dakota comparable with the terminal facilities, it has in Washington and Minnesota. That is admitted. Wisconsin has quite a bit of terminal expense there because of the nature of the lake traffic (St. 262). The traffic in Montana and Idaho and North Dakota receives considerable amount of benefit from the terminal facilities supplied in Washington, Wisconsin and Minnesota, and likewise the business in Washington receives a benefit from the terminal situation in the two states, and in Duluth. You ask if a portion of that expense of maintaining terminal facilities in Washington, Wisconsin and Minnesota should not be apportioned to the middle, or bridge states. No, I don't think so. I would not say that would be so. For instance, it might well be that because of some peculiarities in the terminals that the expense of maintenance in that particular terminal was rather high, and in that event that would be a disability of that terminal, as I see it, and not an entire line care. (St. 263). Having in mind the situation in Washington as to the intrastate traffic, I think that for the purpose of

[fol. 200] determining the true net earnings in a terminal state such as (St. 263) Washington, all of the expenses connected with the maintenance of those terminals should be apportioned to the terminal state.

I apportioned traffic expense between the intrastate and interstate on the basis of the tons of revenue freight handled. In making this study we have made no attempt to assign any higher costs for repairs to log freight cars than for traffic generally (St. 264).

Referring to N. P. Ex. "7" page 1: "Gross operating revenue" means "railway operating revenue"; "operating expenses" means "railway operating expenses". Net revenue from railway operations is determined by subtracting line 2 from line one (St. 278).

Referring to page 2: The net amount of joint facility rent income in the state of Washington for 1933 is the difference between the account 508, joint facility rent income and 541, joint facility rents, is a net credit of $1,355,064, as applying to the state of Washington for the year 1933. That is the amount we received less the amount we paid out. That is merely the proportion of the amount received from the tenant lines as the rental feature of the joint facility arrangement. We refer to these companies that use our tracks as tenant companies. The larger part of these revenues from joint facilities are received on the line between Seattle and Portland. Between Seattle and Tacoma our line is used jointly with ourselves and the G. N. Between Tacoma and Vancouver the line is used jointly by ourselves and the G. N. and the O. W. My impression is that the rent paid by the G. N. includes the Tacoma passenger station. The rentals we receive for the line between Tacoma and Vancouver are the rentals by the G. N. and the O. W. for the use by those companies of that trackage. When we entered into those rental agreements, there was some improvement made as the result of this joint arrange-
[fol. 201] ment. I know that to be a fact. Under these rental agreements the tenant line first pays a certain return based on the cost of the line plus the improvements to it for the use of the facility. That is the rental feature. Then in addition to that the tenant line pays a certain proportion of the expenses of maintenance and operation of the line (St. 280). The real basis, of course, so far as the

maintenance and operation is concerned, is on the basis of the movement of the traffic, the cars and locomotives handled, but the joint facility rent is not on that basis. It is on a fixed basis. The costs borne by the tenant companies, the O. W. and G. N., as to the line between Seattle and Vancouver, includes the payment by those tenant companies of a certain proportion of the N. P.'s ad valorem taxes imposed on that particular portion of its line (St. 281). I have taken no account of the amount of contribution by those tenant companies in any way in computing the N. P. taxes chargeable to its operations in the state of Washington as to intrastate business for the year 1933 in N. P. Ex. "7". The taxes as shown are the taxes that were assessed against the N. P. by the State Board of Equalization. Our position is that those taxes that you speak of would be really a part of the rental (St. 282). We are allowing a credit in our exhibit for the amount the two tenant lines pay toward the maintenance of the road. We have allowed a credit for that as maintenance and structures and part of the transportation. You ask why it too is not treated as part of the rentals. Because we consider the taxes there as distinct from the operating expenses. You ask if the use the N. P. has of this particular line is not sufficient for its operations as a railroad in both intra and interstate (St. 283). I think the facilities are ample under present traffic conditions (St. 284). I want [fol. 202] to make it clear that the amount received in this connection as taxes and rental bills is credited to account 508, joint facility rent income, and was included in our accounts (St. 285). The taxes are included in the amount of $1,355,064 shown as joint facility rent income on page 8, N. P. Ex. "7". But they are not included in the statement on the first page of that exhibit in which I purport to show your railway operating income within the state of Washington in any way, shape or manner (St. 286).

In my computations in N. P. Ex. "7", page 7, I have apportioned taxes between interstate and intrastate operations in the state of Washington for 1933 according to the relative revenues received from each (St. 286).

(At this point counsel for plaintiff read into the record the following provision of the joint user contract between the N. P. and the G. N. (St. 287-8):

"Section 2, the Northern Company will also pay such pro rata proportion of the cost actually incurred by the Pacific Company in the maintenance and operation of the property (which cost shall include insurance and taxes, and a just sum to cover the cost of superintendence and management) as the number of miles of said railway or any part thereof run by engines and cars in its trains bears to the whole number of miles run by engines and cars in the trains of all of the parties using the same or any part thereof; each engine and tender shall be counted as two cars. All movements of engines and cars shall be considered as 'trains' within the meaning of this paragraph" (St. 288).

It was agreed between counsel that by "Northern Company" was meant the Great Northern Railway Company and by "Pacific Company" was meant the Northern Pacific Railway Company. It was further agreed that the joint user contract between the O. W. and the N. P. contained the same clause (St. 288). Counsel for defendant then read into the record from section One of the same contract [fol. 203] between the N. Y. and G. N. as follows:

"The Northern Company will pay for the rights and privileges herein granted the sum of $325,000 per annum in twelve equal monthly installments" (St. 289).

(The witness was then asked if the fact of the payment of these taxes by these tenant lines did not reduce the taxes of the N. P. upon those lines. Counsel for defendant objected thereto as follows: "I object to that, because the property is valued in view of that very thing and increases our taxes. This joint line is valued higher than any other single track main line, and the very fact that they do use it increases the assessed value. * * * It is a double track main line * * *" (St. 289-290). Thereupon the Court stated that he supposed that the amount of taxes paid by the tenant companies was shown in some tabulation, to which counsel for plaintiff answered: "We did not think it important enough to show it, but we will have it here. It won't affect our exhibit" (St. 292). Whereupon the witness continued:)

Referring to page 4, N. P. Ex. "7": I switched over $369,000 plus from intrastate to interstate. I applied the

operating ratio found as to intrastate business to this to determine the proper amount of reduction of intrastate operating expenses by reason of an exclusion of revenue from foreign commerce. We did this on the theory that we are merely seeking to eliminate the amount that has been included, and therefore the proper measure appears to be to take it out on the same basis as it went in. We took this into account in making out computations for the test week. We had been considering it intrastate, in our accounts for 1933, and it was so reported to the D. P. W. as intrastate, and was considered in our test study (St. 296). [fol. 204] The passenger operating expenses are shown on page 11, N. P. Ex. "7." $429,635 (as shown on page 7, 5th line) is all the revenue from intrastate passenger service in Washington for 1933. But we have charged against that a grand total of $1,500,000 in expenses for hauling that local business. In other words, for every dollar the N. P. takes in, in intrastate passenger traffic in Washington, it pays out quite a little better than three dollars (St. 304-5). It is something over twice the amount on interstate. It is my best recollection that the passenger operating ratio for the system is about 200, the Washington interstate was about 200 and the Washington intrastate about 300. This computation is made on page 11 of Ex. "7." The total passenger operating expenses for the year for both intra and interstate I found to be $3,142,708. We use relative passenger miles as the basis of division of that expense as between intra and interstate. The revenue is available, but it is not to be considered (St. 306) a proper method to use. You ask why not. Because the service not being expressly connected up with the revenue in that way, that is taking the total passenger revenue. You ask if it is not a fact that in making my computation I am taking into consideration only the revenues received from passengers on the back end of the train. Yes, that is true. The revenue for mail and express is classed as interstate traffic. You ask if it is not a fact that in making my apportionment I wholly ignore the revenue the N. P. received from mail and express and other items, other than the bare receipts from passenger fares. Well, it is based strictly on the passenger miles as shown. You ask if it is not a fact that the two daily trains running from Seattle to Grays Harbor carry

[fol. 205] scarcely any passengers at all. It is true that the passenger service is somewhat limited in that case. You ask if that service is not maintained practically exclusively for the purpose of hauling express and mail. I am not familiar with that detail (St. 307). You ask if it would be proper to compute the equivalent of revenue passenger miles with respect to express and mail, and add those into the computation to determine what the apportionment should be as between intrastate passengers expenses and interstate passenger expenses. I presume it could be considered. Of course the use of the passenger miles does not give consideration except to the particular passenger feature of it; that is admitted (St. 308). The item apportioned to interstate traffic in our report to the D. P. W. under account No. 106 (mail) is $332,000 plus. That is more than the total amount of passengers revenue from passengers hauled under account No. 102, intrastate passengers. And it is a little more than 70% of the total revenues received from interstate passengers. The total revenue we received from express is $130,000. Of course there is another feature about that, too, and that is that there is a difference in the haul of the interstate and intrastate passengers, and also giving some consideration to the possible excess cost of the local business over the interstate business. Under this plan of ours we are simply taking the total and assuming the expense to be pro rata. You ask whether, in view of the fact that in taking the relative passenger miles I wholly ignore this something over $700,000 in passenger service revenues received in interstate, and the only other factor available being relative revenues received from the two services, it would not be more fair [fol. 206] to the state of Washington to apportion these expenses upon the basis of relative revenues received from the two services. I think some consideration should be given to the matter of the additional revenue of mail and express in that computation. I have not done it in this computation.

Referring to G. N. Ex. "7", page 7: The total ad valorem taxes imposed on the N. P. operating property in Washington is indicated as $2,005,015. I compare that figure with the gross operating revenues for Washington for 1933, of $12,000,000 plus, and find the ratio of taxes to

evenue to be 16.618. That $12,000,000 plus includes both intra and interstate revenues within the state. In arriving at the interstate revenues, both freight and passenger, I apportion revenues on a mileage basis. If, as a matter of fact, the state of Washington was equitably entitled to a greater proportion of the interstate revenues than a mileage pro rata, then that item of $12,000,000 plus would be correspondingly increased. And the fraction of 16.618 would be correspondingly reduced. And if, as a matter of fact, instead of charging against the total operations of the N. P. in the state of Washington, the total amount of taxes imposed for the year 1933 upon its operating property, you should have deducted from the total amount that proportion of the (St. 311) taxes payable by the tenant lines, then that figure of $2,000,000 plus as the taxes on operating property would be correspondingly reduced by that amount of such contribution by the tenant companies. And in that event the ratio of taxes to revenue would be correspondingly reduced. And the ultimate figure would be correspondingly less as a charge to taxes to the state of Washington. I have charged the total filing fee of 1/10th of 1% to intrastate operations. You ask if I have done this on the theory that it is imposed for the purpose of [fol. 207] regulating intrastate business. Well, that is the theory upon which the tax is paid. That is, it is the theory upon which that charge is made, yes (St. 312). The taxes imposed on the N. P. property includes the taxes imposed upon the terminal facilities afforded for the assembling and distributing of interstate and intrastate traffic within the state. The amount of operating property within the state subject to taxation is largely increased and augmented by the fact that the company must take care of distributing and assmbling traffic in the state of Washington on interstate shipments. You ask if these terminal facilities upon which these taxes are imposed is not a benefit not only to the operation of the N. P. system in Washington, but also to the bridge states through which the interstate traffic passes and which have no corresponding terminal facilities such as Idaho, Montana and North Dakota. Well, it is a benefit in a certain way, in that the traffic (St. 313) originates in the west and goes to the east, or vice versa, but we must not overlook the fact of the large expense that we have at the other end of the line in Minnesota, for instance, or Wisconsin. You ask whether, as a matter of

fact, to the extent which these taxes are imposed upon these terminal properties, the taxes should be treated as a system expense rather than as a local expense. No, sir (St. 314).

The taxes that have been charged are the taxes levied for 1933, payable in 1934. My best opinion was that there was a possible reduction contemplated of about $30,000, in round figures. You ask if that reduction has not already been made. Well, that deduction has not been made in these particular figures. The figures I am quoting, and as I stated in my direct testimony, of $2,005,000, is the amount as appearing as a tax assessment, but there is [fol. 208] $32,000, Mr. Smith's exact figures—that is under question at the present time. You ask if I did not mean it was under question at the time I prepared these figures. At the present time, I understand (St. 315). We don't know what credit should be applied, or we would have applied it.

You ask if I ever had any conversation with any members of the D. P. W. as to the propriety of apportioning revenues and expenses in the manner we do in making our reports to the state of Washington. Why, I had no conversation with any members of the Department. I said in my direct testimony that as far as I know or have any knowledge, and I would know if there was any, that there has been no objection, formal objection placed by the Department as to the use of our present method. As a matter of fact, I might state that we have inserted in our annual report for the last 8 or 9 years, possibly, this information as to our method, and called attention to it on the schedule 710, railway operating revenues. We have particularly called attention (St. 316) to the note on page 707 regarding our method of apportionment. You ask whether, in making this study during the test week in 1933, I took into account the empty car movement. Well, in this way—yes, we did—we dealt with all the car mileage, but we took the coal and log movements, on account of their 100% empty movement, and considered that as lost. On the balance of the traffic we assumed, after discussing with our operating people, that there would be no greater empty movement on the intrastate traffic than there would be on the interstate, after eliminating the coal and logs. Therefore, I applied the same ratio of empty movement to the intrastate as to the

interstate, excluding the logs and coal as referred to. The [fol. 209] empty movement was a matter of absolute record. We had the empty car miles. That was a matter of record. Taking just the loaded and empty cars in Washington, the percentage was about 45% for the empty movement to the loaded. It seems to be about 50% for the system, slightly less than Washington; very slightly. I gave 100% credit in my computations to empty car movements on logs and coal, and then I assumed that the balance was the same as the average for the state on the balance of the traffic on intra and interstate. I think that is very favorable to the intrastate traffic. The log movements are heavy, and the coal was a considerable item (St. 318). I deducted the coal and logs from the figure before I figured this percentage, of course, obviously. In other words, from this study I took out the coal and the logs from both the loaded cars and the empty cars and arrived at a percentage, leaving out that traffic, both intra and interstate, and then figured the relationship on the balance of the traffic (St. 323).

You ask how, in 1933, I apportioned revenues on commodities moving in and out of transit on interstate business. In 1933 the revenue would be considered from the point of origin to the milling in transit point as intrastate, and would be allowed to stand as such. When the shipment was billed out from the milling in transit point to the destination, if it were within the state it would, of course, be intrastate, but if it (St. 323) went beyond the state line it would be interstate. We apportioned the revenue including the penalty on the mileage prorate, even though the penalty was incurred in Washington; even though on interstate traffic the service was rendered especially within the state of Washington (St. 324).

(In answer to question propounded by defendant's [fol. 210] counsel:) The United States government loaned the N. P. $1,200,000 (St. 325). The loan was authorized by the P. W. A., as I recall it, nearly a year ago, or some months ago at least, but I am informed it just received the loan (St. 326).

On redirect examination he further testified as follows:

(The witness was asked what amount of the mail and express revenue now apportioned by the N. P. to inter-

state business, would be assignable to Washington if he credited such revenue on the relation of the other passenger train revenue. To this question plaintiff's counsel objected on the ground that the N. P.'s report to the D. P. W. showed that all that revenue is apportioned to interstate business, and it could not now attempt to apportion that revenue in some other way. The objection was overruled (St. 335). Whereupon the witness testified:)

If we were to apportion the mail and express revenue accounts 106 and 107 as shown as interstate for the state of Washington in the year 1913, amounting to $463,485 on the relation of passenger revenue, account 102, as applying to Washington intra and interstate filed, the result would be an allocation to intrastate of $197,769. You ask if the D. P. W. has ever undertaken to classify in its reports what revenue is state and what is interstate (St. 335). Well, unless we consider that order which I showed you of 1914. You ask if heretofore this question as to the assignment of revenue from mail or express has ever become of any consequence. No, it has not in a strict sense. The main reason why no separation has been made, because of the practical impossibility of so doing. The nearest attempt that could be made in the case of mail would perhaps be the question [fol. 211] of whether it was carried on local trains. It would be an almost impossible task to make any real separation as to the class of mail. And I think that has been the governing factor in not attempting a separation. We have no records as to whether mail is intrastate or interstate (St. 336). Those are government records. Now as defendant's counsel state, it has not become a decided issue, but I don't think that is the reason why it was reported as interstate, because we have attempted to make, as we thought, the best possible separation at the time according to the requirements. You ask whether, if any assignment is to be made of mail revenues to the state, the revenue factor is a correct one to be used. I think it is entirely too favorable to the intrastate traffic, having in mind the amount of interstate business carried, but in any event I think that factor is a fair one to use. All I am doing is simply assume that the same percentage of mail was local as for passenger revenue. You ask if as a matter of fact it might not be nearly all interstate, if you had the record.

Well, in a state as large as Washington there would be considerable intrastate, of course.

On recross-examination, he further testified as follows:

Our revenue account with the state is shown on page 700 of our report to the D. P. W. for 1933. In our computations in N. P. Ex. "7" we treat as revenues from passenger service all of the following accounts: 102 passenger, 103 excess baggage, account 104 sleeping car, 105 parlor and chair cars, 108 other passenger train revenue. Mail is not included as intrastate. It is all included as interstate (St. 340). Acct. 106, mail, is classified entirely as passenger, 107 express is classified as passenger, 108 other [fol. 212] passenger trains is classified as passenger, 109 milk is classified as passenger. Acct. 111, special service train, is partial. You ask me to separate those between the ones in which we apportion all of the account to passenger first. Well, 131 dining and buffet service, and 133 station, train and boat privileges; 134 parcel room; 136 storage baggage. Those are the only items that are directly in passenger. You ask if we do not apportion a part of some other accounts to passenger also. Well, you understand that we do not report these items to freight and passenger except as we report intra and interstate to the state, and we do not make this separation of freight and passenger except that we do make the report to the Interstate Commerce Commission of those items that are directly freight and passenger, and those that are common to both services, and in this instance we had to make some separation of the miscellaneous items, of course. You ask what other accounts I considered in apportioning my passenger revenue (St. 341). I did not do this personally, but my recollection is that we used the basis of the revenues as assigned, and used that for dividing the accounts that could not be directly assigned to freight or passenger. After consulting with Mr. Gregory I find it was done that way. We took the total of the directly assigned revenues freight and passenger and used that as the basis for dividing the few items that were not allocated (St. 342). We took this same basis of allocation, freight and passenger, as we used for the I. C. C., and then the amounts that we could not divide we used the ratio of the amounts that we had allocated. That

is the customary basis. I mean that we found the amounts of these accounts 102 to 109 and 131 to 134 and 136, and [fol. 213] allocated those directly, and we also allocated directly to freight those accounts that fall under that classification, and then the items that did not fall under freight and passenger were divided between freight and passenger on the basis of the total of the directly assigned items (St. 343).

I can give the exact accounts on the freight the same as I did on the passenger. Freight includes all of 101 "freight"; all of 110 "switching"; all of 1935 storage of freight, all of 137 demurrage. Now there are the localised items on the freight, and I have given you the passengers items. Those are all local. Then I took the relation between the sum of the first items directly apportionable to passenger and the sum of those directly apportionable to freight as I have named them and apportioned certain other items in (St. 344) proportion to that revenue. The items I so apportioned are: 111, special service train; 138, telegraph and telephone; 142, —; 138 is telegraph and telephone; 142 is rents of buildings and other property; 143 miscellaneous; 151 and 152 joint facility debit. Acct. 132, hotel- and restaurants (St. 345), was divided on the basis of the relative freight operating expenses as shown for that same account in the state of Washington. We apportioned that revenue as between freight and passenger on the same basis as hotels and restaurants account 132 in the state of Washington. Page 707 of our report to the D. P. W. is divided between freight and passenger (St. 346). You ask me to refer to the rules of the D. P. W. in regard to the method of reporting revenues and expenses, and ask whether or not there is a requirement on mail revenues and express revenues, that they be apportioned between interstate and intrastate business—That is correct, yes. We don't follow [fol. 214] that rule when we make out our reports. You ask whether, if we did follow it, we apportioned them all to interstate. We apportion all the mail and express revenues to interstate traffic, yes. You say: presumably whoever prepared these reports to the D. P. W. followed these instructions. No, the reports to the D. P. W. are made up and the plan is made for all the various states, and this is not being followed literally in making the reports. You ask if there are any other things that we disregard except

this particular requirement in regard to the apportionment of mail and express revenue. Well, there are some deviations in the matter of the operating expenses also. I can't tell what they are without an exhaustive study, no, I can't (St. 347).

(Counsel for plaintiff then read into the record the following provisions from page 12 of the rules of the Public Service Commission of Washington prescribed by resolution adopted December 31, 1914, and handed to him by Mr. Peterson:

"Mail revenue. Accounts 106 and 125. Locate to state all revenue derived from mail routes local to the state and a proportion of interstate mail routes based on operating mileage for each such route within and without the state."

"Express revenue. Accounts 107 and 126. If possible locate to state all revenue derived from express lines wholly within the state; otherwise assign to states on basis of operating mileage prorata on lines from which revenue is derived" (St. 348).

The witness then continued:)

I would like to make this point clear in connection with that book that you are offering there, that that book has not been referred to in any of the annual reports as being the method to be used. I don't know, it reached my hands only a few years ago, and I do not know in what way it was received, whether as a matter of information or discussion, or whether it was made final, but I do know that there are no requirements in the annual report that the report shall [fol. 215] be on this basis. The blanks in the form of report that is furnished the N. P. by the D. P. W. provides for the reporting of the revenues intra and interstate (St. 348). And it seems to me if there had been any occasion the question would have been raised by the Department as to why there was no reporting on that figure under intrastate and the proper adjustment made. As a matter of fact, I do not know how official that has been made. I got it as a matter of information. But as I state, the report to the D. P. W. makes no reference to this publication. We explain on page 707 how our figures are arrived at, and the figures have been set out in detail by account and no comment has been made by the state.

You asked if, as a matter of fact, it is impossible to make any apportionment of mail and express. It is, unless you consider that the mail that moves on local trains is intrastate mail. That is the only way. That is not used. You ask if you can safely assume that. No, I can't assume it, it is a false assumption. You say that I said this morning that I might apportion it by relative passenger miles, intra and interstate. (St. 349). No, sir, I did not. Well, I did say this, that in the matter of that express revenue, that if we were to concede that it should be included, and we were to apportion to the state of Washington intrastate this movement, that would apply on the basis of the relation to the intra and interstate passenger revenues, account 102, that on that basis the assignment to the state of Washington intrastate would be $190,000 odd. You ask if I concede that it is a proper basis of apportionment. I think it is entirely too favorable to intrastate, myself. You ask whether it has any relation, whether favorable or un- [fol. 216] favorable, to the amount of the express and mail upon the trains, whether the passengers hauled are interstate or intrastate. I was referring to the revenue from passenger business and not the passenger haul. You ask if the relative amount of intrastate and interstate express or mail on a given train have any relation whatever with respect to the relative number of intrastate and interstate revenue passengers upon that train (St. 350). Well, it has indirectly. If you have a road with a large amount of passenger revenue, it is fair to assume that the mail and express element will run somewhat in proportion (St. 351). You ask if there would not be likely to be a greater number of passengers upon the local trains such as the Grays Harbor train of interstate passengers than of local passengers. That is a question to be determined (St. 351). It is purely speculative. You ask why this relation is reasonable for the apportionment of revenues in this way. The operating expenses have been divided on the basis of the units of passenger revenue, that is the passenger miles, and we are assuming now that we have to make a reduction of that on the basis of this relation figure of passenger revenue which ought to be in accord with the (St. 352) passenger miles. Now we having charged operating expense in this computation on the basis of the relative intra and interstate passenger miles, which corresponds indirectly with

the revenue, it would seem only fair that a similar basis should be used in applying the credit for the revenue on the mail and express. In other words, we are trying to be fairly consistent in the matter. You ask if I am not trying to be consistent with my former method of apportioning the expense between intrastate and interstate. As consistent with the facts as we can. You ask if the reason [fol. 217] I say it is reasonable and a fair method is because it must be consistent with my apportionment of expense as between intrastate and interstate. No, sir, we made the apportionment of intra and interstate on the basis of the best available information, which was the passenger miles, and that corresponds very clearly to the number of passengers carried in relationship, and also the average haul of the intra and interstate passengers is not very dissimilar. Now having done that, and we are proceeding to allow a proportion of the mail and express revenue (St. 353), it does not seem unfair that the same general basis be used in applying that credit as was adopted in applying the other. You ask me to tell you what the reasonable relation is between the number of intra and interstate passengers upon a given train and the amount of interstate and intrastate mail hauled upon that train. Well, it is a difficult situation, and we are trying in this submission to be as fair as possible with the facts that are available. I do not say that it can be exactly classified on the basis of the passenger revenue, it is seemingly the best information. That is all I can say about it, and the only justification I can make (St. 354).

The percentage of empty to loaded cars in the case of intrastate for 1933 I found to be 55.49, and the interstate was 41.12. The 55.49 included all of the coal and logging. We do not report the percentage of empties with respect to intrastate operations to the D. P. W. I arrived at this proportion in this manner: We had the loaded car miles for traffic intrastate and interstate, which included logs and coal. Likewise we (St. 358) had the empty car miles which included, of course, the movement of the empties of coal and logs. They were both eliminated from the respective items. That is, we reduced the loaded car miles and reduced the empty car miles and figured the relationship on the balance, and then we included 100% for the [fol. 218] coal and log cars both for inter and intrastate to

give effect to that excess empty movement. You ask if that would not tend to indicate that the N. P.'s operating ratio on interstate ought to be lower to that extent than its operating ratio as to intrastate. Not necessarily. That is one of the factors, of course, is the matter of the empty haul, but there may be other factors offsetting. You ask if I think the operating ratio as to interstate would be higher or lower than as to the intrastate. I think they would be higher for this reason, that the revenue from local traffic, of course, carries a higher rate per ton mile than does the interstate. For instance, in 1933 the ratio of the per ton mile rate of intrastate traffic was 37% higher than the same figure for interstate traffic. That is due to the shortness of the haul. It does not necessarily mean (St. 359) a greater revenue, but the haul is shorter, and it has a tendency to effect the per ton rate (St. 360).

You ask if I can mention any other factors which would tend to make the interstate factor higher than the intrastate, aside from the difference in revenue per ton mile. Well, I don't want to get into traffic matters, but of (363) course there might be the matter of the rates on the traffic. It might also be in the volume of traffic. In Washington our volume of traffic on intrastate is very heavy in the matter of tons, about 60 some per cent of the total tonnage in the state. Logs is a very important factor; about 2,000,000 tons. You ask if I can think of anything in relation to logs that would tend to make it higher. No, I was speaking of the volume of traffic generally; not logs, but the volume of interstate traffic, as compared with intrastate. You ask whether it is not my honest opinion that the reason why the N. P's operating ratio, with respect to interstate operation, [fol. 219] would be so much higher than I find the operating ratio as to intrastate to be is because that exhibit gives its operation too much expense to Washington or its operation not enough revenue to Washington. No, I don't think so; I don't think so (St. 364).

On further redirect examintion, he further testified as follows:

I would like to say this, that the operating ratio for the state of Washington for the year 1933 was 92.38%, as shown in the report, compared with the ratio of 90.98% as developed in this present study, and I think that is very

favorable to the intrastate traffic, in that particular way. The amount of 1933 taxes in Washington chargeable to other roads under joint facility contracts aggregates $237,299.33, the total amount of the taxes on operating property as assessed for the year 1933 were as shown by Exhibit "7", page 7, $2,005,015 (St. 366). Now, we realize that in account 501, joint facility rents, there are certain charges made against N. P. for other taxes that we have to pay other lines. I don't know what they are, but I have wired for that information as well as the credit.

W. W. JUDSON, called and sworn as a witness on behalf of the defendant, testified as follows:

I am assistant to the general manager of the N. P. I am in the operating department and have been for 20 years. I took part in the work that Mr. Peterson has testified to. You ask what part I took. At the time that they were ready to commence the gathering of the data for the case I had conferences with Mr. Peterson. He made certain requests of me for information, and we found that in our regular, normal routine of work the records were not kept in [fol. 220] such a manner as to give him the information which he required. So it was decided that it was necessary to run what we call a test week in the yards to determine the information which he requested. This relates to the terminal study in June (St. 733). After having a thorough understanding with Mr. Peterson as to what he required, we set the machinery in motion in all our yards to obtain this. You ask what the data was that he required, and whether I have a copy of it. Some of them were typewritten and some were printed. We made printed forms. Defendant's exhibit "14" is the form for the Seattle yard.

(Whereupon said exhibit was received in evidence as an example of 200 of the forms used in the Seattle yard in compiling this terminal study (St. 74-5). The witness then continued:)

This form was sent out with the instructions as to how to fill it out. On the front of the form there are given some 37 code numbers for different movements in the yard. Each code number represents a certain kind of movement in the

Seattle yard. It was sent to the superintendent of the 2 divisions, and in turn given to the yard masters, who furnished it to the yard foreman on each shift as they went to work. You ask how many men were involved in the preparation of each one of these forms in the Seattle Yard. Well, in Seattle here I could not say. There was about 150 men in the state involved in this. In order to prove each one of these movements from which these exhibits are made up, it would take for this terminal study alone 150 men, considering the car record that went with it (St. 75). He filled in this information called for on the front of the form and put it on the back of the (St. 75) form number. As he performed this work at the finish of any particular class of work as outlined in the code, he showed the time and entered the work and the time he completed the work with the code number and any remarks that would identify [fol. 221] —further identify special work within the code. That is the only way we could think of at these conferences, and it is the only way that I know of to get any kind of figure on such a cost. Those employees did that in the course of their duty and under the instruction of their superior. I have had 6 years of experience in the operating department, as special assistant to the vice president, as train master, and now assistant to the general manager. Before that I was assistant engineer in the engineering department. I am familiar, generally, with the method in which the N. P. has operated in Washington (St. 76). I am familiar with the local business and the interstate business and the peculiarities of each kind of business. You ask me to state whether in my opinion the local business is more expense per unit of freight than the interstate business, and if so to give my reason in full. Why, in any and all investigations that we have had occasion to make we have determined that the cost of intrastate business is, generally speaking, greater than the cost of interstate business. That is due to several causes. The haul is shorter, the terminal handlings are greater, which in turn produces a greater damage to the equipment, and a substantial part of the intrasfate business is the log traffic which has peculiarities which make the cost greater than the interstate business (St. 77). The damage to the log equipment is very excessive due to the nature of the commodity and the man-

ner of handling it. The length of haul in log traffic is short even as compared with other intrastate business. The classification in the yard in connection with the log traffic is much greater than the average intrastate business. All of our log business at the present time is intrastate business. You ask as to the relative tonnages in the local and interstate through trains. Well, our main line trains, of course, are a great deal more tonnage, the main line tonnage which handles the predominance of the interstate [fol. 222] business are of greater tonnage than our branch lines which handle the greatest amount of intrastate business. The car and engine miles per day are less for the local trains, but I don't know just in what percentage. With the exception of Wenatchee, the N. P. serves the principal cities and towns in Washington (St. 78). In my opinion it is economically managed and operated. There is no doubt but that it performs a necessary public service for the people of the state of Washington.

On cross-examination he further testified as follows:

I don't know whether I can say offhand what the average haul of log movements is. Our greatest movement at the present time is about 18 miles (St. 79). By that I mean our greatest volume at the present time is about 18 miles. In one particular case, logs are moved in whole train-loads. We have one movement that is practically solely in log trains (St. 80). The main line trains have both classes of traffic, local and interstate. Practically every train, I would say, at the present time, the way business is now being handled (St. 81). A large portion of interstate traffic is handled by the light load trains on the branch lines, mingled with intrastate in those cases too. You ask if then inter and intrastate business or tonnage is not commingled to the same extent on the branch lines as on the main line trains. Well, I have no figure to show that, but I would think that probably there was a greater preponderance of intrastate business on the branch lines. It would naturally follow that there would be. You ask why that would be. Well, the shipments between the towns on the branches are feeders to the main line, and they are just as productive of revenue as other towns on the main line, and there are more of them (St. 82). I do not know of my own knowledge whether there is more interstate or more intrastate ton-

[fol. 223] nage on the branch line trains than on the main line trains. I have no figures.

A ton of interstate freight has to be handled twice; at the beginning of the haul and at the end of the haul. The same is true of a carload of intrastate freight. The car has to be handled twice, at the beginning and the end. You ask how many switching movements we have to make of a carload of interstate freight originating at South Bend and moving to St. Paul. Five, generally, in the normal movement. All of the eastern Washington wheat that is handled via the S. P. & S. to Portland points and Astoria, that is all interstate. Such wheat is handled out of Pasco on the main line train of the S. P. & S. If it originates on the N. P. Walla Walla branch it is handled into Pasco on a branch line train. You have some main line movement of wheat into Pasco that goes to Portland over the S. P. & S (St. 84). It comes from east of Pasco. You ask if the great bulk of it is not otherwise. I don't know what the proportion is (St. 85). As to a carload of freight moving between Vancouver or New Westminister and a point on the N. P. east of Washington, there would be normally 4 switching movements (St. 87). They would be at Auburn, Yakima, Pasco and Spokane. As to a carload of freight moving from Longview, to Vancouver, thence via the S. P. & S. to Pasco or Spokane, thence via the N. P. to a point east of Washington, there would be one switching movement at Longview, one at Vancouver, one at Pasco and one at Spokane. There is not a large volume of that business right now. It does not all move that way. Lumber reaching the main line north of Chehalis and Centralia moves via Auburn normally. A car coming into Chehalis on the C. C. & C. and moving east of Washington would have five switching movements: Tacoma, Auburn, Yakimo, Pasco and Spokane, and a pick-up movement at Chehalis. I am speaking about nor-
[fol. 224] mal movements. In many cases these cars at these terminals are so located in the train that they are not touched in these trains. On other cars they are blocked out at certain terminals. It may or may not be rehandled at those terminals, depending on the consist of the train (St. 89). We have no through trains at the present time that move in their entirety across the state. By moving in blocks, I mean several cars in one group, that may pass through one terminal without being touched, and the work done on that terminal might be done on terminals either be-

hand or ahead of that block. To divide the actual movement of the cars throughout a portion of the year I would have to follow each carload to see exactly what various switching operations were performed in connection with it (St. 90). We made no study to find out how many switching movements were involved as to each particular car of interstate freight across the state. Nor did we in regard to intrastate freight (St. 91). The study in June, 1934, was merely for the purpose of determining the cost, the average cost of switching in these various terminals per loaded car. I did not make any study to find out the cost of switching the empty cars. I gave no instructions relative to the switching costs of empty cars (St. 92). You may move a car into a siding and it is unloaded there, and the same car is filled again right there. I would not say this was uncommon. It is not true of lumber or logging traffic. I do not know what the percentage of empty car movement as compared with loaded car movement in intrastate business in the state is, as compared with interstate business. I would say that the hauling of empty cars in connection with the haulage of traffic is an important part of the expense (St. 93).

On further direct examination he further testified as follows:

I am the operating official who handled this work which [fol. 225] Mr. Peterson testified to. You ask me to state what I did. As soon as the request was made on us for this information we quickly determined it couldn't be made by estimation, so we took the basic data that Mr. Peterson gave us and turned it over to our division staff and under my direction they set up a theoretical operating condition, including yard men, superintendent and so forth, of how this business would move if the intrastate business was eliminated. It was followed through each day, considering the tonnage and the time of arrival at the terminal and the necessity for deliveries of the business and the balancing of power and other operating features, always taken into consideration in lining up trains. From that study I determined what could be done as set forth by Mr. Peterson. It was my conclusion that the trains could be eliminated if local business was discontinued as shown on this sheet 11 of exhibit "15" (St. 127). And sheet 10 is the same for the Idaho Division which is in my jurisdiction also, and is partly

in Washington and partly in Idaho. I made the computations as to the car mile elimination. Where we found certain trains could not be eliminated, but where cars could be eliminated from the train, not necessarily have to be run, and those cars, of course, were in many cases readjusted to fit into the train actually run.

As to the possibility of eliminating passenger trains or passenger train miles, we made an estimate of a few of the branch line trains we thought could be taken (St. 128) off if there were no intrastate business. As to passenger train, the business is so intermingled that to serve the public in the same manner that we serve it now, the large business of intrastate could not be taken off because of the passenger and the head end business, meaning the express business.

[fol. 226] (The witness was then asked whether in his opinion it would be possible to handle the intrastate business in Washington economically or practicably if the local business were discontinued. To this question plaintiff's counsel objected on the ground that it called for a conclusion of the witness on a matter which the court was required to decide. The objection was overruled (St. 129). And the witness then testified:)

It is possible, but not without great loss. It is not practical. The N. P. line and its railroad facilities were constructed for the handling of both local and interstate business (St. 129).

On cross-examination the witness testified further as follows:

You ask who assisted me in securing my data with regard to the possible elimination of cars, trains and car miles, passenger trains, etc. All the members of the division staff whose duties are connected with the movement of trains. They reported to the division superintendent, and the latter reported their conclusion to me. You ask if my conclusions are based on their conclusions. I sat in with them at several of the meetings while the work was in progress and talked with them about the manner and the result, their result and the results of all of us engaged in the work. I changed some of their conclusions myself.

The head end business on passenger trains is mail, express and baggage. There is some of that on all these local passenger trains running on the branch lines (St. 130). A

large number of dead-heads ride on all trains. An important part of the passenger service business in Washington arises from the revenue the N. P. receives from hauling express and mail (St. 131).

W. C. PINGER, called and sworn as a witness on behalf of defendant, testified as follows:

[fol. 227] I am assistant general auditor. The auditor has charge of the books of account. You ask how the N. P. credits revenue received on lumber or other commodities which come into a terminal or reconsignment point and is there unloaded for milling or other treatment in transit and then moved out in an interstate movement from that transit point. Heretofore this division between intra and interstate traffic has not been made. We made it in the way easiest for our own accounting. With the imposition of the tax on one and not on the other there has been a difference. It had been our practice when we had milling in transit to take all the milling into intrastate revenue at the milling point. If it moved out and became an interstate movement we credited the intrastate and moved it into the interstate revenue. This caused us to put it into the intrastate until we knew (St. 142) where it belonged. Such freight as that moves under a through rate, with a transit privilege, the right to unload and if grain, to mill it, and lumber to finish the lumber in some way or treating or preparing the commodity. That is known as a transit rate. Probably quite a substantial amount of that kind of revenue is included in the intrastate figure which was submitted in the interrogatories. We have never analyzed those accounts to determine the amount. I prepared the information for those interrogatories. The tax commission has never made any assessments against the N. P. for this tax which is sued for here, to my knowledge (St. 143). This transit business would make quite a difference. There is such business as grain consigned to the Port of Seattle elevator. We are exempted in our foreign commerce. It may be regarded as one of 3 or 4 things, probably mere traffic moving from the port directly to a boat. We have so regarded it. This is additional to a port elevator. There it comes to rest in the elevator and is shipped out. The question is that or is it not taxable. There is such business, not

[fol. 228] only wheat, but apples and other things. It is substantial in amount. You ask whether or not the rate put into the revenue (St. 145) into the port has been credited to intrastate revenue. All of it. The answer is in my interrogatories. To get the record of what goes out in shipment, you would have to go to our agent in shipping and see how much is assigned to storage elevators. You would have to go to the elevator record to make certain that 100% of their product was exported or whatever it might be was exported (St. 146).

On cross-examination he further testified as follows:

I imagine there are a lot of transit points in Washington. Under the stoppage-in-transit rule or regulation, we charge the consignor of the rough product such as wheat, the local rate from the point of origin to the milling point first. He pays this local rate in advance. He registers this commodity or shipment in transit at the time the consignment is made (St. 148). At the milling point the commodity is converted into some other product such as flour, and then it is reloaded normally or usually in the converted form and shipped to some other destination, maybe outside the state, or maybe inside the state. And a rate is charged on the original product, the unfinished product, to the point of destination, plus a so-called stoppage in transit penalty. That penalty varies with respect to various commodities. For wheat I think it is 2½¢ (St. 149). The consignor has to reship out of the milling station within a limited time to get advantage of the through rate. The consignor loses the right to reduce the rate if he doesn't move it within a specified period. When the commodity is moved out of the transit station, we withdraw the local charge and give him a through rate from the original point of consignment to [fol. 229] the point of destination. You ask whether or not they ever forfeit the right by not shipping out in time. Undoubtedly, but I don't know to what extent. We apportion the interstate revenues on a mileage basis as to the different states (St. 150). The 2½¢ is to cover the charge for unloading and loading. You ask whether or not, under normal circumstances, commodities moving in transit and taking the local rate and having the local rate charged up and moving out of transit and having the local rate taken out and placed in interstate, the items do not equalize each other from month to month if they are so taken out and so

put in from month to month so the amount on interstate side would not be normally increased if the traffic remained the same. It would have a tendency of postponing the tax a little (St. 151) because it would be thrown ahead by taking it out. We normally take out the same amount we put in if it remains the same, but that doesn't allow for the peaks and the depressions. If the tax were perpetual it would not make any difference over a period of years. Counsel for defendant asks if I mean to say that there would be no net credit for the interstate business on account of this transit rate. There would be a net credit in the early months and it would appear as a debit later when it moved out from the transit point. You ask if it would have the effect of reducing the taxable amount of intrastate income. It would have during the early period, but later on you would get a debit to offset it if the movement is intrastate and later goes into interstate. One way would be to keep it out until we know definitely where it is going. Our method has been to put it in intrastate and take it out when we know what it is by final analysis (St. 152).

M. G. Crawford, called and sworn as a witness on behalf of defendant, testified as follows:

I am Assistant General Superintendent of Transportation for the N. P. I have charge of the car supply and the [fol. 230] interchange of cars and the records on that matter. I would say that in the account of equipment rentals, car hire, there is no net credit accruing on intrastate business in the state of Washington. This car hire is the amount which railroads pay to each other for the use of cars on the other line. It includes the perdiem rate of $1 a day. If the N. P. had a car on the G. N. we would be credited by the G. N. with $1 a day for that car while it was on the G. N. (St. 153). The general sum is $1 a day. The reason that there is no credit in the matter of car hire on intrastate traffic insofar as our line is concerned is that it is of such a nature that to a very large extent it is not delivered to our connections, and the only way that car hire accruals could occur would be through the collection possibly of rental from our connections (St. 154). As to local business in Washington, the character of the business interchange is of such a nature that the debits and credits

of that class of traffic would just about offset each other. We don't keep currently any accounts as to car hire as between local and interstate in Washington.

On cross-examination he further testified as follows:

If an N. P. car is shipped from Seattle to New York city via lines east of St. Paul, the lines east of St. Paul would pay the N. P. a $1 a day for each day they held the car on this shipment and return to the N. P. line, and if the N. P. made a shipment in a New York central car from (St. 155) Seattle, the N. P. would pay the New York Central a $1 a day for all the time the N. P. held possession of the car, and until it left the N. P. line (St. 156). You ask if the owning company pays for some of the repairs while a car is in possession of a foreign line. I should think so, yes (St. 156). I don't know if any portion of the expenses connected with the maintenance of the equipment while [fol. 231] these cars are in the hands of and in the possession of foreign lines, are paid by the N. P. (St. 161).

(Defendant's Exhibit "16" was thereupon received in evidence (St. 163).)

C. R. Lonergan, called and sworn as a witness on behalf of defendant, testified as follows:

I am a traffic expert for the D. P. W. The National Carriers, including the N. P. and G. N. and other lines have now an application pending before the Interstate Commerce Commission for an increased rate. There has been an application filed for an increase in the state of Washington with the Department, and that is pending before the Department. You ask if there is any way of knowing when that application can be heard. I think the carriers request that it be not heard until after the I. C. C. makes its findings, because the same increase is asked of the local rates as is asked for the interstate rates (St. 164). What that increase will be cannot be known until the I. C. C. acts. There is no chance of bringing the state case to trial before that. There is no way of knowing when the I. C. C. will finally make its order. It will probably be some time early next year, because the hearing extends until December.

On cross-examination he further testified as follows:

I am familiar with the proceedings taken by the railroad companies in that case that I referred to in my testimony, which is Ex Parte No. 115. You ask if the railroad companies raised any question in that case that the rates should be increased by reason of the imposition of this occupa-[fol. 232] tional tax. I don't believe that was one of the reasons they gave. I might say this, that at the hearing the carriers put in their case in Washington. It was put in starting, I think, October 1st, 1934 (St. 165). You ask if they introduced evidence in regard to what their occupational tax would be, at that hearing. I did not hear any. I was there. They stated what their entire expenses were. I did not hear anything about them including the occupational tax. They included their item of taxes in their statements of revenues and expenses. In putting in their evidence they did not follow the classification that is detailed in their reports, in the I. C. C. reports. Most of the exhibits were composite exhibits covering western railroads and eastern railroads and southern railroads. It was not any separate showing made by any one railroad (St. 166). The N. P. and G. N. figures were included in this northwestern group. You ask if any particular railroad had the right to make a separate showing if it so desired. Well, it was not done that way.

(Counsel for defendant thereupon stated that there was no occupational tax included, because none had ever been levied against the railroad, much less collected, and we don't think any will ever be collected, either. So it certainly was not in the showing (St. 167). Whereupon the witness continued:)

I do not know that the occupational tax was in the showing made by the northwestern railroads in said hearing. These were the general figures of expenses of revenues that I had reference to. You ask if the I. C. C. hearing relates to local rates in the state of Washington (St. 168). It includes rates beyond 220 miles in length on merchandise, and in some cases it includes rates for all distances. But generally speaking the application is made up so as to exclude any advances in rates where truck competition is involved for distances up to 220 miles. You ask if there is any

[fol. 233] proceeding for an increase of rates brought by the G. N. or N. P., other than the one before the I. C. C. As I testified here, the carriers also filed an application with the D. P. W., a similar application. In fact, it is identical with the I. C. C. application, and they are requesting the Department to take no action, not call a hearing or do anything about it until the matter of interstate rates is definitely settled by the I. C. C., so that it is pending. It was filed in September, 1934 (St. 169). You ask whether in that application the railroads state any claim for this occupational tax. No (St. 170).

T. M. JENNER, called as a witness on behalf of defendants, testified as follows:

I am a member of the Tax Commission. Exhibit "D" attached to the Answer (St. 170) appears to be a copy of Senate Bill No. 18 (St. 171). I attended a meeting before the Legislative Committee, at which this bill was up for consideration. I don't recall whether it was the Revenue and Taxation Committee or not. Mr. Sharpe attended that committee meeting, and urged that the Committee favorably report out this Senate Bill 18 (St. 172). The bill never got to the floor of the house as far as I know. I don't know whether it died in the original committee or the Rules Committee (St. 174) (St. 175).

On cross-examination he further testified as follows:

Mr. daPonte, Mr. Balmer and other railroad attorneys were present at the committee hearings on said Senate Bill 18, and quite strenuously opposed the reporting of the bill favorably by the Committee (St. 176).

W. C. SMITH called and sworn as a witness on behalf of defendant, testified as follows:

[fol. 234] I am assistant tax commissioner of the N. P. at Seattle. I handle the taxes of the N. P. in Washington. I am, just in a general way, familiar with the taxes paid by the tenant lines to the N. P. I know that they do pay

taxes. I furnish the St. Paul office with the amount of the (St. 327) taxes we pay on these lines over which tenant companies operate. And then the N. P. at St. Paul charges a proportion under the contract to the tenant lines. The I. C. C. requires us to credit those amounts to rentals, account 508, I think, is the number, but they must be credited to rentals. They must be credited to rentals (St. 328).

(Counsel for defendant then read into the record the following excerpt from the joint facility contract between the Oregon-Washington and the N. P. (St. 328-330):)

"The Oregon Company will pay for the rights and privileges herein granted the sum of $325,000 per annum in 12 equal monthly installments on the first day of the month for the preceding month and this rental will be increased by one-third of four and one-half per centum (St. 328) upon the actual cost to the Pacific Company of all improvements, betterments and additions to the property properly chargeable to capital account beyond those created by the aforesaid expenditure of $2,500,000. But the rentals herein agreed to be paid are based upon the use of the property by the parties hereto and by the Great Northern Railway Company, and if another railway company or other railway companies are admitted by the Pacific Company to run trains upon the said railway, or any part thereof one-third of the rental payment of such tenant or tenants shall be credited to the Oregon Company."

"Sec. 2. The Oregon Company will also pay such prorata proportion of the cost actually incurred by the Pacific Company in the maintenance and operation of the property (which cost shall include insurance and taxes and a just sum to cover cost of superintendence and management) as the number of miles on said railway or any part thereof run by engines and cars in its trains bears to the whole number of miles run by engines and cars in the trains of all the parties (St. 329) using the same or any part thereof; such engine and tender shall be counted as two cars. All movements, of engines and cars shall be considered as 'trains' within the meaning of this paragraph.

"The Oregon Company shall not be charged on account of the maintenance of operation of any telegraph or telephone line not used in its business. The joint operating expenses shall be charged with a proportion of the expenses

of maintaining and operating any telegraph or telephone line used in the operation of the joint line equal to the proportion of wires so used to all the wires on the line."

[fol. 235] On cross-examination the witness further testified as follows:

You ask if the I. C. C. makes any rules in regard to how we shall apportion taxes paid by tenant companies in making our reports to the state regulatory bodies. The I. C. C. as I know (St. 330). It does not make any rules of that does not know that there is anything of that kind, so far kind. You ask if there would be anything to prevent the N. P. from accounting for those taxes in a different way in so far as the state reports are concerned. We only keep one set of accounts, and our reports are uniform to all bodies (St. 331).

(Counsel for defendant then read into record the following accounting rule prescribed by the I. C. C. as to Account No. 508, Joint Facility Rent income (St. 334):)

"The account shall include amounts receivable accrued for rent of tracks, yards, terminals and other facilities owned or controlled by the accounting company and used jointly with other companies or individuals. Amounts receivable from other companies being reimbursements for taxes on property jointly used, shall be credited to this account."

[fol. 236] DEFENDANT'S EXHIBIT "5"

Is a copy of a decree confirming special master's sale of the property of the Northern Pacific Railroad Company (St. 7).

DEFENDANT'S EXHIBIT "6"

Is a copy of a deed from the Northern Pacific Railroad Company to the defendant (St. 7).

Defendant's Exs. "5" and "6" having been introduced in support of Paragraph V of the Answer which was afterwards voluntarily stricken (Tr. 80-81), these exhibits are omitted.

[fol. 237] DEFENDANT'S EXHIBIT 7

Def.'s Ex. "7", p. 1

Northern Pacific Railway Company

Result of Intrastate Operations, Year 1933

(1) Gross operating revenue	$5,271,893
(2) Operating expenses	$4,796,440
(3) Net revenue from railway operation	$475,453
(4) Railway taxes (on operating property)	$889,319
(5) Railway operating income (deficit)	$413,866R

R Indicates Red Figure.

[fol. 238] Def's. Ex. "7", p. 2

Northern Pacific Railway Company

If joint facility rent income (proportion applicable to local traffic) received for rental of lines in Washington, year 1933, be included and Washington's proportion of bond interest applicable to local business and return on value of property be included, (which defendant states in the negative), the results are as follows:

(1) Joint facility rent income net credit, representing net amount from Acct. 508, rentals for use of line less Acct. 541, amount paid to other companies for rental of line		$582,774
(2) Bond interest:		
Interest on funded debt, year 1933, system	$14,241,028	
Less interest on Series "B" and "C" bonds issued for purchase of C. B. & Q. stock	6,792,691	
Balance of interest		$7,448,337
(3) Amount assigned to State of Washington based on the relation of State of Washington to the system of gross operating revenue, transportation service car miles, revenue traffic units and all track mileage owned, year 1933, 25.09%		1,868,788
(4) Freight proportion of above sum based on ratio of freight operating expenses, State of Washington, to total freight and passenger operating expenses, year 1933, 71.80%		1,341,790
(5) Passenger proportion based on ratio of passenger operating expenses, State of Washington, to total freight and passenger expenses, State of Washington, 28.20%		526,998

Def's. Ex. "7", p. 2—Continued

(6) Washington intrastate proportion based on relation of total revenue net ton miles for year 1933, 39.86%	534,837	534,837
Washington intrastate proportion based on relation of revenue passenger miles intrastate to total revenue passenger miles in Washington during year 1933, 47.76%	251,694	
Total assignment of bond interest to Washington account intrastate traffic		786,531

[fol. 239] Def.'s Ex. "7", p. 3

(7) Assessed value of operating property in Washington, year 1933	$100,450,000	
Assignment to Washington intrastate on same bases as used above for bond interest,	$42,277,195	
6% on above		2,536,632
(8) Cost of reproduction new less depreciation as found by I. C. C. (See Vol., 25 Valuation Reports, p. 00), plus net additions and betterments to December 31, 1933, in State of Washington	$167,437,700	
Apportioned to Washington intrastate on same basis as found for bond interest	70,470,844	
6% interest on above		4,228,251

(9) The net result of crediting Washington intrastate with proper proportion of joint facility rents and charging it with proper proportion of bond interest as above is a loss of $203,757 in addition to the $413,866 deficit from intrastate operations, and if the interest on the assessed valuation be used instead of bond interest the loss is $1,953,858 in addition to said deficit of $413,866 and, if interest on the I. C. C. valuation be used instead of the assessed valuation, the loss is $3,645,577 in addition to said deficit of $413,866.

[fol. 240] Def.'s Ex. "7", p. 4

Northern Pacific Railway Company

Operating Revenues State of Washington Intrastate as reported to Department of Public Works				$5,802,530
Deduction account of amount as included in connection with foreign commerce			$369,606	
August 1933	$20,311			
September 1933	28,563			
October 1933	30,559			
November 1933	28,585			
December 1933	86,588			
		$194,606		
January to July 1933 estimated on basis of $25,000 per month		175,000		
		369,606		
Deduction account of switching in connection with interstate traffic included as intrastate			161,031	
				530,637
				$5,271,893

Def.'s Ex. "7", p. 4—Continued

August 1933	$16,660		
September 1933	17,962		
October 1933	14,139		
November 1933	11,763		
December 1933	11,827		
		72,351	
January to July, 1933 on basis of ratio of interstate to total in months of August to December 1933		88,680	
Operating expenses account of above reductions			
Freight operating revenue intrastate 1933 (Acct. 101) as state to Dept. of Public Works			4,836,839
Freight operating expenses as used in connection with above revenue			3,291,785
Operating ratio			68.06
Reduction of operating expenses by reason of exclusion of revenue from foreign commerce 68.06 of $369,606 or			251,554
As no expenses were figured in connection with switching revenue no deduction is made for operating expenses in that connection, but freight operating ratio as explained has been applied to intrastate switching revenue of $210,821. 68.06% of $210,821			143,485

[fol. 241] Def.'s Ex. "7", p. 4-5

Operating expenses as computed on freight operating ratio for miscellaneous freight revenue accounts excluding switching account 110. 68.06% of $164,204			$111,757
Additional operating expenses:			
Switching	$143,485		
Miscl. Rev. items	111,757		
		255,242	
Less operating expenses on foreign commerce eliminated		251,554	
Net increase		$3,698	

[fol. 242] Def.'s Ex. "7", p. 6

Northern Pacific Railway Company

State of Washington—Intrastate Operations
Year ended December 31, 1933

Total Operating Expenses

Freight operating expenses (as per exhibit)		$3,291.785
Passenger operating expenses (as per exhibit)		1,500,957
Total operating expenses as applicable to Washington intrastate traffic, year 1933		4,792,742
Increase in operating expenses account adjustment of revenue in connection with foreign commerce, switching and miscellaneous revenues		3,698
		$4,796,440

[fol. 243] Def.'s Ex. "7", p. 7

Northern Pacific Railway Company

Washington State Taxes—Year 1933

			Amount of Taxes Applicable
Gross Operating Revenues, State of Washington, 1933		$12,064,954	
Taxes on operating property		2,005,015	
Ratio of taxes to revenues		16.618	
Intrastate Freight Revenue	$4,842.258	16.618	804,686
Intrastate Passenger Revenue	429,635	16.618	71,397
	5,271,893	16.618	876,083
Filing fee 1/10 of 1% on above intrastate revenue—Freight			4,740
Passenger			430
			5,170
Federal Taxes System			
Capital stock tax	62,000		
Federal Transpn. tax	10,103		
U. S. Excise taxes	694		
	72,797		
System operating revenue	$47,578,677		
Ratio of Federal taxes to system operating revenue	.153		
.153 of Washington intrastate freight revenue			7,409
.153 of Washington intrastate passenger revenue			657
Total Federal taxes			8,066
Total State taxes on operating property and Federal taxes—			
Washington intrastate freight			816,835
Washington intrastate passenger			72,484
Total Washington intrastate taxes			889,319

[fol. 244] Def.'s Ex. "7", p. 8

Northern Pacific Railway Company

State of Washington, Year 1933

	Freight	Passenger	Total
Joint facility rents net	$815,241	$539,823	$1,355,064
Intrastate proportion of freight based on ratio of intrastate net ton miles, year of 1933—39.86%	324,955	.....	324,955
Intrastate proportion of passenger based on ratio of passenger operating expenses—47.76%	.....	257,819	257,819
Total intrastate traffic	324,955	257,819	582,774

[fol. 245] Def.'s Ex. "7", p. 9

Northern Pacific Railway Company

Washington Intrastate Revenues—Year 1933

Account	As reported to Department of Public Works	Adjustments	Intrastate revenues revised
101 Freight	$4,836,839	$369,606*	$4,467,233
102 Passenger	312,449	.....	312,449
103 Excess baggage	2,444	.....	2,444
104 Sleeping car	8	.....	8
105 Parlor and chair car	2,838	.....	2,838
108 Other passenger-train	5,935	.....	5,935
109 Milk	11,036	.....	11,036
110 Switchings	371,852	161,031@	210,821
111 Special service train	1,241	.....	1,241
112 Other freight-train	102,002	.....	102,002
131 Dining and buffet	22,427	.....	22,427
132 Hotel and restaurant	68,995	.....	68,995
133 Station, train and boat privileges	2,465	.....	2,465
134 Parcel room	3,708	.....	3,708
135 Storage—freight	825	.....	825
136 Storage—baggage	1,661	.....	1,661
137 Demurrage	9,741	.....	9,741
142 Rents of bldg. and other property	6,014	.....	6,014
143 Miscellaneous	50,220	.....	50,220
151-152 Joint facility—net debit	10,170	.....	10,170
Total	3,802,530	530,637	5,271,893

@ Represents switching in connection with interstate operations.
* Represents revenue on foreign commerce.

[fols. 246 & 247] Def.'s Ex. "7", p. 10

Northern Pacific Railway Company

State of Washington

October 22-28, 1933

Amount of intrastate freight operating expenses week of October 22-28, 1933 as per attached detail	$75,078.42
Revenue net ton miles	7,629,079
Operating expense cost per revenue net ton mile (cents)	.98411

(Insert—To follow Defendant's Exhibit "7", p. 10)

Northern Pacific Railway Company

State of Washington—Year 1933

Passenger proportion of Operating Expenses, Intrastate.

Total passenger proportion of Operating Expenses year 1933, Intra and Interstate			$3,142,708
Revenue Passenger miles		%	
Intrastate	18,052,604	47.76	
Interstate	19,749,788	52.24	
	37,802,392	100.00	
Passenger proportion of Operating Expenses as applicable to Intrastate Traffic			
47.76% of $3,142,708 or			1,500,957

Year 1933

Total Freight Operating Expenses on Above Basis for Year 1933

Revenue net ton miles, Washington intrastate year end. Dec. 31, 1933	334,493,591
Operating expense cost per revenue net ton mile as above for week of Oct. 22-28, 1933 (cents)	.98411
Total freight operating expenses	3,291,785

[fol. 248] Def.'s Ex. "7", p. 12

Northern Pacific Railway Company

Analysis of Operating Expenses as Applicable to Washington Intrastate Freight Traffic

Oct. 22 to 28, 1933

Washington Intrastate Traffic

Train and engine wages	$9,826.25	
Fuel for locomotives, water, lubricants, other supplies and engine house expenses	6,683.07	
Locomotive repairs (road service)	4,592.71	
Yard Expenses	9,104.69	
Freight car repairs, depreciation and retirements	9,552.01	
Steam locomotives, depreciation and retirements	1,187.64	
Station employes and station supplies and exp.	9,603.60	
Miscellaneous transportation accounts	2,877.65	
Miscellaneous maintenance of equipt. accts.	1,477.30	
Maintenance of Way and Structures	11,202.01	
Traffic Expenses	3,086.41	
General Expenses	5,945.44	
Transportation for Investment Cr.	60.36R	
Total freight operating expenses		$75,078.42

R Indicates Red Figure.

[fol. 249]

Def.'s Ex. "7", p. 13

Northern Pacific Railway Company

Summary of Train and Engine Expenses in Connection with Intrastate Freight Traffic—State of Washington, October 22-28th, 1933

	Freight Car Miles			Gross Ton Miles			Net Ton Miles		
	Intrastate	Interstate	Total	Intrastate	Interstate	Total	Intrastate	Interstate	Total
Idaho Division...	96,413	328,177	424,590	3,902,383	13,233,661	17,136,044	1,778,809	5,232,736	7,011,545
Tacoma Division..	253,231	285,063	638,294	13,322,232	10,631,317	23,953,549	6,046,548	3,780,290	9,826,838
Total.....	449,644	613,240	1,062,884	17,224,615	23,864,978	41,089,593	7,825,357	9,013,026	16,838,383
% of total.....	42.30	57.70	100%	41.92	58.08	100%	46.47%	53.53%	100%

	Wages of trainmen and enginemen			Fuel for train locos., water and other engine supplies and engine house expenses—train			Locomotive repairs		
Idaho Division...	$2,275.16	$5,185.59	$7,460.75	$1,281.80	$3,400.61	$4,682.41	$1,096.20	$2,928.40	$4,034.60
Tacoma Division.	7,805.22	5,495.47	13,300.69	5,574.47	4,296.89	9,871.36	3,617.74	2,945.03	6,562.77
Total.....	10,080.38	10,681.06	20,761.44	6,856.27	7,697.50	14,553.77	4,713.94	5,883.43	10,597.37
Cost per 100 Net Ton-Miles (cents).....	.1288	.....	.....	.0876	.....	.....	.0602	.....	.....
Net ton-mile of traffic actually handled.....	7,629,079								
Revised cost.....	$9,826.25	.....	.....	$6,683.07	.....	.....	$4,592.71	.....	.....

[fol. 250] Def.'s Ex. "7", p. 14

Northern Pacific Railway Company

Freight Car Repairs, depreciation and retirements State of Washington, Year 1933

Freight train car repairs, average of 3 years ending Dec. 31, 1933	$565,463.71
Depreciation, Year 1933	594,307.22
Retirements, Year 1933	17,579.23
	$1,177,350.16
Amount applicable to week of Oct. 22-28, 1933, 7/365 or 1.918%	22,581.58
Intrastate proportion based on car miles during test period	42.30
Amount as assigned to intrastate freight traffic	9,552.01

[fol. 251] Def.'s Ex. "7", p. 15

Northern Pacific Railway Company

Steam Locomotives, Depreciation and Retirements State of Washington, 1933

Year 1933	Idaho Division	Tacoma Division	Total
Steam Locomotives Depreciation	$82,279.76	$125,835.75	$208,215.51
Steam Locomotives Retirements	1,761.51	2,638.24	4,399.75
Total	84,141.27	128,473.99	212,615.26
Amount applicable to week of Oct. 22-28, 1933, 7/365 or 1.918%	1,613.83	2,464.13	4,077.96
Less amount used in terminal studies	368.84	823.79	1,192.63
Total	1,244.99	1,640.34	2,885.33
Intrastate proportion based on gross ton miles	22.77	55.12	
Amount as assigned to intrastate freight traffic	$283.48	$904.16	$1,187.64

[fol. 252] Def.'s Ex. "7", p. 16

Northern Pacific Railway Company

State of Washington—Year 1933

Station Employees—Freight				$641,150
Station Supplies—Expenses				39,809
				$680,959
Tons carried Washington 1933:				
Intrastate	2,776,861	65.39%		
Interstate	1,998,872	34.61%		
	5,775,733	100%		
Adjusted tonnage:				
Logs	2,000,463 X1		2,000,463	
Other intrastate	1,776,398 X2		3,552,796	
	3,776,861	65.39	5,553,259	73.53
Interstate	1,998,872 X1	34.61	1,998,872	26.47
	5,775,733	100%	7,552,131	100%
Dividing Station Employees and station supplies on above basis gives for Washington Intrastate		73.53%	or	$500,709
Amount as applicable to week of Oct. 22-28, 1933 7/365 or 1.918%				$9,603.60

(Here follow tables, folios 253-255.)

[fol. 253]

Def.'s Ex. "7", p. 17. (Sheet 1)

Northern Pacific Railway Company

Miscellaneous Transportation Accounts—State of Washington—Freight Year 1933

	Idaho Division			Tacoma Division			Total State of Washington		
	Year 1933	Week of Oct. 22-28 1933	Intrastate 1933, Propn. Wk. of Oct. 22-28	Year 1933	⁎ Week of Oct. 22-28 1933	Intrastate Propn. Wk. of Oct. 22-28 1933	Year 1933	Week of Oct. 22-28 1933	Intrastate Propn. Wk. of Oct. 22-28 1933
			22.71%			55.34%			
Train Supplies and Expenses	$38,448.97	727.45	164.20	$50,357.65	965.86	534.51	$88,806.62	$1,693.31	699.71
Superintendence	39,664.24	760.76	172.77	72,417.85	1,388.97	768.66	112,082.09	2,149.73	941.43
Dispatching Trains	23,202.39	445.02	101.06	67,808.16	1,300.56	719.73	91,010.55	1,745.58	820.79
Signal & Interlocker Oper	10,926.50	209.57	47.59	17,646.85	338.47	187.31	28,573.35	548.04	234.90
Crossing Protection	3,960.31	75.96	17.25	38,302.83	734.65	406.56	42,263.14	810.61	423.81
Drawbridge Operation	31.36	.60	.14	31,478.83	603.76	334.12	31,510.19	604.36	334.26
Tel. & Tel. Operation	13,192.07	253.02	57.46	13,923.30	267.05	147.79	27,115.37	520.07	205.25
Stationery & Printing	5,513.11	105.74	24.01	10,015.05	192.09	106.30	15,528.16	297.83	130.31
Other Expenses	1,676.78	32.16	7.30	3,066.98	58.82	32.55	4,743.76	90.98	39.85
Operating Jt. trks & Fac. Dr	22,506.50	431.67	98.03	9,101.75	174.57	96.61	31,608.25	606.24	194.64
Operating Jt. trks & Fac. Cr	5,552.17R	106.30R	24.14R	112,555.40R	2,158.81	1,194.69R	118,097.57R	2,265.11R	1,218.83R

R Indicates Red Figure.

[fol. 254]

Def.'s Ex. "7", p. 17 (Sheet 2)

Insurance	500.55	9.60	2.18	$793.85	$15.23	$8.43	$1,294.40	$24.83	$10.61
Clearing Wrecks	9,021.76	173.04	39.30	3,397.08	65.16	36.06	12,418.84	238.20	75.36
Damage to Property	15,529.92	298.05	67.69	6,108.81	117.17	64.68	21,648.73	415.22	132.53
Dam. to L. Stock on R of W	3,505.21	67.23	15.27	5,629.21	107.97	59.75	9,134.42	175.20	75.02
Loss & Damage Fr	26,485.53	507.99	115.36	32,767.63	628.48	347.80	59,253.16	1,136.47	463.16
Injuries to Persons	32,795.67	629.02	142.85	16,732.05	320.92	177.60	49,527.72	949.94	320.45
Weighing Insp. & Dem. Bur	6,044.30	115.93	26.33	9,511.44	182.43	100.96	15,555.74	298.36	127.29
Operating Jt. Yds. Termls. Dr	144.89	2.78	.63	48,335.49	927.07	513.04	48,480.38	929.85	513.67
Operating Jt. Yds. Termls. Cr	85,932.92R	1,648.19R	374.30R	86,235.48R	1,654.00R	915.32R	172,168.40R	3,302.19R	1,289.62R
Coal & Ore Wharves	.....	.....	.....	680.44	13.05	7.22	680.44	13.05	7.22
	161,684.97	3,091.10	701.98	239,284.37	4,589.47	2,539.83	400,969.34	7,680.57	3,241.81
Less amount as included in term. studies Frt. propn	.....	221.13	50.22	.....	567.29	313.94	.....	788.42	364.16
Total	.....	2,869.97	651.76	.....	4,022.18	2,225.89	.....	6,892.15	2,877.65

⁎ 7/365 or 1.918%.

[fol. 255]

DEF'S EX. "7"

Northern Pacific Railway Company

Various Maintenance of Equipment Accounts

State of Washington—Year 1933—Freight

Maintenance of Equipment	Year 1933	# Week of Oct. 22–28 1933	Intrastate Propn. Oct 22–28 1933	Year 1933	# Week of Oct. 22–28 1933	Intrastate Propn. Wk. Oct. 22–28 1933	Year 1933	Wk. of Oct. 22–28 1933	Intrastate Propn. Wk. Oct. 22–28 1933
	Idaho Division			Tacoma Division			Total State of Washington		
Superintendence	$31,411.82	$602.48	$136.82	$51,473.14	$987.25	$546.34	$82,884.96	1,589.73	683.16
Shop Machinery	9,036.29	173.32	39.36	12,762.14	244.78	135.46	21,798.43	418.10	174.82
Power Plant Machinery	3,138.00	60.19	13.67	2,984.82	57.25	31.68	6,122.82	117.44	45.35
Work Equipment Repairs	9;364.78	179.62	40.90	26,333.95	505.09	280.93	35,698.73	684.71	321.83
Work Equipment Depr.	8,193.87	157.16	35.79	16,239.84	311.48	173.25	24,433.71	468.64	209.04
Work Equipment Retirements	960.54	18.42	4.19	1,811.13	34.74	19.32	2,771.67	53.16	23.51
Miscellaneous Equipt. Reprs.	111.26	2.13	.48	190.06	3.65	2.02	301.32	5.78	2.50
Injuries to Persons	16,948.28	325.07	73.82	5,260.02	100.89	55.83	22,208.30	425.96	129.65
Miscellaneous Equip. Depr.	137.48	2.64	.60	240.48	4.61	2.55	377.96	7.25	3.15
Insurance	118.13	2.26	.51	1,471.82	28.83	15.62	1,589.95	30.49	16.13
Stationery & Printing	427.04	8.19	1.86	536.87	10.30	5.70	963.91	18.49	7.56
Mtg. Jt. Eq. at Trmls.—Dr.	12,514.30	240.02	54.51	14,237.18	273.07	151.12	26,751.48	513.09	205.63
Mtg. Jt. Eq. at Trmls.—Cr.	10,678.17R	204.81R	46.51R	19,297.08R	370.12R	204.82R	29,975.25R	574.93R	251.33R
	81,683.62	1,566.69	356.00	114,244.37	2,191.22	1,215.00	195,927.99	3,757.91	1,571.00
Less amounts used in terminal cost studies	.....	58.52	13.29	.....	145.30	80.41	.....	203.82	93.70
Total		$1,508.17	342.71		2,045.92	1,134.59		3,554.09	1,477.30

Based on 7/365 or 1.918% of year
R Indicates Red Figure

[fol. 256] Def.'s Ex. "7", p. 19

Northern Pacific Railway Company

Maintenance of Way—Structures

Washington Intrastate Freight Traffic

	Idaho Division	Tacoma Division	Total
Average Maintenance of Way Structures—Freight 3 years ended Dec. 31, 1933.	$499,257.79	$1,027,538.44	$1,526,796.23
Week of Oct. 22–28, 1933 7/365 or 1.918%.....	9,575.75	19,708.18	29,283.93
Less amount as used in terminal studies.....	836.01	3,052.56	3,888.57
Total M.W. Structures—Freight.....	8,739.74	16,655.62	25,395.36
Intrastate proportion based on freight car miles for test week Oct. 22–28, 1933 as follows:	22.71	55.34	
Intrastate.....	$1,984.79	$9,217.22	$11,202.01
Interstate.....	$6,754.95	7,438.40	14,193.35

[fol. 257] Def.'s Ex. "7", p. 20

Northern Pacific Railway Company

Apportionment of Traffic Expenses to Intrastate, State of Washington, Year 1933

Traffic Expenses Freight, State of Washington, Year 1933			$246,089
Tons of revenue freight:			
Intrastate	3,776,861	65.39	
Interstate	1,998,872	34.61	
	5,775,733	100%	
Washington intrastate proportion			$160,918
Week of Oct. 22-28, 1933, 7/365 or 1.918%.....			3,086.41

[fol. 258] DEF.'s Ex. "7", p. 21

Northern Pacific Railway Company

State of Washington

General Expenses

State of Washington—Freight—Year 1933

Total Freight Operating Expenses	$8,002,333	
Less General Expenses	633,648	
Total Operating Expenses, Freight (Exclusive of General)	$7,368,685	
Ratio of General Expenses to total excluding General	8.60%	

Washington Intrastate Freight Traffic

Freight Operating Expenses Intrastate Week of Oct. 22-28, 1933 (Excl. General)	$69,132.98	
General Expenses, 8.60% of $69,132.98		$5,945.44

[fol. 259] DEF.'s Ex. "7", p. 22

Northern Pacific Railway Company

Transportation for Investment Cr.

State of Washington—Year 1933—$7,227.30

Amount Applicable to week of Oct. 22-28, 1933.

7/365 or 1.918%	$138.62
Washington intrastate freight proportion	60.36
Ratio of car miles in intrastate traffic	

[fol. 260] Defendant's Exhibit "8":

Purports to be a copy of the N. P.'s Annual Report to the D. P. W. for the year ending December 31, 1933.

Defendant's Exhibit "9":

Purports to be a copy of the N. P.'s Annual Report to the D. P. W. for the year ending December 31, 1932.

Pertinent parts of Exhibits "8" and "9" can be readily referred to in the briefs and these exhibits are therefore omitted.

Defendant's Exhibit "10":

Page 23 is a set-up purporting to show the par and average market value of the N. P.'s stock and funded debt for each of the years 1930 to 1933 inclusive and the average for the four years.

Page 24 is a set-up purporting to show the N. P.'s system net railway operating income for the years 1930 to 1933 inclusive and the first seven months of 1934. It also purports to show the average percentage for the years 1930 to 1933 inclusive of the N. P.'s Washington operating properties of the system operating revenue, car miles, traffic units, all track mileage owned and reproduction cost.

Page 25 is a set-up purporting to show the market value of the N. P.'s Washington operating property based upon the data set forth on pages 23 and 24.

Since the market value of the N. P.'s Washington properties is not deemed material to this inquiry, the foregoing exhibit is omitted.

[fol. 261] Defendant's Exhibit "11":

Purports to show separately as to each station named below the average cost per engine hour from June 3rd to 9th, 1934. As to each such station is set forth in one column by the names and numbers of accounts the purported expense for the test period incident to Maintenance of Way and Structures, Maintenance of Equipment, Transportation and General; in the next column the purported total net engine hours for the test period, and in the last column, the purported cost per engine hour, evidently computed by dividing the total engine hours into the total expense for the week. The totals for the various stations are shown to be as follows:

Station	Total for Week Beginning June 3, 1934 Expense for test period	Net Engine Hours	Cost per Engine Hour
Spokane	6,134.52	564.37	10.87
Pasco	3,223.84	260.65	12.37
Yakima	2,883.41	260.93	11.05
Everett	884.46	89.74	9.86
Seattle	9,582.77	756.15	12.67
Auburn	3,955.93	325.74	12.14
Tacoma	7,035.09	589.51	11.93
Centralia	1,058.18	80.58	13.13
Aberdeen	452.53	53.08	8.53
Hoquiam	537.74	48.59	11.07

[fol. 262] Defendant's Exhibit "12":

Is headed: "Analysis of engine hours and cost per car in connection with switching operations" during the week of June 3, 1934, at the stations named in Exhibit "11". To each form of service rendered in switching operations is given, (with variations as to different stations), an arbitrary number, thus; 1A and 1B "Classification", 2A "Transfer"; 2B "Interchange"; 3 "Industry"; 4 "Freight house"; 5 "Team Track"; 6 "Co. Coal docks and ash pits"; 7 "Passenger"; 8 "Shop switching"; 9 "Store Department"; 10 "M. of W. Department"; 11 "Weighing or ice house"; and 12 "Other service—meantime etc."

As to each station, the gross engine hours and net engine hours are set forth. The next column involved in each one of these services purports to show the total number of loaded cars handled in each of such services; the next column, the number of loaded cars handled per net engine hour in each of such services; the next column, the cost per net engine hour as computed for such station in Exhibit "11" and the last column, the cost (in cents) per loaded car for each of such services.

[fol. 263] Defendant's Exhibit "13":

The first sheet purports to show the cost of switching for cars moving in intrastate log traffic during the week of October 22, 1933, based on terminal cost study for week of June 3, 1934. As to each of the stations, Yakima, Everett, Tacoma, Centralia and Hoquiam is shown, in the first column, the elements of switching service performed (as described in Exhibit "12"); in the next column, the cost per car; in the next column, the number of cars, and in the last column, the total costs for each station. The total for

all said stations is shown to be: Number of cars, 1106; total costs, $2,278.21; average per car, $2.06.

The second sheet purports to show the cost of switching for cars moving in intrastate traffic (except logs) during week of October 22, 1933, based on terminal cost study for week of June 3, 1934. As to each of the stations named in Exhibit "11" is shown the cost per car, the number of cars and the total costs. The total for all said stations is shown to be: Number of cars, 1,729; total costs, $6,826.48; average per car: $3.95.

The subsequent sheets purport to show, as to each of said stations, the details of the showing in the second sheet. As to each such station is shown the movement of traffic, the elements of switching service performed (as described in Exhibit "12") as to various groups of cars, the cost per car of such group of cars, the total costs for each such group of cars, the total number of cars handled, the total cost of handling all cars, and the average per car.

[fol. 264] Defendant's Exhibit "14":

Is a card purporting to show a code number for each of various engine yard movements, together with blanks in which to show; the engine number, date, time engine crew and switch crew each worked, switch foreman, no. of brakemen, and the switch crew time for the work done under each numbered element of switching service.

Defendant's Exhibit "15":

Consists of 14 sheets containing various set-ups relating to the traffic analysis made by defendant for the week of March 25, 1932. Since plaintiff does not dispute these calculations, but only the conclusions sought by defendant to be drawn therefrom, this exhibit is omitted.

[fol. 265] Defendant's Exhibit "16":

Exhibit "C" attached to the Answer (Tr. 46-7) was offered in evidence as Defendant's Exhibit "16" (St. 163). It purports to be the First Supplemental Findings of Fact and Order dated April 27, 1933, in a proceeding before the D. P. W. "in the matter of the application of common carrier railroads for fifteen per cent increase in freight rates in the state of Washington." The Board finds that the 15% rate increase authorized by its order of December 17,

1931, was being retained as to certain commodities and between certain points, but not as to others, resulting in discrimination as to localities, and the application to continue the rates represented by such increase until September 30, 1933, was accordingly denied. There is nothing in the findings to indicate that the carriers had made any showing to the Department as to the occupational tax imposed upon them or as to any possible increase in operating expenses which might result therefrom.

Defendant's Exhibit "17":

Exhibit "D" attached to the Answer (Tr. 48) was offered as Exhibit "17". It purports to be a copy of Senate Bill No. 18 of the Extraordinary Session of the Legislature of 1933, giving public service companies doing both an interstate and intrastate business the privilege of withdrawing from their intrastate business if they so desire by filing a notice of such withdrawal with the D. P. W.

[fol. 266] Defendant's Exhibits for Identification "18" to "22" and "22A" and "22B":

Purported to contain various underlying data connected with the various special studies made by defendant (St. 180-1, 412-3). These were, with the consent of plaintiff's counsel, later withdrawn (St. 514).

[fol. 267] Plaintiff's Rebuttal

C. R. Lonergan, called and sworn as a witness on behalf of plaintiff, testified as follows:

I have been chief of traffic division of the D. P. W. of Washington since 1927. Prior to that time I was in the railroad business for 33 years with the N. P. in various capacities, including the following capacities connected with the traffic: traveling freight agent and general agent, and assistant general freight agent (St. 368), general freight agent and assistant to the vise president in charge of traffic.

In connection with my work with the D. P. W. I have had occasion to study the reports made by the various interstate railroad companies to the D. P. W., particularly with respect to the method of apportionment of railway operating expenses and railway operating revenues to the state of

Washington. I am familiar with the N. P. lines in Washington and outside of Washington, and its various terminal properties within and outside of the state. The principal terminal properties of the N. P. in Washington are at Seattle, Tacoma and Spokane. Those are the larger terminals. And then there are other terminals in the smaller towns as well. The principal N. P. terminals outside of the state are: the head of the Lakes, that is Duluth and Superior, which is considered one terminal. St. Paul (St. 369), Minneapolis, and then, of course, we have district terminals along the line. There are some district terminals in the bridge states of Idaho, Montana and North Dakota. The latter terminal property are smaller than the terminals in Washington, Minnesota and Wisconsin. The terminals in Tacoma and Seattle are both very large terminals. The N. P. has an extensive terminal in Tacoma. I would say it [fol. 268] is perhaps somewhat smaller than the Seattle Terminal (St. 370). The N. P. has an extensive terminal in Spokane, the largest terminal of any of the roads that reach Spokane. It would be smaller than the Seattle Terminal. You ask what switching or terminal services are furnished in Spokane, so far as the N. P. is concerned. Spokane is a division point on the N. P. and trains are made up and broken up there, and the Northern Pacific also furnish interstate terminal services. It has the largest number of industries on its tracks of any of the railroads, and in addition to taking care of its own industry switching, it switches (St. 371) for the other roads to and from industries on the N. P. That is true of Seattle as well. I am familiar with the method used by the N. P. of apportioning revenues from interstate shipments of freight and passengers as between the state of Washington and the balance of the system. Briefly, that method is to apportion the local revenues directly to the state, and to apportion the balance of the interstate revenues on a mileage prorate proportion as to each individual shipment. I am familiar with the (St. 372) method of accounting of the N. P. to the state of Washington in accounting for its railway operating expenses. Those various items of expense are grouped into 6 main groups, the first of which is the maintenance of way and structures. In apportioning the expenses in connection with the maintenance of ways and structures to the state of Washington, the reports are made in such a way

that all expenses connected with the maintenance of way and structures are directly apportioned, to that particular state, with a certain mileage proportion of certain general expenses such as superintendence that cannot be localized.

(Questions by defendant's counsel.)

I don't pretend to be a railroad accountant. All my ex- [fol. 269] perience has been in the traffic department. I am the traffic expert for the D. P. W (St. 374). The Departmen has accountants in its service (St. 375).

(Questions by plaintiff's counsel.)

You ask what I do in connection with the traffic in my position as traffic man for the D. P. W. Everything that pertains to traffic, that is railroads, boat lines, trucks, busses and all. You ask if I have anything to do with rates and the propriety of rates. Yes. In connection with the determination of the propriety of rates I take into consideration operating expenses and revenues (St. 375). We have access to the annual reports, and I analyze some of them, and other members down there analyze them.

You ask me to state whether or not in my opinion such method of apportioning revenues followed by the N. P. is a proper method of apportioning revenues to the state of Washington for the purpose of determining the true net railway revenues in the state (St. 374). I would say not for ratemaking purposes. You ask why not. Because, as is stated in the N. P. annual report, a good many of those items are on arbitrary assumptions, and are not a true picture of the revenue and expenses accruing to the state of Washington. You ask how, in my opinion, the expenses connected with the maintenance of way and structures of the large terminal properties, such as those located in Spokane, Seattle and Tacoma, should be apportioned—directly to the state where located, or to some extent as system expenses. Of course that opens a very large question, and I might explain it in this way: the present method of dividing these revenues and expenses has been adopted not only by the state of Washington, but by all the other states, in the absence of any better method. And the subject has been in controversy for a good many years. It was in controversy when I came with the Department in 1927. There [fol. 270] have been extensive hearings by the I. C. C., but

no conclusion has ever been (St. 377) reached. The Commission, in Ex Parte 91, revision of accounting rules of steam railroads, got out a tentative report, in which it was recommended that it be left to a committee of state public utility regulatory bodies and railroad accountants and national industrial traffic league representatives, and 2 or 3 other committees, but nothing has ever been done. And in all consideration of intrastate rates we have always taken into account these arbitrary assumptions that are contained in the state figures, and to quite an extent have disregarded them. That is the mileage prorate which gives the state of North Dakota or Montana the same revenue per mile as it does in the state of Washington without regard to the terminal services, the absorption of competitive switching on interstate business, and many other factors which distort the figures. And as I say in our consideration of intrastate rates we have, to quite an extent disregarded the said figures (St. 378). I don't know that I can add anything to that. It is a matter of common knowledge that these figures that are filed in the annual reports of the railroads covering their state revenues and expenses are incorrect.

You ask why no objection is raised to them by the D. P. W. ordinarily in the absence of a contest on rates. We have raised objections, and we have discussed it with the railroad auditors, but the difficulty is that unless either the I. C. C. orders some change or all of the states can agree upon some uniform basis, there isn't any way of changing them. For example the N. P. running through 6 or 7 states cannot do one thing in Washington and another thing in Minnesota which in the aggregate will not foot up 100% for the system. You ask if it isn't a (St. 379) recognized fact [fol. 271] in all of these investigations that are made before the I. C. C. and all state commissions that the bridge state is not entitled, as a matter of fact, to a mileage prorate division of the interstate revenues. Yes, that is the general contention. Not by the bridge states, but by the railroads and by the other states that are involved. (Question by defendant's counsel.) The bridge state stands pat (St. 380).

The objection to the apportionment of all of the expenses connected with the maintenance of way and structures of a terminal state such as Washington as applies to the N. P., to the state of Washington, and the apportion-

ment of none of those expenses whatever to the bridge state is that it does not place the proper charge upon interstate traffic; it places it all where it is expended in the state of Washington. The terminal facilities located in Washington are of benefit to the traffic traversing the intermediate states, and in my opinion some of that expense should be apportioned to those intermediate states. That should also be true in regard to the maintenance of the terminals in Wisconsin and Minnesota. That should likewise be apportioned to this state and to the intermediate states as well. A portion of the taxes imposed by the state of Washington on the N. P. terminal facilities in Washington should likewise be apportioned to the bridge states, for the same reasons I have stated (St. 382).

You ask whether it is my opinion that the interstate revenues should be apportioned to Washington on a mileage prorate. No. You ask why not. Because that division does not allow for the terminal service. In other words, if the expenses are to be apportioned locally, to the terminal state, then a greater proportion of the earnings or the revenues should be apportioned to that state. You should either apportion a certain proportion of the expenses connected [fol. 272] with this terminal service to the remainder of the states, or you should (St. 382) apportion a greater percentage of the interstate revenues to the state to equalize those expenses (St. 383).

The N. P. does not keep its books so as to show the actual expenses of operation incurred in the state of Washington like an independent road would, that would terminate, say, at the Idaho line. It does not so segregate its expenses in its accounting. Where a through rate is made between several connecting lines, the revenues received from interline shipments of that kind based upon the through rate, is allocated or apportioned to the different lines handling the business. If there were three connecting lines involved in handling the freight on a through rate, there would be two terminal lines and one intermediate line. You ask whether or not any practice has been established between connecting lines operating in that way for the apportionment of the revenues between the connecting lines. Yes (St. 384). I am familiar with that practice. You ask what that general practice is (St. 385). The standard practice is to allow the originating line a minimum of 25% of the through rate from point of origin to destination. That would be the minimum.

You ask as to the local rate. Well, sometimes it is agreed upon that the originating line will accept this local, and other times it may be less than local and at other times may be more than local. You ask what the delivering line would get (St. 386). That would depend on how long a haul the delivering line got. If the delivering line got a reasonably long haul it would accept a mileage prorate, but if it was a terminal line, a short line, it might exact something above its mileage prorate.

If the terminal states were apportioned more than a [fol. 273] mileage prorate on a fair and equitable basis of division (St. 387) of apportionment, and the middle states or bridge states were apportioned less than mileage prorate, that would not necessarily mean that more than 100% would be apportioned in the aggregate. I might say in that connection that in this Ex Parte 91 proceeding before the commission, the D. P. W. and the Public Utility Commission of Oregon suggested that these terminal states be allowed—in order to offset that, correct it—the constructive mileage something over and above the actual mileage prorate. By constructive mileage I mean a mileage arbitrarily apportioned to a given segment of the line for the purpose of computing divisions of the revenue. For example, roughly, the N. P. mileage across the state would be 400 miles, and our suggestion was that the state of Washington be allowed, I think, 125 miles in addition to that for the terminal expense or service. You ask whether or not in any proceeding in which the N. P. and other railroad companies were parties, the propriety of the divisions or apportionments made in the reports was in issue and discussed by the D. P. W. Yes. The case of D. P. W. Complainant, vs. Chicago, Milwaukee, St. Paul & Pacific, cause 6172, was one of them. Plaintiff's Ex. "24" constitutes the findings of fact and order in that particular proceeding. The portion on pages 47 and 48 is the relevant portion in that connection (St. 389).

(Whereupon plaintiff's Ex. "24" was received in evidence over defendant's objection that the same was irrelevant and immaterial (St. 389).

On cross-examination he further testified as follows:

[fol. 274] This mileage prorate has been used by the railroads in this state in connection with the state statistics for a good many years. It is the only one that ever was used, so far as I know. It has been more important, of course, since 1920, since the passage of the Transportation Act. Before that it was not so material (St. 390). It would be impossible to change that method with respect to any one state without orders from the I. C. C. or the agreement upon the part of states interested. Minnesota is an important terminal state for the N. P. and a number of other roads both transcontinental and roads coming in from the East. The state of Minnesota has much more extensive terminals on the N. P. than the terminals in Washington. They are at least as expensive, I would say. If (St. 391) I am going to give Washington credit because of terminals in this state I would have to give Minnesota credit for its terminals. I think it is true that it would involve a recasting of the entire situation and averaging up of the result. You would have to consider the relative importance of the various terminals in each state, and the amount of traffic that was originated and delivered at the terminals. You ask if it isn't a fact that if any such thing as that was attempted on any general scale it would involve an utterly hopeless mess and confusion, and we would have to take years to work it out. Well, that is perhaps true, because the I. C. C. has been at it for several years, and they have not reached any conclusion. The N. P. pays its gross revenue tax in Minnesota and on this same proportion of revenue used everywhere else, but the situation in Minnesota is a little different. Minnesota is the neck of the bottle for the N. P. and has the advantage of all of that bridge traffic (St. 392). You ask if it isn't a fact that there isn't any-[fol. 275] thing more firmly established amongst the railroads throughout the United States than this proposition of mileage prorate of interstate revenue. It is established, but I would not say that it is satisfactory to the railroads. It is the universal practice. You ask if it isn't true that I never did devise any formula by which I could tell how much revenue should be apportioned to (St. 393) Washington other than this. Well, I have discussed a good many formulae, but I have never been able to get everybody to

agree to establish it. I think it is true that if we ever depart from this system, that you could find hundreds of different views and opinions as to what should be substituted. The D. P. W. has discarded the mileage proration in some rate cases. The decision of the D. P. W. was correct according to the belief of the members of the Department (St. 394). You ask if it is not a fact that it is impossible to devise any system, so far as I know, by which it could be done mathematically. Oh, I think it could be done by recasting the figures and allowing constructive mileage, provided we could get an agreement. You always have to make certain so-called arbitrary assignments of expenses where the expenses are common to both state and interstate business. You ask if we are ever going to get anything but an approximation. No, it would not be absolutely accurate. It could not possibly be. Traffic coming in from the south and going to British Columbia would cross Washington, but that would be a very small amount. I haven't the figures here, but I have studied them a good many times. In case of the grain originating on the N. P. and going to Portland, the state (St. 395) gets 90% or more under the mileage prorate, where it moves over the S. P. S. That is a fairly heavy volume of traffic. There is a whole lot of freight also originates in the bridge states, such as the Dakota grain, and grain, livestock, lumber and ore [fol. 276] in Montana. You ask if it is not a fact that it is wholly inaccurate to classify one state as a bridge state and another state as a terminal state; that you can't divide them in that way. Well, I think you can. The volume of bridge traffic can be measured, it can be determined. But that does not mean that there is not also a lot of traffic originating and delivered in the bridge state too. The total traffic of the bridge states is not altogether bridge traffic (St. 396). The traffic *on* North Dakota on bridge traffic is about equal to the traffic density of Washington. North Dakota is one of the largest grain producing states. It is a terminal state with respect to that traffic (St. 397).

For local business, the carrier is entitled to a higher per ton rate than for long haul interstate business. The average haul of the interstate is substantially in excess of the average haul on the local. It is true that the cost per unit of freight of the local business is substantially in excess

of the interstate business, because of the short haul and the same terminal service in either case (St. 397). In other words, we have an origin and delivery service for the business in both instances. That is about as firmly established a principal of rate making as there is (St. 398).

The matter of divisions is largely a matter of bargaining between the companies. The general practice that I spoke of is the usual standard basis, but it may be deviated from, of course. If one road has the control of the situation it may dominate the division. It is just like any other contract that is made (St. 398). This 25% rule to which I testified applies as well on traffic originating in the east and moving out into Washington as on traffic originating in Washington and moving east. It would be standard from [fol. 277] all directions. It applies in all directions, east, west, north and south. I think it is true that whatever the merits or demerits of this 25% practice, inasmuch as it applies generally, the advantages and disadvantages will equalize as between the roads, as a general rule (St. 399).

On redirect examination he testified further as follows:

The preponderance of traffic is eastbound. As to this specific business, it would not be equalized in view of the excess or preponderance of eastbound traffic. (Question by defendant's counsel.) You ask if a state can go to the I. C. C. and insist upon a railroad reporting an adequate amount of revenue. We have not tried it for 7 or 8 years. When I said that it was the universal practice in the United States to accept the mileage prorate as the proper method of apportionment as between state, I meant for accounting purposes. You ask me as to the situation where there is a rate case in one of the states involving the propriety of a local rate. Well, as I testified this morning, so far as the D. P. W. is concerned, we don't take these figures of the carriers as to state revenue at the full face value in deciding questions of rates. The controversy over these figures as to a mileage prorate division comes into almost every state rate case (St. 402). In these various controversies, neither the states nor the carriers accept it when it is detrimental to their interests. In every rate case it is always a matter of very lively dispute as to what the proper apportionment of revenues should be. Minnesota has some valuable terminals. That state uses a gross revenue tax.

If they receive a lower amount of revenue by reason of [fol. 278] this mileage prorate, they could adjust it very readily by still increasing the rate up or down. You ask if there is any reason why a proper and equitable method could not be reached in a dispute over the propriety of a local rate by an exhaustive study of the subject at that particular time. Perhaps everybody would not agree to it. You ask me to state what the purpose of this requirement or practice is in regard to reporting to the state the revenues and expenses. The I. C. C. requires these data for systems as a whole, and the state regulatory bodies (St. 404) require it for their purposes of state regulation, and the figures as to the state represent a division of the system figures, so that if a railroad runs through 7 states the total of the figures of the 7 states will equal the total of the report to the I. C. C. I'm afraid that if each state were to make a careful and exhaustive study to determine just the amount which should properly be apportioned to the state, the cost of reporting this data would be prohibitive (St. 405).

The N. P. annual report for 1933, Exhibit "9" shows that the total revenue-freight carried by the N. P. for that year, on page 519, is 12,464,110 tons. According to the same report, page 910, there originated in the state of Washington 4,375,789 tons. That would be about a third, roughly. You ask me what proportion of the total traffic is hauled through Washington. I don't think it shows it that way. You could put it this way that on the system as a whole there were carried, as I stated, over 12,000,000 tons, and that would mean, multiplied by 2 of approximately 24,000,000 terminal handlings, that is in and out, origin and destination. The state figures show that originating in Washington, 4,275,789 tons and terminating 4,264,866, which would, added together, make 8,640,655 tons that were handled terminally in Washington, that is either originated in Washington or terminated here. In other words, that would be about one-third of the total N. P. system business has its origin or destination in the state of Washington.

[fol. 279] On recross-examination he further testified as follows:

Washington has a very substantially greater proportion of intrastate business than any other state of the system.

It is just about equally divided. It has a large amount of branch lines. Washington has very difficult mountain conditions; grades and curves, across the Cascade Mountains. It has many streams and rivers and bridges. You ask if it is not a fact that the operation conditions in Washington are not favorable to low cost. In Western Washington they are fairly favorable. But across the state in eastern Washington not so favorable (St. 407).

On further redirect examination he further testified as follows:

It costs more to operate over the mountains in Washington that it would, say, in a plain state or prairie state like North Dakota. You ask if it is the theory of rates that the rate is to compensate for the cost of operation. Yes, that is one of the factors. The rate is made to compensate for the haulage over the mountains. It is also made to cover cost of terminal services. The terminal service charge is absorbed in the line haul rate. The terminal services and the line haul service is all included as part of the structure of the service, the total service, to be paid for by the imposition of this tariff (St. 408). If the computation of mileage is from station to station, the terminal service is in no way whatever reflected by the apportionment on a mileage prorate. It wholly ignores it and considers only the mileage of haul. It ignores it on the other end just the same (St. 409).

(Whereupon N. P. Exhibit "46" was received in evidence without objection (St. 415).

[fol. 280] E. V. Peterson, recalled by plaintiff for further cross-examination, testified as follows:

The figures shown on plaintiff's Exhibit "25" for identification are the figures that I used in connection with the division of revenues for the year 1933 as between freight and passenger. They are correctly stated in accordance with our exhibit submitted. In N. P. Ex. "7", wherever I had occasion to use the division of revenues in the state of Washington I used these figures. The only point where I had occasion to use the revenue as between freight and

passenger was in connection with the tax statement on page 7, N. P: Ex. "7". The revenues (St. 419) shown on the present exhibit '25" are those as reported to the state of Washington for total intrastate and total interstate and for the total of intra and interstate for the year 1933, and do not include the further adjustment in connection with the foreign commerce and switching as shown by Defendant's Exhibit No. "7", page 4.

You ask me whether or not Plaintiff's Ex. "28" is the data furnished to the Plaintiff's attorney in this case in regard to the contribution by the tenant lines of the taxes for the year 1933 levied by the state of Washington. No. It does not. It represents the amount that is included in the accounts for 1933 and not as levied for 1933. The amount shown by Plaintiff's Exhibit "28" was submitted by me in response to counsel's request, for a statement of the amount of taxes that would be included in the net joint facility rents, and the amount that is shown—that is, $248,935.08 as applying to account 508, and $21,334.34 as applying to account 541, is the amount which was included in the net credit to joint facility rents net for the year 1933, and would not cover the taxes for the year 1933. It would cover the assessments that were made for the year and such [fol. 281] adjustments as might be made in the accounts. Of course we realize that the accounting is not always in line with the assessed taxation (St. 420). You ask if I mean those figures which might later be adjusted in some way. Well, we noticed in the record prior to the giving of this information the amount that actually applied so far as the credit account was concerned to the 1933 taxes, which amounted to $237,000. That was introduced in my testimony. But this figure shows $248,935.08. You ask me for what year that represents a contribution to the total taxes paid by the N. P. Well, they would take up in their statements the amount that would apply to the year, but there are various adjustments made possible on account of previous years, so that the amount, strictly speaking, is not the 1933 assessment. It comes very close to it. It is the figure that is included in account 548 and 541 in the Defendant's Exhibit submitted, Exhibit "7". It is the best figure that we can get, and it is also the amount that was included in those accounts.

The N. P. also contributed certain taxes for the use of other lines which they did not own, and that shows as the item $21,334.34. The net amount is the last item of $227,600.74. Those figures were furnished plaintiff's counsel last Saturday night (St. 422).

C. A. MANSCHRECK, called and sworn as a witness for plaintiff, testified as follows:

I reside in Seattle. My business is supervisor of valuations, for the Tax Commission of the state of Washington. My work is assisting the commissioners in the valuations of public utilities assessed by the Tax Commission, also assisting the commissioners in arriving at valuation figures when requested by the county assessors, of utilities assessed by the county assessors. This work involves a study of [fol. 282] the annual report made to the D. P. W. and tax commission by the public utilities. I am familiar with those reports (St. 416). I have been engaged in this character of work since May, 1925. Four years prior to that I was employed as assistant to the director of the department of efficiency, of Washington, in statistical and accounting work. You ask if I have accounting experience also in connection with my work with the tax commission. I supervised the installation of the present accounting system on the occupational tax, as well as the accounting system that was set up for the income tax two years ago. The law was declared unconstitutional, but the tax commission made all preparation for the collection of that tax as provided by the law. I started with the department of efficiency in 1921, and while employed by the department of efficiency I set up the appropriation accounting system now used by the state. From 1916, I think it was, down to August of 1920 I was (St. 417) chief paymaster in charge of supplies and accounts for the United States Shipping Board. From 1909 until 1916 I was employed by the city of Seattle as auditor of disbursements in the comptroller's office (St. 418).

Plaintiff's Ex. "25" shows the gross operating revenues, intrastate, interstate and total intra and interstate, (St. 422) in the state of Washington of the N. P. divided as to freight and passenger by accounts. This is a copy of

the statement that was submitted to counsel for plaintiff by Mr. Peterson the other day.

Plaintiff's Ex. "26" is the allocation of passenger operating expenses for the year 1933 to Washington intrastate passenger traffic only, as compared with N. P. Ex. No. "7", page 11 (St. 423). There is a second item there that was reported also to the D. P. W., the same page and same line, but column "F", which is expenses apportioned to pas- [fol. 283] senger and allied services, of $1,121,760. The total expenses as reported on these two lines or these two columns total $3,142,708. This $3,142,708 includes the expenses of both intra and interstate passenger service. I apportioned those expenses as between intrastate and interstate passenger service on the basis of the amounts shown in the second column on Exhibit "25" intrastate passenger revenue of $429,635, and on the interstate passenger revenue, which is column 5 of Ex. "25" of $921,447. The total passenger train revenues or the total of these 2 revenues is $1,351,082, which is the same figure as appears on the total of Ex. "25", the second column from the right-hand end. The ratio of intrastate revenues to the total of intra and interstate revenues of $1,351,082, or the amount of $429,635 of intrastate revenue divided by this total of $1,351,082 gives a ratio of 31.80%, and I have applied that ratio to the operating services, the total operating expense reported of $3,000,000 plus, which gives a total of $999,381 (St. 424). I used this method of apportioning because, to my mind, it is a truer indication of the division between intra and interstate revenues, than passenger miles, for instance, or passengers carried. I had revenue passenger miles intra and interstate, and the only other factor that was available was relative revenues. You ask why I believe that relative revenues was a better indication. Well, the revenue passenger miles as shown in N. P. Ex. "7", page 11, does not give consideration to the mail and express revenues in passenger train service. You ask if there are not milk and other services aside from that received from passengers alone. Yes, there are other train service revenues that were allocated both as to intra and interstate (St. 425). You ask if the expenses incident to the hauling of mail and express and milk would be reflected by relative passenger [fol. 284] miles. No, I don't think it would be reflected at all.

Plaintiff's Ex. "27" shows the total railway operating expenses in connection with Washington's 1933 intrastate operations as compared with N. P. Ex. "7", page 6. The freight operating expense as shown on page 10 of the N. P. Ex. is $3,291,785. The passenger operating expenses as computed on plaintiff's Ex. "26" is $999,381. The total railway operating expenses applicable to Washington intrastate traffic was $4,291,000 plus, the total of the above two items. In those cases, with respect to freight service (St. 426). I have used the N. P. figures. I added the adjusting figure which is shown in N. P. Ex's. "7", pages "4" and "5", which is due to the foreign commerce and switching charges. The net increase shown there was $3,698, whereas the increase was $3,688, which gave a total operating expense applicable to Washington intrastate traffic of $4,294,000 plus. I have noted by starring the $3,688, the error.

Plaintiff's Ex. "28" is the exhibit that Mr. Peterson just testified to.

Plaintiff's Ex. "29" is a computation of taxes apportionable to Washington intrastate operations as deduced from defendant's figures. You ask me to explain that generally. I found the percentages set forth in lines "D" and "E" (St. 427). The percentage of 15.91% is apportionable for passenger service, and "E", the percentage apportionable to freight service. I then set forth in line "F" the total taxes levied for the year 1933 (St. 428) as reported in N. P. Ex. "7", p. 7. I then reduced that by the amount shown on Plaintiff's Ex. "28". And then found that the net amount of ad valorem taxes payable by the N. P. on the Washington operating property for 1933 was as shown in line "H", $1,777,000 plus. Having determined that net amount, I ap- [fol. 285] portioned it between freight and passenger operations on the basis of the ratio shown in lines "D" and "E". I then apportioned the taxes as between intrastate freight service and interstate freight service on the ratio of intrastate freight car miles to the total of intra and interstate for the test period as shown on page 13 of N. P. Exhibit No. "7". That was 42.30%. You ask how I computed the taxes apportionable to intrastate freight operations. I applied that percentage of 42.30% to the $1,494,000 in line "I" and arrived at the figure $632,227. You ask how I arrived at the amount which I apportioned to passenger service. On the basis of passenger revenue as shown on Plain-

tiff's Ex. "25", the ratio of 31.80 in line "O" applied to $282,787 (St. 429) on line "J" produces the amount of $89,926. I then added the taxes apportionable to intrastate freight and passenger operations and get the figure shown in line "Q". Then I aded to that the other taxes apportioned to Washington intrastate, as shown by N. P. Ex. "7". The total amount then of taxes apportionable to Washington intrastate operation is shown to be the last figure, $735,389. You ask if I consider this a proper way from the available data to apportion the taxes to the intrastate passenger and freight operations. Yes. You ask if I consider it a fairer way to the state of Washington, in determining the earnings as to intrastate operations, than the method used in N. P. Ex. "7", page 7, which is based purely on revenues from the two operations. Yes. You ask why. Well, as I stated previously, the taxes apportioned to passenger train service were based on passenger miles (St. 430). I apportioned the taxes as between freight and passenger on the basis of car miles, which reflects the use of the property. I used relative car and locomotive miles as be-
[fol. 286] tween freight and passenger originally and then as between intra and interstate freight I used relative freight car miles. That is, relative use as distinguished from relative revenues. You ask whether in my opinion the taxes should be apportioned on a factor reflecting relative use rather than relative revenues, (St. 431). I think they should be apportioned on a relative use factor. Relative car miles is the only available factor you had for that purpose in considering the N. P. study.

Plaintiff's Ex. "30" is a restatement of the railway operating income from Washington intrastate income operations comparable with page 1 of N. P. Ex. "7". I show first the total revenues, which is the same figure shown on the N. P. Exhibit. Operating expenses are taken from our Exhibit "27", after adjustments as to railway operating expenses incident to passenger service and foreign commerce and switching as computed by the defendant. I then get a net figure which is line 2 subtracted from line 1. I then apportion the railway taxes as found by me on Ex. "29". I then arrive at what I call railway operating income amounting to $241,000 plus. That is a black figure.

The purpose of Plaintiff's Ex. "31" is to show the difference resulting from using the expenses incident to maintenance of way and structures for one year, for the year 1933,

instead of taking a 3 year average. In doing this first of all I used the amounts apportioned by the defendant to the 2 divisions, the Idaho and Tacoma, and arrived at the percentages of the total, which is lines "A" to "E". And then on line "F" I find the total maintenance of way and structures expense for the year 1933 only (St. 433) as reported by the D. P. W. and reference is made to where they are found. That is the figure on the vertical column "Z". [fol. 287] Then to find the amount that should be apportioned to the Idaho and Tacoma divisions, I apportioned on the basis as shown on lines "D" and "E", applying that to the total shown in column "Z". To find, for instance, the amount apportionable to the Idaho division. The figure shown in line "G", that is, the Idaho division, is the amount in line "F" multiplied by 32.70. In "H" I take the fraction shown in line "E" and multiply that by the total shown in "F". I have now apportioned the expenses for the year 1933 as between the Idaho and Tacoma divisions (St. 434). I then proceed to make a reduction of the amounts used in the terminal studies on the basis of the percentage of 1.918 as used by the defendant. To do that, I multiply the amount shown in line "G" for instance, as to the Idaho division, by 1.918 and arrive at the figure, $7,467. To find the Tacoma division proportion I multiply the amount shown in line "H" by that same fraction, and then add the first 2 amounts to get the total. I arrive at the amount that is deducted by defendants as amounts involving terminal studies, by taking the relation of the three year average of $1,189,000 to $1,526,000. That gives me the fraction shown in line "K". In doing that I assumed that the N. P., in making its calculations in the terminal studies, used the three-year average as far as the expense of maintenance are concerned. That amount was taken from page 19, N. P. Ex. "7", third column, which is divided as to the Idaho and Tacoma divisions. I multiplied the amounts they showed by this fraction of 77.88%, and then to reach line "O" I deducted the relative amounts shown in lines "L", "M" and "N" from the amount for the week as shown in line "I". I have thus gotten the total maintenance of way and structures freight expense for the week by using the amount shown for 1933 only, instead of taking the three year average, as the figure shown in line "O", and as [fol. 288] compared with the fourth item shown in line 19 of Exhibit "7". I then apportion that as between intra and

interstate services by using the same percentages as appear on page 19, N. P. Ex. "7", which is relative car miles (St. 436). And I apply the fraction 22.17 to the figure just above it in line "O", and reach the figure for intrastate service of $1,454,000 plus. To reach the next figure in vertical column "Y", line 2, intrastate, I multiply the $12,000 plus in line "O" by 55.34%, and arrive at a figure of $7,178. I then deducted the amounts shown on that first line, intrastate, line 2, from the amounts shown on line "O" and arrived at the interstate amount shown underneath. I thus find the total intra-state expense as to maintenance of way using the figures only for one year instead of three years to be $8,724.02, for the two division (St. 437).

Plaintiff's Ex. "32" is the same kind of a study only applied to the freight train car repairs, wherein the defendant used a three-year average. That is, freight train car repairs, and the depreciation and retirements. I used the expenses for 1933 only, whereas the N. P. uses the three-year average for freight train car repairs, and the reported item for depreciation and retirements for the year 1933 only (St. 437). Line "D" is the total of lines "A", "B" and "C". You ask how I find the total for the one week. It is apportioned on that percentage basis of 1.918 as used in N. P. Exhibit "7"-page 14, and I arrive at the figures shown in line "F". I apportion that item as between interstate and intrastate on the relative car mileage basis as shown on Exhibit "7", page 13. The percentage, 42.30%, is the same percentage they used. Then I arrive at the figure on line "H" of $8,372 plus.

Plaintiff's Ex. "33" is an analysis of operating expenses as applicable to Washington intrastate freight traffic for the week October 22, 1933, as compared with N. P. Ex. "7", page 12, as corrected or modified by Plaintiff's Exhibits [fol. 289] "31" and "32" (St. 438). Instead of the figure reached by the N. P., I reach a figure of $71,420.83, as compared with $75,078.42.

Plaintiff's Exhibit "34" is a modification or correction of N. P. Ex. "7", page 10, to conform to Plaintiff's Ex. "33". Item "A" is the total on Plaintiff's Ex. "33". The revenue net ton miles is the figure used for the test week, and appears on page 10 of N. P. Ex. "7". To get the operating cost per net ton mile I divided the ton miles into expense. Line "D" is the study for the entire year. That

figure is taken from the report to the D. P. W., page 906, item 94.. That is used by the N. P. in its study on page 10, N. P. Ex. "7" (St. 439). Line "E" is a repetition of line "C". To find the amount set forth in line "F" I multiply the revenue net ton miles by the operating expense per revenue net ton mile as figured in lines "D" and "E", and reach the figure of $3,131,429 in line "F" (St. 440).

Plaintiff's Ex. "35" is a computation made to show the operating ratio as to Washington interstate freight traffic for 1933. I first set forth in Line "A" the freight revenues as shown on Plaintiff's Exhibit "25" as given to me by Mr. Peterson, the total in the fourth column. Then, to reach the operating expenses in freight service I took the figure that was reported to the D. P. W. on page 707 in columns "C" and "E". The total of the two is $8,002,333. Then, to reach the figure set forth in "C", which is the total operating expenses in Washington as to intrastate freight service as computed by defendant, I took the figure as shown in line "F", Plaintiff's Ex. "34" (St. 440). Deducting the *the* amount of $3,131,000 from the $8,002,000 gives the total operating expense in Washington as to interstate freight service of $4,870,904. I find the operating ratio to be 91.20. I have, so far as I could, in making that computation, used the operating expenses for the year 1933 only. I have not taken the average for any other period [fol. 290] of years, rather than the one year, so far as I know.

Plaintiff's Ex. "36" is a modification of N. P. Ex. "7", pages 4 and 5, to show the results of using operating expenses incident to freight train car repairs and maintenance of way and structures for 1933 only, instead of the average for three years. You ask in what way that differs from N. P. Ex. "7", pages 4 and 5. Why, the difference there is the difference that appears in line "F", which is a figure taken from Plaintiff's Exhibit "34", showing the total freight operating expenses on the basis of the exhibit, and the application of the operating ratio. To get the operating ratio as to intrastate freight service connected with account No. 101 I divided the figure in line "F" by the figure in line "E", and reached an operating ratio of 64.74, as compared with 68.06. In the computations in lines "H", "I" and "J" I arrive at the figure which I use by applying the operating ratio at which I have arrived, of 64.74,

instead of the operating ratio found by the N. P. in its exhibit. Line "K-1" is merely a repetition of line "F", and is the total freight expense as used in connection with account 101. "K-2" and "K-3" are the adjustments appearing in lines "I" and "J", and the total of those two items is $242,792. I have deducted from that amount the reduction in expenses incident to foreign commerce, and by the application of the 64.74 ratio, and reach a net figure of $3,509, which was deducted from the item appearing on line "K-1" which produces a total of $3,127,920 as the total freight operating expense incident to intrastate freight operations in Washington. Line "L" shows the railway operating expenses incident to intrastate freight traffic as computed by the N. P. in Exhibit "7", pages 4 and 5, which is $3,295,483. Line "M" shows the net reduction resulting from your computations as compared with the N. P. com- [fol. 291] putations of $167,563, net reduction in railway operating expenses. That reduction results entirely from my using a one-year average of operating expenses incident to maintenance of way and structures and freight train car repairs expense instead of using a three-year average (St. 443). I have already shown the railway operating income on intrastate operations on Exhibit "30" to be $241,650, to which I added these savings in operating expenses to reach the amount of $409,213 shown in line "O", as railway operating income as to freight and passenger for the year 1933 as to intrastate business only (St. 444).

Plaintiff's Ex. "37" shows the reduction in operating expenses as to Washington 1933 intrastate traffic if the expense item for pensions is eliminated. I first find the total expenses incident to freight service and the total incident to passenger service and add those together and get your third item of $4,706,850, and then you found the proportionate amounts of the two amounts of expense. I find that the expenses incident to intrastate freight service is 41.18% of the total, and the operating expense of intrastate freight traffic is 58.82% of the total (St. 444). I then pick out the item "pensions" from the operating expense as reported to the D. P. W., and find the total for freight to be $194,000 plus and for passenger, $73,000 plus, and the total for both services to be $267,954. I apportioned those as between intrastate freight and passenger on the basis shown above

in the third and fourth lines. If you eliminate the charge of expense as to pensions from the railway operating expenses incident to Washington 1933 intrastate traffic, both freight and passenger, the total amount eliminated would be $103,471 (St. 445).

Plaintiff's Ex. "38" is a statement to show the railway operating revenues and taxes and the apportionment of taxes on the basis of revenues allocated to the state, treating all state and federal taxes as system expense (St. 445). [fol. 292] I find the relation of the total taxes accrued as shown by the reports, both state and federal, to the total operating revenues of the company for the year, and find that the company pays out 12.365% of its system revenues in taxes. Then I find the amount of taxes apportionable to intrastate freight and intrastate passenger service by multiplying the total revenues received from those services by this 12.365%, and then add to that the Washington filing fees, reaching a total of $657,039, which is subject to a correction due to contributions by tenant lines over the entire system (St. 446). The figures reached in this exhibit are not included in any way in the computations by which I have reached the amount of railway operating income as shown on Plaintiff's Ex. "30" or "36" (St. 447).

The general purpose of Plaintiff's Ex. "39" is to show what the revenue, the operating revenues, in Washington would be if the operating ratio as to intrastate operations is the same as the operating ratio as to interstate operation in Washington. To compute that amount I first find the total amount of operating expenses incident to both services, intra and interstate, which is in line "A" taken from the report submitted to the D. P. W. (St. 447). In Line "B" I show the railway operating expenses on 1933 Washington intrastate freight traffic as shown in Plaintiff's Exhibit "36," line "K-5." To find the railway operating expenses incident to interstate, I deduct the amount in line "B" from the amount in line "A." Then in line "D" I show the operating ratio to be 64.74 as shown in Plaintiff's Ex. "36," line "G." I then find the total amount of railway operating revenues which have to be apportioned to Washington on its interstate freight traffic in order that its operating ratio will be the same on the interstate as on its intrastate by raising the amount in line "C" to 100%; i. e., by dividing "C" by "D," and multiplying by

[fol. 293] 100. The amount shown in line "F" is the railway operating revenue in Washington from intrastate freight traffic. In line "G" I show the reported passenger operating revenues, as shown in Exhibit "25," and then add the three items together to show the total (St. 448) of $13,722,554 as compared with the reported figure of $12,064,954. Those computations are based upon the assumption that the operating ratio on interstate business is no greater or is the same as that on intrastate business as computed by me (St. 449).

By Plaintiff's Ex. "40" I am proposing to apportion the ad valorem taxes payable by the defendant on its operating property for the year 1933 on the revenue basis, but instead of using the reported item of twelve odd million dollars I use the computed item being the total shown at the bottom of Exhibit "39." I find that the taxes less the amount contributed by tenant lines is 12.953% of the computed operating revenue shown in line "A" which is carried forward from the preceding exhibit (St. 450). Then in line "F" I show the total intrastate freight and passenger revenues as shown by N. P. Ex. "7," page 4, and to find the taxes applicable, I multiply this amount by the percentage shown in line "E," reaching the figure of $682,868. To that I add the other taxes as shown, i. e., the filing fee of the D. P. W. and Washington's proportion of Federal taxes, showing the total taxes apportionable to be $696,104.

I did not use that total figure in arriving at my results as to railway operating income as shown in Plaintiff's Exhibit "30" and Plaintiff's Exhibit "36." I used the higher figure of $735,389 (St. 450).

Plaintiff's Ex. "41" is the revenue per ton mile of freight hauled in Washington in 1933, interstate and intrastate and the percentage of difference between interstate and intra-
[fol. 294] state, the underlying figures all of which are taken from the report (St. 450) to the D. P. W. as indicated. I find the revenue per ton mile on intrastate freight in Washington to be the amount shown in line "C," or 1.446 cents, and on interstate to be 1.053 cents (Line "H"), and that the revenue per ton mile on intrastate freight exceeds that on interstate by 37.32% (St. 451).

Plaintiff's Ex. "42" is a similar calculation as to the revenue per passenger mile, intrastate and interstate. It

is correct (St. 451). The revenue per passenger mile on interstate is found to be 22.83% higher than on intrastate (St. 452).

Plaintiff's Ex. "43" is a comparison of aggregate taxes payable by certain interstate railroad companies under revenue laws in force prior and subsequent to 40-mill and other limitation acts, comparing the year 1932 with 1933. 1932 was the last year that there was an unlimited millage. After that the 40-mill tax law and other limitation acts applied. The comparison is made for the transcontinental lines, the N. P., G. N., O. W. and Milwaukee (St. 452). The first line "A" shows the total ad valorem taxes levied in 1932 payable in 1933 as to these four lines and the total. There were changes in valuations in 1933 as compared with 1932, and there was also a settlement of the N. P. tax case. And so that there had to be an adjustment according to equalized values. In line "B-1" is shown the taxes, the valuations or rather the equalized assessed valuations for each of the roads for the year 1932, and in line "B-2" I show the same for the year 1933 as to each road (St. 453). In line "C" I show the ratio of the one to the other for the purpose of harmonizing the showing as to 1932 with 1933. So that I find in line "D" the total ad valorem taxes that would have been payable for 1933 on the basis of the 1932 mileage rates by multiplying line "A" by line "C." [fol. 295] In line "E" I show the total ad valorem taxes payable for 1933 levied under 40-mill and other limitation acts under the laws in force in 1933. Those were the actual taxes levied, and not the accrued taxes (St. 454). Line "F" shows the total amount of occupational taxes payable for 1933 had the same been imposed for that entire year. That was computed on the basis of 1½% applied to the railway freight revenues less the mail revenues, intrastate only, as reported to the Tax Commission on page 22 of the Tax Commission report. That would be the maximum amount of occupational tax that could possibly be payable by these various companies for that year after excluding mail revenue. Line "G" is the total of lines "E" and "F," being the sum of the occupational tax if it had been imposed for the whole of the year 1933, and the ad valorem (St. 455) taxes which were actually imposed for the year 1933. In line "H" I attempt to show the net savings in total taxes ad valorem and occupational which the named

companies would thus have realized in 1933 under this new tax plan resulting from the enactment of these new limitation acts, and that was based on the application of the occupational tax to the full year's business. I had to use that in order to make a comparable showing, because I did not have the revenues by months. To find this net savings I deducted the figures in line "D" from the figures in line "G."

What I have stated heretofore relates to all taxes, state, county and all ad valorem taxes paid by the company. I now come to what taxes, if any, have been paid so far as taxes imposed for state purposes alone are concerned. Line "I" shows the ad valorem taxes for state purposes which would have been levied for 1933 under revenue laws in force prior to the 40-mill and other limitation acts. You [fol. 296] ask how I found that. Well, each year I am required to make up a statement to the State Board of Equalization showing amounts required for the various funds to be levied by the State Board of Equalization for the tax rolls of that year, and they millage requirements were used there and applied to the valuations to produce the amount shown on line "I." The "other limitation acts" referred to in the exhibit is the Showalter Bill which has a limitation of 5 mills on the state school fund levy. I took that into consideration. Line "J" shows the actual amount levied under the 40-mill and other limitation acts. That is the actual amount I did levy (St. 457). Line "K" is a mere repetition of line "F." Line "L" shows the total ad valorem taxes for state purposes for 1933 as actually imposed plus the total amount of occupational taxes which would have been payable for the whole year 1933 if the law had been in force during all of that period. Then in Line "M" I show the net savings in total taxes for state purposes alone, both ad valorem and occupational, which the named companies would have realized in 1933 under the new tax plan, and I reach that figure by deducting line "I" from line "L."

Plaintiff's Ex. "44" purports to be a comparison of aggregate taxes payable by certain interstate railway companies under revenue laws in force prior and subsequent to the 40-mill and other limitation acts. This is 1932 as compared with 1934, as to the same railroads covered in Ex. "43." It is made in the same manner as Ex. "43"

(St. 459). For the purpose of computing occupational taxes I have assumed that the taxable income of these various roads would be the same for 1934 as for the whole of the year 1933.

Plaintiff's Ex. "45" is a work sheet showing how the figures on exhibits "43" and "44" were computed and [fol. 297] applied. The exhibit is self-explanatory. All statements on it are correct (St. 461).

On cross-examination he further testified as follows:

You ask what the amount charged for a railroad ticket has to do with the expense that is incurred in carrying that passenger.

I don't think there is any relation. You could change your passenger rates ad libitum without in the slightest degree changing the expense of operating the passenger train either up or down. Whether your rate was three cents a mile or one cent a mile, the expenses would be the same if your operations were the same. The fact is that the number of miles the train runs has an important bearing on the expense of that train. The mail and express revenue which I have included in the passenger revenue amounts to about $463,000. All of that is assigned in the account to interstate. Undoubtedly some part of that belongs to the local business. I assigned it all to interstate because no other figures were available (St. 463). I think I know what deferred maintenance it. You ask if there has been such a thing as deferred maintenance during this depression. Not to my knowledge. I don't know anything about railroad operations so far as maintenance is concerned. The maintenance item varies from year to year. Some years you spend more and some less (St. 464). We show a return on exhibit "30" of $241,650. Mr. Peterson shows a loss on sheet 1, Ex. "7", of $413,866 (St. 465). You ask if I don't think the fact that the revenue per passenger mile is greater on interstate than on local business is due to the fact that the railroads have been trying to meet this bus and stage competition on short hauls and it would greatly reduce the rates. I don't know what it is due to. Those are computations made from the figures as reported. I didn't analyze the reason. That might be an explanation (St. 467).

[fol. 298] On redirect examination he further testified as follows:

You ask whether I would say, if I had nothing else to go by, there would be any relation between relative revenues from given services and the relative expense incident to such services. I think passenger train revenues in this instance more clearly reflects or represents the use made of passenger train service. You ask why. Well, because they are allied services here and various services that are common on passenger trains, such as a revenue derived from excess baggage, sleeping car, parlor and chair car, passnger train, milk, dining and (St. 468) buffet, hotel and restaurant, station, train and boat privilege, parcel room, etc. Mail and express should also be included. I don't know whether there is some mail and express which is purely intrastate, but I think that there is,—might be. I don't know whether there is or not, no rthe extent of it. I am using the figures submitted by the railroad company exclusively in making this computation.

On recross-examination he further testified as follows:

You ask if all I know about this matter is what I got from the defendant's exhibits. No, from the reports to the D. P. W. and the I. C. C. and the reports to the Tax Commission. (Question by plaintiff's counsel.) I did not have access to defendant's books in St. Paul. (Question by defendant's counsel.) I never asked for access (St. 470).

You ask if it is not true that the 40-mill law reducing real and personal property taxes in the state did not confer any peculiar benefits upon railroads any more than it did on any other property. No, I don't think that is true (St. 509). You ask what peculiar benefits it conferred on railroads. I think the allocation of real estate values as found by the State Board of Equalization to taxing districts on a mileage basis, as provided by the acts for distribution of [fol. 299] railroad valuation, throws a lesser value in the high levy taxing district than it does in the low taxing district, and that the valuations so allocated, for instance, to the City of Seattle or the County of King, with large terminals, does not reflect or does not correspond to the actual value of other real property within the city, and to the extent of that particular taxing district the railroad property

would bear a lesser (St. 510) burden than other real estate in that district. The law provides for the allocation, but not the 40-mill law. Such benefit, if any, existed before there was any 40-mill limit. You ask if it is a fact that the 40-mill law conferred no special benefits upon railroad or other property. Not any more than enjoyed previously, and would enjoy again if there was no 40-mill limit, if the same method of allocation was followed as is followed now. That method of allocation is provided by some other statute. There is no occupational tax levied directly upon real property (St. 511).

On redirect examination he further testified as follows:

The 40-mill limit law is not an absolute limit of all taxes to 40 mills. The tax levies range all the way from the thirties up to, I think, the highest was in Grays Harbor, 106 or 104 mills on the assessed valuation. You ask how it happens that you can levy more than 40 mills. Due to the 40-mill tax law, providing for bonded indebtedness, warrant indebtedness and interest retirement. I know there is a heavy bonded indebtedness in certain cities and taxing districts. I don't know the amount. The full amount of levy for those purposes, so far as the property in those big centers is concerned, is unaffected by the 40-mill limit, so far as the levies for the payment of these bonds and the [fol. 300] retirement of these bonds is concerned (St. 512). The N. P. would not profit any more now than it did previous to the 40-mill limit law. I mean by that that the allocation of the property valuations, for instance of the N. P., is made on the same basis as it was previously made, and that as long as the Act is in effect we would continue to allocate that value to taxing districts irrespective of the actual value of the property within the district, such as I mean in Seattle, for instance where we allocate on a mileage basis. The same value or the same rate per mile is alocated to property within the City of Seattle as is allocated, for instance, to—oh, we will take Kittitas County or any other county through which the main line runs, and it gives no effect to the intensive terminal properties within the city or county or wherever the terminal properties are located. I think that business property, hotels and apartment houses and things of that kind are paying proportionately more on the value of their property within the cities than the railroad companies are paying (St. 513).

(Question by defendant's counsel.) You ask if I mean, according to my idea of the value of railroad property. Well, as fixed by the State Board of Equalization (St. 514).

Plaintiff's Exhibits "47", "48", "49", "50" and "51" were received in evidence (St. 471). Thereupon counsel for defendant read into the record the following:

"Seattle Washington, March 12, 1934.

To the State Tax Commission, Olympia, Washington:

The undersigned challenges the validity of Chapter 191, Laws 1933 of Washington as amended, and the privilege [fol. 301] tax imposed thereby against it and upon its revenue, upon the ground that the same constitutes an unlawful exaction against it in violation of the Constitution of the State of Washington and the Constitution and laws of the United States, and the filing of this return pursuant thereto is the involuntary act of the undersigned and made under protest to avoid imposition of penalty threatened by said act. In making this return the undersigned does not waive any defense or challenge that it may properly assert against the statute as amended, or the enforcement thereof, and hereby reserves the right to assert the invalidity of said act and any tax that may be assessed against the undersigned under this return.

Northern Pacific Railway Company, (Signed) by L. B. Daponte, Western Counsel" (St. 472).

Thereupon it was admitted by counsel for defendant that no part of the occupational taxes for which this action was brought has ever been paid (St. 473).

A. S. Edmonds, called and sworn as a witness for plaintiff, testified as follows:

I reside in Portland and have been assistant traffic manager of the Union Pacific System for about 13 years. You ask if I have ever had occasion to study the problem of divisions between connecting carriers on inter-line shipments. Yes, in my present capacity and previously. You ask if I assisted in fixing the divisions of revenue in inter-line traffic as to the Union Pacific, the Oregon Short Line and the O.-W. Yes. That is to say, before they were finally approved they

were submitted to me for my approval and I then examined them and concurred in them. The Union Pacific consists of: the O.-W., Oregon Short Line, Union Pacific Railroad, Los Angeles and Salt Lake Railroad and, in some degree, the St. Jo and Grand Island (St. 474). The O.-W. consists of a line from Seattle to Huntington on the border lines between Idaho and Oregon. From an east and west standpoint, that substantially corresponds roughly with the lo- [fol. 302] cation of Spokane on the G. N. and N. P. Then we have a line from Spokane to a connection with the main line at several points, Pendleton, Umatilla, Mesner and the various branches. You ask if this system corresponds roughly with the N. P. system west of Spokane, serving Oregon and parts of Washington. Oh, substantially so, yes. They don't serve the same territory in detail by any manner of means. You say you are speaking of the east and west locations and the character of service as to the territory covered. That is about right. The Oregon Short Line consists mainly of the main line running from Huntington, Oregon to Granger, Wyoming, with a north and south line running from Butte, Montana, to Salt Lake City and Ogden, Utah and various branches. The Union Pacific Railroad Company consists of a main line approximately one thousand miles long from Council Bluffs to Ogden with various branches. It goes to Ogden; and a main line from Kansas City out to (St. 475) Denver and various branches. The majority of the traffic is handled over the main line between Ogden and Council Bluffs. On a shipment of lumber from Portland to Chicago, you ask what would be the ordinary routing of that shipment if the routing was controlled by the Union Pacific Company. Through Huntington, Granger, Council Bluffs, and there we deliver to our connection. Council Bluffs is on the west side of the Missouri River. You ask over what road we ship, say between Omaha or Council Bluffs and Chicago. Over the C. G. & W., The Burlington, Northwestern, and Illinois Central. The Northwestern is the preferred connection. You ask how the distance between Omaha and Chicago, as to shipments between Chicago and Portland over the Union Pacific system via the Northwestern, say, compares with the shipments from Portland to Chicago via the N. P. and St. Paul (St. [fol. 303] 476). About the same. It is approximately the same between St. Paul and Chicago and Omaha and Chi-

cago. That depends on what line you use, either between the Twin Cities and Chicago or between Council Bluffs and Chicago. You ask whether, with respect to the three lines, two terminal lines and intermediate line, I would say there was any general principal in regard to the apportionment of inter-line revenue as between those lines of that kind, the connecting lines of that kind as to inter-line shipment. The bases most generally used has been a mileage pro rate with a minimum of 25% to any line, whether the terminal line or the intermediate line. The local rate is the maximum generally, yes (St. 477). It might be less than 25%, depending on the agreement of the parties. These divisions would apply both west and east, to traffic going in both directions. As a rule the short line would get the 25% minimum whether it received the traffic or originated the traffic (St. 478). I would say generally that one hundred per cent of the O.-W. stock is controlled by the Short Line, and all but about fifteen hundred shares of the Short Line is controlled by the Union Pacific Railroad. That has been true for a number of years, so far as I know. You ask me to give you the divisions on interline shipments between the O.-W. and the Oregon Short Line (O. S. L.), both east and west. The O.-W. receives on their traffic interchange fifty-three percent, whether east or west bound; the Short Line forty-seven percent. The O.-W. proportion would include allowances made by us to Camas Prairie and any of the water lines that operate, more particularly the line on the Snake River. The Camas Prairie Line extends between Reparia and Grangeville with a branch running to Stites, [fol. 304] Idaho, and from there to a place known as Headquarters, north from Orphena. It extends into Washington at Reparia. The physical property of that road is largely owned share and share alike by the N. P. and O.-W. (St. 479). If the O.-W. received a shipment from some other line, say the N. P., at Portland or some other point, that line would receive a contribution out of the joint rate, which would generally be deducted before we pro-rated with our own system lines on these percentages that we are talking about (St. 480). We would first pay them and then apportion the balance 53 and 47. The same thing would generally be true if the shipment originated on the O. S. L. from some line other than the U. P. You ask what the divisions are between the O.-W., the O. S. L., and the U. P. as

to traffic between points on the O.-W. and the U. P. The O.-W. 35%, O. S. L. 27%, and U. P. 38%. In other words, on a shipment between Portland and Omaha, the O.-W. would receive 35% of the revenue, the O. S. L. 27% and the U. P. 38%. Roughly, the distance from Portland to Huntington is 390 miles approximately, from Huntington and Granger, 541 miles, and between Granger ond Omaha, about 840 or 844. The distance from Huntington to Portland is about 20 miles in excess of the distance between Portland and Spokane (St. 481). Those divisions apply whether eastbound or westbound; in whichever direction the business goes. Those divisions were effective about September 1, 1923 (St. 482). The 35% to the O.-W. is no more than it got as an independent company. When I concurred in them I stated they were substantially as high as I could negotiate if we were an independent carrier (St. 484). You ask if the division results in the O.-W. receiving more than a mileage pro-rate. On the average I would say we do not. You must remember, for example, that we get only 35% on the business originating in Portland; we likewise get 35% on business originating in Seattle or destined to [fol. 305] Seattle. Similarly we get 53% on business originating at Weiser and coming to Portland where it is nothing like 53% or, indeed, 30% of the mileage. On the other hand, on our lumber business originating at Baker and going to points on the Short Line, Salt Lake and Ogden, where we had considerable movement, we get nothing like 25%. We wouldn't get anything like 25% under the old arrangement. We got more than 25% in that divisional base, of course. On business from Portland and Portland to Omaha we get considerably more than a mileage pro-rate (St. 485). We would get about 30% on a mileage pro-rate from Seattle to Omaha. On shipments to Omaha, we would get slightly less on a mileage pro-rate, even on the longest haul, than under the present divisions. We would also get a good deal more on a mileage pro-rate on the lumber business we handled to Cheyenne, Laramie and Denver. You ask if there is not a particularly large volume of business flowing between Portland and Omaha and points east. No, not a great deal. If you eliminate perishables and lumber and even a substantial quantity of both of those is moving through the canal that we formerly handled. Our transcontinental tonnage, whether going to the Missouri River or

east thereof, is substantially lighter in both directions than it ever has been. You ask whether or not the lines, mileages between various points, and percentages indicated as to revenue and the various divisions indicated on plaintiff's Ex. "52" are correct. I didn't prepare the statements, but I would say they are substantially correct. The words "revenue 25%" on the line extending from Portland to Spokane and from Spokane to St. Paul via Chicago, Milwau-
[fol. 306] kee, means that the O.-W.'s proportion of the revenue on traffic moving from Portland to St. Paul would be 25% according to its divisions with the Milwaukee. (Question by defendant's counsel.) You ask if I know whether those things are correct. I don't know that the mileage is correct. The divisions are. (Questions by plaintiff's counsel.) It is 368 and a fraction miles from Portland to Spokane over our line. I don't know whether Exhibit "52" is taken from our actual distance tables or from our mileage books. There would be some variations because the distances are between different terminals. You ask if the 20.11% indicates the relation between 370 miles and the total distance between Portland and St. Paul via the Milwaukee Road. I don't know as to that, I didn't make the figures, but that is the intention of it, certainly. It applies also as to the G. N. (St. 488). So far as divisions are concerned, those are the correct ones (St. 489).

(Whereupon plaintiff's Ex. "52" was received in evidence. St. 489. The witness then continued:)

You ask if I really know whether the divisions between the O.-W., O. S. L. and U. P. yield to the O.-W. more or less than a mileage pro-rate. No, not as a whole. It would take millions and millions of calculations, because, to figure that out, you would have to take every pound of freight that moved from or to a point on the O.-W. and figure the individual shipments on that individual road. We are getting from the Short Line a very much less revenue on a very heavy traffic, for example, our wheat traffic, from western Idaho, than we would get from a mileage pro rate. It is one of the heaviest traffics we have (St. 491).

E. V. Peterson, called as a witness for defendant in surrebuttal, testified as follows:

[fol. 307] Sheet 2 of defendant's Ex. "53" is a statement showing the effect if allowances be made in the passenger proportion of operating expense for the proportion of the mail and express revenue and indicates that if the (St. 492) proportion of the intra-state revenue passenger miles to the passenger miles in the state be applied to the total mail and express revenue as shown for the state of Washington, that the amounts applied to intra-state would be $221,359 and would reduce the amount as previously reported from $1,500,957 to $1,279,598. The effect of that is to allow credit for the local traffic in Washington for a proportion of the mail and express revenue. I have allowed 47.76% being on the base of revenue, intra-state revenue passenger miles. You ask if I think that is fair and correct. Why, I think it is not only fair and correct, but I think, myself, that it is rather favorable to the intra-state traffic in view of the large movement of interstate service for mail and express.

Sheet 3 of the same exhibit is a redivision of the Washington State tax and operating property. Making an allowance for the amounts billed versus tenant lines, billed against tenant lines for taxes on joint property and, with that deduction, we show an amount of $1,767,716; as applying to the 11.33 Washington State tax, an addition has been made for the tax as paid to other companies on joint property, making the total to be divided $1,789,050. This amount is then apportioned between freight and passenger on the relation of operating expense, freight and passenger in the State of Washington as indicated and the freight (St. 493) proportion assigned to Washington intra-state is on the basis of the revenue net ton miles, intra-state traffic to the total revenue net ton miles of the state for the year [fol. 308] 1933. Similarly, for passenger we have applied as Washington intra-state the proportion of the percentage of 47.76%, which is based on the relation of the passenger miles intra-state to the total passenger miles. An addition has been made for the filing fee as paid to the D. P. W. of $5,272 and also the proportion of the Federal tax on relation of the Washington intra-state revenue to the system, operating revenue has been included, and the latter item is $8,066, making a total assessment of $766,309. That would be comparable to the amount of $735,389 shown in plaintiff's Ex. "29".

Sheet 4 is a restatement of a portion of the previous exhibit "7", as introduced by defendants; a revision has been made due to the fact that the tax collected from tenants and also tax paid to other lines has been eliminated. That reduces the amount of the joint facilities rent, when I take out the tax. The amount now shown on sheet 4 is $484,890 as compared with $582,774 shown by defendant's Ex. "7", pages 2 and 8.

Sheet 1 is a summary of the amounts, that is, shows the result of the adjustments I have referred to, and corresponds to sheet 1 of Ex. "7". Those allowances to the intra-state business, if made, would reduce the deficit shown on Ex. "7", page 1, of $413,866, to $69,497.

I have looked at plaintiff's Exs. "25" to "45" casually. I haven't made a very thorough survey. You ask what I have to say as to the method used on page 2 of Ex. "26" in apportioning the passenger expense. I don't think it is a proper base for this reason: the carrier has experienced a loss of passenger revenue, perhaps more on local business than on interstate and it is quite noticeable that in the last four years the revenue per passenger mile on intra-
[fol. 309] state service has been somewhat less than that for interstate service. Prior to 1929 the reverse was true. That is, the rate per passenger mile on intra-state was somewhat in excess of that for interstate. The idea is that we have a case where we are rendering a certain specific service in transporting passengers and if bus competition makes it necessary to reduce our rates on local business, it doesn't necessarily reduce the cost of doing that business and, therefore, I think the unit for passenger miles is preferable to the matter of revenue itself and another thing, the fact of inclusion of mail and express revenue as interstate, of course, has the effect of only placing a small portion of the expense against the intra-state traffic as shown by the percentage of 31.6 in the exhibit, I believe. Revenue reflects the rate charged for passenger traffic (St. 496). You ask if that has the slightest relation to the expense of doing the passenger business. Not as I see it. It couldn't possibly have any relation. You ask if you attempt to divide passenger expense on the relation of revenue, you are not using a factor which has no relation whatever to the expense. I would say so, yes. You ask if it is a fact that the passenger miles, passenger train miles, is directly

related to the expense of the passenger traffic. I would say yes, especially so in the state of Washington where the number of passengers carried are about the same for intra- and interstate as well as passenger miles (St. 497).

You ask why it is not proper to use maintenance expense for only one year. (Over plaintiff's objection.) I don't think that the maintenance charges for one year, especially at the present time when it has become necessary to defer [fol. 310] certain expenses that can be deferred, is a good measure. As a matter of fact, I don't think that the cycle of maintenance can be represented by one year even under normal conditions and this was very well recognized. That was very well recognized by the United States Government in connection with the guarantee period and also the Federal control period. In arriving at the standard return of the railroads it was provided the period was particularly specified as being the three year period ending June 30th, 1917 and the maintenance allowance for carriers in the Federal Control period likewise the guarantee period was determined on the base relationship of the expenditures on the average for the three years I mentioned. Not only that, but it is quite customary, in order to get a cycle of maintenance (St. 498) to take more than one year. Personally, I prefer a longer period than three years, were it not for the fact that, going beyond that, we get into a new economic cycle, as it were. If you go back to 1929 or 1928, the expenses are not related to present prices (St. 499).

(At this point plaintiff's counsel moved to strike the testimony of the witness in regard to why he believed that a longer period that one year should be used because such testimony would place him in the category of an expert witness on the matter, which he doesn't pose as being, he being an accountant. The motion was denied (St. 499). Whereupon the witness continued:)

The measure is like that of (St. 499) allowing the carrier to establish maintenance the way reserves are established on occasion when the amount expended did not meet the requirements of the year's accounting. Maintenance goes in cycles. Some years you spend more than others. You ask if there has been in fact, during the depression, [fol. 311] deferred maintenance. It is reflected in the accounts. The expenditures have been reduced wherever

possible. You ask if the fact that the maintenance was not actually made, doesn't prove that it wasn't incurred (St. 500).

(The following was volunteered by the witness.) It is impossible to get one week of a year that will be exact so now I find here that the net ton miles of the particular week are somewhat over 18%, 18.6% over what they would be for 1/52 of a year. As I said, it is not expected that any one week you might select would be just 1/52 of a year, but the variation is so pronounced that I fully believe, in view of that, that the application of this cost developed for one week as developed in an intra-state statement of our intra-state expense and, of course, I have not touched on that more fully before because, having in mind the passenger situation, but I wanted to bring it out now, and I think, in view of the fact that the ton miles were so great in that week and the majority of the expenses were applied on the week's basis that from some tentative figures I have prepared, that the expense could be greatly increased. I have not tried to estimate what the expenses per annum would be if this test week had been exactly 1/52 of the year. I am not taking some other week but am dividing the expense of that week so as to reflect more equally the increase of ton miles handled in that week.

(The following proceedings were then had as shown by the Statement of Facts:)

"Q. What rate per ton mile did you get, cost per ton mile?

Mr. Sharpe: Well, are you getting another week in now?

Mr. daPonte: Why don't you pay attention and you will find out?

[fol. 312] Mr. Sharpe: You mean you are taking another week?

A. No. I am dividing the expense of that week so as to reflect more equally the increase of ton miles handled in that week.

Mr. Sharpe: Well, I think this is improper now, to go and pull another week on us, or some other group of figures in rebuttal.

The Court: He may proceed.

A. I just wanted to make that statement for the record.

Mr. daPonte: Go ahead.

A. That would give a much higher cost than the expense.
Q. How much higher?

Mr. Sharpe: I object to that.

Mr. daPonte:

Q. Approximately three hundred thousand dollars?
A. Approximately that.

Mr. Sharpe: How am I to meet that kind of testimony, Your Honor?

Mr. da Ponte: Instead of using the cost for net ton mile for this test week he has taken the average cost for the entire year.

Mr. Sharpe: That is what he has done all along.

Mr. Peterson: You don't understand the (St. 502) proposition, Mr. daPonte. I have taken the per ton mile per week and applied that to the train expense and the higher expense, but on the balance of the expense of that $75,000, instead of using the ton mile for the week, I have used 1/52 of the year's ton miles on the so-called stationery expense because I had only assigned to the one week, 1/52.

Mr. daPonte:

Q. Your idea was to get the cost in a strictly average week?
A. That was the idea.
Q. Instead of the lower cost of this more favorable week.
A. That was my thought in view of the passenger situation.

Mr. daPonte: That is all."

On cross-examination he further testified as follows:

[fol. 313] I did not pick another week at all. You ask if I guessed maybe I was wrong in picking the week. No, the week happened to be one that was a little more favorable on account of using the month of October. I had made a study of this thing to find out what was a typical week when I started in. I gave what, in my opinion, was the best choice

I could make as a representative week. But you can't gauge these weeks until you get all the details of the individual traffic. That is impossible (St. 503). You can't tell until you get the figures for individual weeks. You ask me if I have to make my study first and then determine whether I hit the right week. No, not necessarily. You ask how I can tell whether I picked the right week or not unless I make a test of each of the 52 weeks you are comparing it with. The traffic for one week was normal, a little better than normal, so far as general movement was concerned, but it so happened that one week had a rather substantial movement of traffic.

You ask how much money the lines in the state of Washington realize from local mail and local express. I don't know. We know there is some, but the matter of division is a matter I can't inform you on (St. 504). I suppose that on a local train between Seattle and Grays Harbor there is an express car and a mail car. There might be a considerable amount of mail and express hauled upon that train without any local passengers being hauled. You ask if it is then not a fact that there is no reasonable relation between the number of intra-state passengers hauled on a given train and the amount of mail and express hauled on that same train. Well, the same conditions would apply perhaps to an extent on your interstate business as well as on your local business, I take it. You ask if it is not true [fol. 314] that there is no relation between the number of passenger miles represented by the passenger and the amount of mail and express hauled on the same trains (St. 505). Yes, I would say there would be a fairly reasonable relation. It wouldn't be the exact one, of course. You ask what the relation is, if there is any, between the revenue we receive for mail between Seattle and Spokane and the number of local passengers hauled on the same train. There would be the indirect, but not the direct relationship. You ask if there would be any relation between the amount of mail hauled, local mail hauled between Seattle and Spokane and the number of dead head passengers hauled. No, dead head passengers are not included in our passenger miles. You ask if it is not a fact that there wouldn't be any relation to the number of dead head passengers hauled

between Spokane and Seattle and the amount of mail hauled. Oh, no. You ask what would be the difference between the relation between the amount of local mail hauled between Spokane and Seattle and the number of pay passengers. The local pay passengers indicate the general business of that territory and if that is so, why, there would be the compensatory cost of express and mail. A lot of passengers are hauled on the bus between Spokane and Seattle. They don't haul any local mail at all. We have lost that business so far as the local business is concerned. You say we might not haul any local passengers at all on a train between Spokane and Seattle and still have to haul a lot of local mail. That is a matter to be determined by the traffic department as to what the conditions are exactly. You ask if it is not true that I don't know anything about the relation. I can't give an exact opinion of the relationship, no.

You ask if at any time I went over and examined the freight cars to determine to what extent they were main- [fol. 315] tained. No, sir. You ask if, at any time, I have gone over the right of way and the (St. 507) structures of the Northern Pacific in the state of Washington to determine whether or not those structures and that right of way were properly maintained. No, sir. I have never done it. You ask if it is not a fact that I really know nothing about it as to any one time from my own personal knowledge. I know about the general conditions from the financial standpoint. ("Q. Well, I am speaking of the actual conditions.") No, sir, absolutely not (St. 508).

(Defendant's ex. "53" was thereupon received in evidence. St. 508).

(Plaintiff's counsel thereupon agreed that defendant need not introduce in evidence the data connected with the special studies which had been brought into the court-room by defendant during the trial. St. 514.)

(It was thereupon agreed between counsel for the N. P., G. N., the State and the Court that the determination by the lower Court as to the amount of the tax would not be deemed res adjudicata against the State. St. 519.)

(Thereupon N. P. Exhibit "54" was received in evidence.)

[fol. 316] Plaintiff's Exhibit "23":

Is a copy of "The Rules Covering the Separation of Operating Expenses between Freight Service and Passenger Service on Large Steam Railways," issue of 1920, issued by the I. C. C. on December 3, 1919 (St. 187).

[fol. 317] Plaintiff's Exhibit "24":

Is a copy of the Findings of Fact and Order in Cause No. 6172, before the Department of Public Yorks of Washington, entitled "Department of Public Works of Washington, Complainant, vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al., Respondents," dated June 23, 1930, and to which proceeding, the Great Northern Railway Company, and Northern Pacific Railway Company were parties. Such Findings of Fact are in part as follows:

"Respondent N. P., the principal coal carrier in Washington, presented testimony and exhibits making certain comparisons of average expenses in Washington with the average for Wisconsin, Minnesota and North Dakota where the H. & H. scale applies. These comparisons included average operating expense, cost per revenue net ton mile; freight operating expense on the 'Interstate Commerce Commission' basis per mile of road and per 100 revenue net ton mile; 'out of pocket' costs per 100 revenue net ton mile; cost of maintenance per mile of track operated; density of traffic; taxes, etc.

"All of the operating cost figures are based upon the arbitrary allocation of revenues and expenses now employed under which interstate revenues are apportioned to states on basis of a mileage pro-rate. This disregards the terminal proportion of the revenue and gives the intermediate states as great a share in proportion to mileage as the states in which the traffic originates and terminates. It gives no consideration to relative costs in different states as constitutiing any measure of relative revenue which should be apportioned to such states. Non-revenue freight or company material is a large factor in the operating costs in Washington, but under the existing plan of localization expenses to the state in which they occur, the costs of handling company freight is not distributed in proportion to their responsibility for the expenses. Absorption

of competitive switching charges on interstate traffic and many other factors also contribute to distort the facts. The carriers, apparently to protect themselves against the misuse of state statistics, incorporate a protective clause in their annual reports to state regulatory bodies. As an example, the N. P. in its annual report to this Department includes the following note (1927 report, p. 706):

" 'The statements herein, either of revenue or expenses attributed to Washington are misleading unless properly understood. They are necessarily based on arbitrary assumption as follows:

" 'Revenues contain first the revenue of business wholly local within the state and in addition a proportion of interstate revenues determined by the proportion of mileage which each interstate freight shipment or passenger is carried within the state. Charges for expenses contain first those expenses wholly incurred within the state, and in addition some mileage proportion of expenses which cannot be localized. Apportioning either such revenues or such expenses on a mileage basis is purely arbitrary and has been adopted for want of any other basis.'

[fol. 318] "Respondents contend that the present system of allocation of revenues and expenses by states is the result of instructions from this and other regulatory bodies and that they cannot use any other method under existing conditions. The whole question is now before the Commission in Ex Parte 91 'General Revision of Accounting Rules for Steam Railroads.'

"With that proceeding pending it is obvious that nothing would be accomplished by an attempt of the Department to effect any change in its rules as to these allocations. Any plan which we might suggest as being fair to Washington could not be adopted by the carriers unless it were simultaneously adopted in other states served by the Washington carriers because no change in the present formula can be enforced which when applied to all states will not total one hundred per cent of the system revenues and expenses. It is therefore necessary for the Department in considering the statistics presented by respondents, to give them such weight as is merited with due allowance for the arbitrary assumptions upon which they are constructed."

(Here follows table, side folio 319.)

[fol. 319]

PLFF'S EX. "25"

Northern Pacific Railway Company

State of Washington—Year 1933

Gross Operating Revenues

Account		Intrastate			Interstate			Total Intrastate & Interstate		
		Freight	Passenger	Total	Freight	Passenger	Total	Freight	Passenger	Total
101	Freight	$4,836,839	.....	$4,836,839	$5,316,515	.....	$5,316,515	$10,153,354	.....	$10,153,354
102	Passenger	.....	$312,449	312,449	.....	$419,807	419,807	.....	$732,256	732,256
103	Excess Baggage	.....	2,444	2,444	.....	3,283	3,283	.....	5,727	5,727
104	Sleeping Car	.....	8	8	.....	5	5	.....	13	13
105	Parlor and Chair Car	.....	2,838	2,838	.....	1,061	1,061	.....	3,899	3,899
106	Mail	.....	.....	.....	.....	332,851	332,851	.....	332,851	332,851
107	Express	.....	.....	.....	.....	130,634	130,634	.....	130,634	130,634
108	Other Passenger Train	.....	5,935	5,935	.....	Dr. 8,847	Dr. 8,847	.....	Dr. 2,912	Dr. 2,912
109	Milk	.....	11,036	11,036	.....	3,896	3,896	.....	14,932	14,932
110	Switching	371,852	.....	371,852	.....	.....	.....	371,852	.....	371,852
111	Special Service Train	1,149	92	1,241	655	113	768	1,804	205	2,009
112	Other Freight Train	102,002	.....	102,002	28	.....	28	102,030	.....	102,030
131	Dining & Buffet	.....	22,427	22,427	.....	30,131	30,131	.....	52,558	52,558
132	Hotel & Restaurant	7,831	61,164	68,995	.....	.....	.....	7,831	61,164	68,995
133	Station, Train & Boat Privileges	.....	2,465	2,465	.....	.....	.....	.....	2,465	2,465
134	Parcel Room	.....	3,708	3,708	.....	.....	.....	.....	3,708	3,708
135	Storage—Freight	825	.....	825	.....	.....	.....	825	.....	825
136	Storage—Baggage	.....	1,661	1,661	.....	.....	.....	.....	1,661	1,661
137	Demurrage	9,741	.....	9,741	.....	.....	.....	9,741	.....	9,741
138	Telegraph & Telephone	.....	.....	.....	18,179	7,548	25,727	18,179	7,548	25,727
142	Rent of Bldgs. & Other Property	5,569	445	6,014	.....	.....	.....	5,569	445	6,014
143	Miscellaneous	46,504	3,716	50,220	12,231	2,109	14,340	58,735	5,825	64,560
151–152	Joint Facility—Net Debit	9,417	753	10,170	6,631	1,144	7,775	16,048	1,897	17,945
	Total	$5,372,895	$429,635	$5,802,530	$5,340,977	$921,447	$6,262,424	$10,713,872	$1,351,082	$12,064,954

Revenues apportioned as follows:

Freight—All of accounts #101, 110, 112, 135 and 137, direct.
Passenger—All of accounts #102 to 109, inclusive, #131, 133, 134 and 136, direct.
Accounts #111, 138, 142, 143, 151 and 152 on basis as testified to by Mr. Peterson.
Account #132 on same basis as operating expenses.

[fol. 320] PLFF's Ex. "26"

Northern Pacific Railway Company

Allocation of Passenger Operating Expenses, for the Year 1933, to Washington Intrastate passenger traffic only

(Compare N. P. Ex. 7, page 11)

Expenses related solely to passenger and allied services (D. P. W. page 707, line 247, Col. "D")		$2,020,948
Expenses apportioned to passenger and allied services (D. P. W. page 707, line 247, Col. "F")		1,121,760
Total expenses as reported		$3,142,708
Passenger train revenues:		
Intrastate (Plffs. Ex. "25.")	$ 429,635	
Interstate (Plffs. Ex. "25.")	921,447	
Total passenger train revenues (Plffs. Ex. "25.")	$1,351,082	
Ratio of Intrastate Revenue to total Intra and Interstate revenues $429,635÷$1,351,082=		31.80%
Operating expenses applicable to Intrastate passenger service $31.80% of $3,142,708=		$ 999,381

[fol. 321] PLFF's Ex. "27"

Northern Pacific Railway Company

Total Railway Operating Expenses in Connection with Washington 1933 Intrastate Operations

(Compare N. P. Ex. 7, page 6)

Freight operating expenses (N. P. Ex. 7, P. 10)	$3,291,785
Passenger operating expenses (As per plaintiff's Ex. "26")	999,381

PL'FF's Ex. "27"—Continued

Total railway operating expenses applicable to Washington intrastate traffic, year 1933	$4,291,166
Increase in operating expenses, account defendant's adjustment of revenue in connection with foreign commerce, switching and miscellaneous revenues.	
(N. P. Ex. 7, Pp. 4-5)	3,688*
Total operating expenses applicable to Washington Intrastate traffic for 1933	$4,294,854

* Error of $10.00 in defendant's exhibit.

[fol. 322] PLFF's Ex. "28"

Northern Pacific Railway Company

Amount as Credited in Account #508, Joint Facility Rent Income, and Charged in Account #541

Joint Facility Rents, for Taxes, State of Washington, Year Ending December 31, 1933

Account #508, Joint Facility Rent Income

Amount included as credits for taxes, billed against tenant lines in connection with joint facilities	$248,935.08

Account #541, Joint Facility Rent

Amount included as charges for taxes billed versus Northern Pacific, for use of lines or facilities of other companies	$21,334.34
Net amount of taxes credited to joint facility rents—Net, for year ending December 31, 1933	$227,600.74

Olympia, Washington, October 20, 1934.

Submitted by E. V. Peterson.

[fol. 323]

PLFF'S EX. "29"

Sheet 1 of 2 sheets

Northern Pacific Railway Company

Computation of Taxes Apportionable to Washington Intrastate Operations as Deduced from Defendant's Figures. (Compare N. P. Ex. 7, page 7)

	Freight	Passenger	Total Freight and Passenger
A. Car miles (DPW, p. #904–5)	57,196,045	9,685,381	66,881,426
B. Locomotive miles (DPW, p. #904, Lines 24, 29, 38, and 39)	2,781,209	1,659,592	4,440,801
C. Total car and locomotive miles	59,977,254	11,344,973	71,322,227
D. Ratio of passenger car and locomotive miles to total freight and passenger car and locomotive miles. 11,344,973+71,322,227=			15.91%
E. Ratio of freight car and locomotive miles to total freight and passenger car and locomotive miles. 59,977,-254+71,322,227=			84.09%
F. Total taxes payable on N. P. operating property for 1933. (N. P. Ex. 7, p. #7)		$2,005,015	
G. Less net amount of Washington taxes on N. P. operating property contributed by tenant roads. (Plffs. Ex. "28")		227,601	
H. Net ad valorem taxes payable by N. P. on Washington operating property for 1933			$1,777,414
I. Net Washington taxes chargeable to freight operations. (E x H)			1,494,627
J. Net taxes chargeable to passenger operations. (D x H)			282,787
K. Ratio of intrastate freight car miles to total of intra and interstate for test period. (N. P. Ex. 7, p. # 13).		42.30%	
L. Taxes apportionable to intrastate freight operations. (K x I)			632,227
M. Intrastate passenger revenues. (Plffs Ex. "25")		$429,635	
N. Total intra and interstate passenger revenues. (Plffs. Ex. "25")		1,351,082	
O. Ratio of intrastate passenger revenue to total intra and interstate passenger revenue, (M÷N)		31.80%	

[fol. 324]

Plff's Ex. "29", Sheet 2 of 2 Sheets

Northern Pacific Railway Company

Computation of Taxes Apportionable to Washington Intrastate Operations as Deduced from Defendant's Figures

(Compare N. P. Ex. 7, Page 7)

(Continued)

	Freight	Passenger	Total Freight and Passenger
P. Taxes apportionable to intrastate passenger service operations (O x J)			$89,926
Q. Total ad valorem taxes apportionable to intrastate freight and passenger operations. (L÷P).....			722,153
R. Other taxes apportioned by defendant to Washington intrastate operations.....	$5,170		
(N. P. Ex. #7, p. #7).....	8,066		
			13,236
Total of all taxes apportionable to Washington intrastate operations..			$735,389

[fol. 325] PLFF'S EX. "30"

Northern Pacific Railway Company

Computation of Railway Operating Income from Washington, 1933, Intrastate Operations

(Compare N. P. Ex. 7, Page 1)

(1) Gross operating revenue (N. P. Ex. 7, p. 4)	$5,271,893
(2) Operating expenses (Plff's. Ex. "27").....	4,294,854
(3) Net revenue from railway operation	977,039
(4) Railway taxes on operating property (Plffs. Ex. "29").....	735,389
(5) Railway operating income.....	241,650

[fol. 326] PLFF'S EX. "31"

Sheet 1 of 2 Sheets

Northern Pacific Railway Company

N. P. Ex. 7, page 19, Corrected to show results of taking year 1933 only as to Maintenance of Way & Structures expense.

Percent of total expense for Maintenance of Way & Structures—

3 year average apportioned to Idaho & Tacoma divisions:

(A) Amount apportioned to Idaho division	$499,257.79
(B) Amount apportioned to Tacoma division	1,027,538.44
(C) Total for 2 divisions	1,526,796.23
(D) Percent apportioned to Idaho division (A÷C)	32.70%
(E) Percent apportioned to Tacoma division (B÷C)	67.30%

	Idaho Division (x)	Tacoma Division (y)	Total (z)
(F) Maintenance of Way & Structures for 1933—Total as reported by carrier and proportions as above indicated (Col. C, Col. E, line 110, p. 704, DPW) $137,179.15+$1,051,878,63=			$1,189,057.78
(G) Apportioned to Idaho division (F x D)	388,821.89		
(H) Apportioned to Tacoma division (F x E)		$800,235.89	
(I) Week of Oct. 22–28, 1933 7/365 or 1.918%	(.01918 x G) $7,457.60	(.01918 x H) $15,348.52	(.01918 x F) $22,806.12

Less amount as used in terminal studies as follows:

(K) Relation of 1933 only to average for 3 years:
$1,189,057.78÷$1,526,796.23=77.88%
(L) Idaho division $836.01 x .7788=651.08
(M) Tacoma division $3,052.56 x .7788=2,377.33

[fol. 327] (Plff's Ex. "31", Sheet 2 of 2 Sheets

Northern Pacific Railway Company

N. P. Ex. 7, page 19, corrected to show results of taking year 1933 only as to Maintenance of Way & Structures expense

	Idaho Division (x)	Tacoma Division (y)	Total (z)
(N) Total Idaho & Tacoma divisions $3,888.57 x .7788	.....	.....	$3,028.41
(O) Total Maintenance of Way & Structures—Freight	$6,806.52	$12,971.19	19,777.71
(P) Intrastate proportion based on freight car miles for test week Oct. 22–28, 1933, as follows	22.71%	55.34%	
(Q) Intrastate	1,545.76	7,178.26	8,724.02
Interstate	5,260.76	5,792.93	11,053.69

[fol. 328] PLFF'S EX. "32"

Northern Pacific Railway Company

Correction of N. P. Ex. 7, p. 14, Freight Car Repairs, Depreciation and Retirements by Using Freight Train Car Repairs Expense Item for 1933 only Instead of Three Year Average.

(A) Freight train cars—"repairs" (1933 only) (DPW, p. 704, line 125)	$420,070.28
(B) Depreciation (DPW, p. 704, line 126)	594,307.22
(C) Retirements (DPW, p. 704, line 127)	17,579.23
(D) Total	$1,031,956.73
(E) Percentage applicable to week of October 22–28, 1933, 7/365 or	1.918%
(F) Amount applicable to week of October 22–28, 1933, (E x D)	$19,792.93
(G) Intrastate proportion based on relative car miles (N. P. Ex. 7, p. 13)	42.30%
(H) Amount as assigned to intrastate freight traffic (F x G)	8,372.41

[fol. 329] PLFF'S EX. "33"

Northern Pacific Railway Company

Defendant's Analysis of Operating Expenses as Applicable to Washington Intrastate Freight Traffic, for the Week of October 22 to 28, 1933. (N.P. Ex. 7, p. 12, as corrected by Plffs. Ex's. "31"–"32")

Washington Intrastate Traffic

Train and Engine Wages	$9,826.25	
Fuel for locomotives, water, lubricants, other supplies and engine house expenses	6,683.07	
Locomotive repairs (road service)	4,592.71	
Yard expenses	9,104.69	
Freight car repairs, depreciation and retirements	8,372.41	(Plffs. Ex.
Steam locomotives, depreciation and retirements	1,187.64	"32")
Station employees and station supplies and expenses	9,603.60	
Miscellaneous transportation accounts	2,877.65	
Miscellaneous maintenance of equipment accounts	1,477.30	
Maintenance of way and structures	8,724.02	(Plffs. Ex.
Traffic expenses	3,086.41	"31")
General expenses	5,945.44	
Transportation for Investment Cr.	60.36 R	
Total freight operating expenses	$71,420.83	

[fol. 330] PLFF'S EX. "34"

Northern Pacific Railway Company

State of Washington

October 22–28, 1933

Correction of N. P. Ex. 7, p. 10 to conform to Plaintiff's Ex. "33".

(A) Amount of intrastate freight operating expenses, week of October 22–28, 1933 (Plffs. Ex. "33".)	$71,420.83
(B) Revenue net ton miles	7,629,079.00
(C) Operating expense cost per revenue net ton mile (cents) (A ÷ B)	.93617

Year 1933

Total Freight Operating Expenses on Above Basis for Year 1933

(D) Revenue net ton miles, Washington intrastate, year ending December 31, 1933 (DPW, p. 906, item 94)	334,493,591.00
(E) Operating expense cost per revenue net ton mile as above for week of October 22–28, 1933 (cents) (Line C)	.93617
(F) Total freight operating expenses (D x E)	$3,131,429.00

[fol. 331] PLFF'S EX. "35"

Northern Pacific Railway Company

Computation of Operating Ratio as to Washington Interstate Freight Traffic for 1933 Assuming Accuracy of Defendant's Figures as to Operating Expenses on Intrastate Freight

Revenues—Freight:	
(A) Freight revenues—Interstate (Plffs. Ex. "25")	$5,340,977
Operating Expenses—Freight:	
(B) Total operating expenses in Washington as to freight service only	
(Col. C, p. 707 DPW)	5,324,757
(Col. E, p. 707, DPW)	2,677,576
Total	$8,002,333
(C) Total operating expenses in Washington as to Intrastate freight service as computed by Def. (Plffs. Ex. "34" in F)	3,131,429
(D) Total operating expenses in Washington as to Interstate freight service (B − C)	4,870,904
(E) Operating ratio as to Washington interstate traffic for 1933 resulting from defendant's calculations (D ÷ A)	91.20%

[fol. 332] PLFF'S EX. "36"

Northern Pacific Railway Company

Correction of N. P. Ex. 7, pp. 4–5, to Show Result of Using Operating Expenses Incident to Freight Traincar—Repairs and Maintenance of Way and Structures for 1933 only Instead of Average for Three Years as Computed by Defendant

(A) Operating revenues State of Washington intrastate as reported to Dep. of Public Works				$5,802,530
(B) Deduction account of amount as included in connection with foreign commerce as computed by defendant:				
August 1933	$20,311			
September 1933	28,563			
October 1933	30,559			
November 1933	28,585			
December 1933	86,588			
		$194,606		
January to July 1933 estimated on basis of $25,000 per month		175,000		
			$369,606	
(C) Deduction account of switching in connection with interstate traffic included as intrastate; as computed by defendant:				
August 1933	$16,660			
September 1933	17,962			
October 1933	14,139			
November 1933	11,763			
December 1933	11,827			
		$72,351		
January to July, 1933 on basis of ratio of interstate to total in months of August to December 1933		88,680	161,031	530,637
(D) Operating revenues in Washington—intrastate as reported by Dep. of Public Works, less above deductions—(A−(B+C)=				$5,271,893

(Plff's Ex. "36")—Continued

(E) Operating expenses account of above reductions—Freight operating revenue intrastate 1933 (Acct. 101) as reported to Dep. of Public Works	$4,836,839	
(F) Freight operating expenses as used in connection with above revenue (See Plff's. Ex. "34")	3,131,429	
(G) Operating ratio as to intrastate freight operations for 1933 (F ÷ E) =	64.74%	
(H) Reduction of operating expenses by reason of exclusion of revenue from foreign commerce 64.74% of $369,606, or	239,283	

[fol. 333] Northern Pacific Railway Company

Correction of N. P. Ex. 7, pp. 4–5 to Show Result of Using Operating Expenses Incident to Freight Train Car—Repairs and Maintenance of Way and Structures for 1933 Only Instead of Average for Three Years as Computed by Defendant.

(I) As no expenses were figured in connection with switching revenue no deduction is made for operating expenses in that connection, but freight operating ratio as explained has been applied to intrastate switching revenue of $210,821 – 64.74% of $210,821	$136,486	
(J) Operating expenses as computed on freight operating ratio for miscellaneous freight revenue accounts excluding switching account 110—64.74% of $164,204	106,306	
(K) Railway operating expenses incident to intrastate freight operations computed from above figures:		
(K–L) Freight operating expenses as used in connection with account 101 (Line F)		$3,131,429
(K–2) Plus operating expenses incident to intrastate switching (Line I)	136,486	
(K–3) Plus operating expenses incident to Miscellaneous revenue items (Line J)	106,306	
Total of Lines K–2 and K–3	242,792	
(K–4) Less operating expenses incident to foreign commerce eliminated (Line H)	239,283	3,509
(K–5) Total freight operating expenses incident to intrastate freight operations (K–2 plus K–3 minus K–4)		$3,127,920
(L) Railway operating expenses incident to intrastate freight traffic as computed by defendant (N. P. Ex. 7, pp. 4–5) $3,291,785 + $3,698 =		$3,295,483
(M) Net reduction in railway operating expenses incident to intrastate freight traffic as corrected (L – K–5)		167,563
(N) Railway operating income as shown on Plaintiff's Ex. "30", after correction of Defendant's showing of operating expenses and taxes		241,650
(O) Railway operating income after correction of Defendant's computations as to freight and passenger operating expenses and taxes (N + M)		$409,213

[fol. 334] PLFF'S EX. "37"

Northern Pacific Railway Company

Reduction in Operating Expenses as to Washington 1933 Intrastate Traffic if Expense Item for Pensions Eliminated

Expenses related solely to freight service (DPW p. 707, In 247, Col. C)	$5,324,757		
Expenses apportioned to freight service (DPW p. 707, In 247, Col. E)	2,677,576	$8,002,333	100.00%
Less 1933 expenses on Washington Intrastate freight traffic (N. P. Ex. 7, pp. 4–5)		3,295,483	41.18%
Railway operating expenses on Washington Interstate freight traffic		$4,706,850	58.82%

Pensions:		
Freight (DPW p. 707, In 238)	$194,689	
Passenger (DPW p. 707, In 238)	73,265	
	$267,954	
Amount by which operating expenses incident to Intrastate freight traffic should be reduced if pension charge eliminated. 41.18% of $194,689=		$80,173
Percentage of railway operating expenses apportionable to Washington for the year 1933: Intrastate Passenger Traffic (Plffs. Ex. "29")		31.80%
Amount by which operating expenses incident to Intrastate passenger traffic should be reduced if pension charge eliminated 31.80% of $73,265=		23,298
Total deduction in railway operating expenses incident to Washington's 1933 Intrastate traffic, both freight and passenger, resulting from elimination of pension expense item		$103,471

[fol. 335] PLFF'S EX. "38"

Northern Pacific Railway Company

State and Federal Taxes Chargeable to Washington Intrastate Traffic—Year 1933

		Amount of Taxes Applicable	
Gross railway operating revenues, System, 1933 (DPW p. 301, In 2)	$47,578,676		
Total State and Federal Taxes accrued. (DPW p. 312, In 50)		5,883,250*	
Ratio of total taxes to total railway operating revenues.		12.365%	
Intrastate freight revenue	$4,842,258	12.365%	$598,745
Intrastate passenger revenue (N. P. Ex. # 7, p. 7)	429,635	12.365%	53,124
Total	$5,271,893	12.365%	$651,869
Washington filing fees (N. P. Ex. #7, p. 7)			5,170
Total Washington Taxes (See Note)			$657,039

* From this amount should be deducted net contribution in taxes by tenant lines.

[fol. 336] PLFF'S EX. "39"

Northern Pacific Railway Company

Computation Showing Total Railway Operating Revenues Apportionable to Washington for 1933 on Assumption that Operating Ratio as to Intra and Interstate Freight Traffic is the Same as Shown by N. P. Ex. 7, as to Intrastate.

(A) Railway operating expenses—intra and interstate freight operations for the year 1933. (Page 707, DPW)	
(Line 247, Col. C)	$5,324,757
(Line 247, Col. D)	2,677,576
Total	$8,002,333
(B) Railway operating expenses on 1933 Washington intrastate freight traffic (Plff's. Ex. "36", In K-5)	$3,127,920
(C) Railway operating expenses on 1933 Washington interstate freight traffic (A−B)=	$4,874,413
(D) Operating ratio as to 1933 Washington intrastate freight traffic (Plff's. Ex. "36", In G)	64.74%
(E) True railway operating revenues on 1933 Washington interstate freight traffic if operating ratio as to such traffic is same as on intrastate freight traffic (C÷D)=	$7,529,214
(F) Railway operating revenues on 1933 Washington intrastate freight traffic (N. P. Ex. 7, p. 7)	$4,842,258
(G) Railway operating revenues on 1933 Washington passenger traffic intra and interstate (Plff's. Ex. "25")	$1,351,082
	$13,722,554

[fol. 337] PLFF'S EX. "40"

Northern Pacific Railway Company

Taxes Apportionable to Washington 1933 Intrastate Railway Operations on Assumption that Operating Ratio as to Washington Interstate Freight Operations is Same as on Intrastate Freight Operations. (Compare N. P. Ex. 7, p. 7)

(A) Washington gross operating revenue for 1933, assuming operating ratio on interstate freight traffic same as operating ration on intrastate freight traffic. (Plffs. Ex. "39")		$13,722,554
(B) Ad valorem taxes on defendant's operating property (N. P. Ex. 7, p. 7)	$2,005,015	
(C) Net amount contributed by tenant lines	227,601	
(D) Net ad valorem taxes payable by defendant		1,777,414
(E) Ratio of said taxes to revenue (D ÷ A) =		12.953%
		Amount of Taxes Applicable
(F) Intrastate freight and passenger revenue (N. P. Ex. 7, p. 4)	$5,271,893	
(G) Taxes applicable $5,271,893 x 12.955% =		$682,868
(E) Plus filing fee 1/10 of 1% (N. P. Ex. 7, p. 7)		5,170
(I) Plus federal taxes as apportioned (N. P. Ex. 7, p. 7)		8,066
(J) Total taxes apportionable		$696,104

[fol. 338] PLFF'S EX. "41"

Northern Pacific Railway Company

Revenue per Ton Mile of Freight Hauled in Washington in 1933 (1) Interstate, (2) Intrastate and (3) Percent of Difference Between Interstate and Intrastate

(A) Ton miles revenue freight (intrastate only) (p. 906 DPW (94)			334,493,591
(B) Freight revenues—intrastate traffic only (p. 700 ln 1, DPW rep.)			$4,836,839.24
(C) Revenue per ton mile on intrastate freight traffic (B ÷ A)			$0.01446
(D) Total ton miles in Washington (revenue freight)—inter and intrastate (p. 905 ln 94 DPW)	839,237,509		
(E) Intrastate only (Line "A")	334,493,591		
(F) Interstate only (D − E)	504,743,918		504,743,918
(G) Freight revenue—interstate traffic only (p. 700, ln 1 DPW)			$5,316,514.76
(H) Revenue per ton mile—interstate freight only (G ÷ F)			$0.01053
(I) Percentage by which revenue per ton mile on intrastate freight exceeds revenue per ton mile on interstate freight (C − H) ÷ H =			37.32%

[fol. 339] PLFF'S EX. "42"

Northern Pacific Railway Company

Revenue per Passenger Mile in Washington in 1933 (1) Interstate, (2) Intrastate and (3) Percent of Difference Between Interstate and Intrastate

(A) Revenue passenger miles (intrastate only) (p. 906 DPW)			18,052,604
(B) Passenger Revenue—intrastate traffic only (p. 700 ln 2, DPW)			$312,449.06
(C) Revenue per revenue passenger mile on intrastate traffic (B ÷ A) =			$0.01730
(D) Total revenue passenger miles in Washington, both inter and intrastate (p. 905 ln 98 DPW)	37,802,392		
(E) Intrastate only (A)	18,052,604		
(F) Interstate only (B − E)			19,749,788
(G) Passenger revenues—interstate traffic only (p. 700 ln 2 DPW)			$419,806.90
(H) Revenue per passenger mile—interstate traffic only (C ÷ F) =			$0.02125
(I) Percentage by which revenue per revenue passenger mile on interstate business exceeds revenue per revenue passenger mile on intrastate (H − C) ÷ C) =			22.83%

[fol. 340]

PLFF's Ex. "43", Page 1

Comparison of Aggregate Taxes Payable by Certain Interstate Railroad Companies Under Revenue Laws in Force Prior and Subsequent to 40-Mill and Other Limitation Acts—1932 Compared with 1933

Line No.		On Operating Property Of				
		N. P.	G. N.	O.-W.	Milw.	Total
A.	Total ad valorem taxes levied in 1932 payable in 1933	$2,464,986	$1,556,485	$750,535	$827,264	$5,599,270
B.	Equalized assessed valuations for					
	(1) 1932	44,658,663(a)	30,710,723	18,293,038	16,649,871(b)	110,312,295
	(2) 1933	42,864,636	29,304,046	16,734,784	14,841,004	103,744,470
C.	Ratio of 1933 assessed value to 1932 assessed value (line B(2) ÷ line B(1))	95.982802%	95.419590%	91.481710%	89.135850%	94.0456153%(c)
D.	Total ad valorem taxes that would have been payable for 1933 on basis of 1932 millage rates (Ln A x line C)	2,365,963	1,485,192	686,602	737,389	5,275,146
E.	Total ad valorem taxes payable for 1933 levied under 40-mill and other limitation acts	2,005,014	1,250,860	608,327	648,440	4,512,641
F.	Total amount of occupational taxes payable for 1933 had same been imposed for entire year 1933	87,038	47,056	10,928	19,713	164,735
G.	Total ad valorem taxes plus occupational taxes, if imposed for entire year 1933, payable for 1933 (line E + line F)	2,092,052	1,297,916	619,255	668,153	4,677,376
H.	Net savings in total taxes, ad valorem and occupational, which said companies would thus have realized in 1933 under new tax plan (Ln D−Ln G)	273,911	187,276	67,347	68,236	597,770
I.	Ad valorem taxes for state purposes which would have been levied for 1933 under revenue laws in force prior to 40-mill and other limitation acts	700,086	460,684	272,507	238,705	1,671,982

[fol. 341]

PLFF'S EX. "43" Page 2

J. Ad valorem taxes for state purposes actually levied for 1933 under 40-mill and other limitation acts	$321,992	$211,884	$125,335	$109,788	$768,999
K. Occupational taxes if levied for entire year 1933 (see line F above)	87,038	47,056	10,928	19,713	164,735
L. Total ad valorem taxes for state purposes for 1933 under 40-mill and other limitation acts, plus total occupational taxes payable for 1933 had same been imposed for that entire year (line J + line K)	409,030	258,940	136,263	129,501	933,734
M. Net savings in total taxes for state purposes, ad valorem and occupational, which said companies would thus have realized in 1933 under the new tax plan (line I — line L)	$291,056	$201,744	136,244	$109,204	$738,248

(a) Based on $105,000,000 full value as used in settlement.
(b) Actual reassessment value.
(c) 5,275,146 ÷ 5,599,270, equals 94.211317%.

[fol. 342]

PLFF'S EX. "44", Page 1

A. Total ad valorem taxes levied in 1932 payable in 1933	$2,464,986	$1,556,485	$750,535	$827,264	$5,599,270
B. Equalized assessed valuations for:					
(1) 1932	44,658,663(a)	30,710,723	18,293,038	16,649,871(b)	110,312,295
(2) 1934	40,167,043	27,577,404	15,[illegible]2,547	13,803,937	97,000,931
C. Ratio of 1934 assessed value to 1932 assessed value (line B (2) ÷ line B (1))	89.942332%	89.797313%	84.472284%	82.907171%	87.933919%(c)
D. Total ad valorem taxes which would be payable for 1934 on basis of 1932 millage rates (ln A x ln C)	2,217,066	1,397,682	633,994	685,861	4,934,603
E. Total ad valorem taxes which would be payable for 1934 under 40-mill and other limitations acts, on basis of 1933 millage rates.	1,878,833	1,177,157	561,716	603,128	4,220,834

PLFF's Ex. "44", Page 1—Continued

Line No.		On Operating Property Of				
		N. P.	G. N.	O.-W.	Milw.	Total
F.	Total amount of occupational taxes which would be payable for 1934 on assumption that companies' revenues will be same in 1934 as in 1933	87,038	47,056	10,928	10,713	164,735
G.	Estimated total ad valorem taxes plus occupational taxes payable on said assumption for 1934 (line E + line F)	1,965,871	1,224,213	572,644	622,841	4,385,569
H.	Estimated net savings in total taxes, ad valorem and occupational, which said companies would thus realize in 1934 under new tax plan (line D − line G)	251,195	173,469	61,350	63,020	549,034

[fol. 343]

PLFF's Ex. "44", Page 2

I.	Ad valorem taxes for state purposes which would have been levied for 1934 under revenue laws in force prior to 40-mill and other limitation acts	715,244	471,728	273,610	241,343	1,701,925
J.	Ad valorem taxes for state purposes actually levied for 1934 under 40-mill and other limitation acts	298,738	197,028	114,279	100,802	710,847
K.	Occupational taxes for 1934 if same as for 1933 (see line F above)	87,038	47,056	10,928	19,713	164,735
L.	Total ad valorem taxes for state purposes for 1934 under 40-mill and other limitation acts, plus total occupational taxes payable for 1934 if revenues the same in 1934 as in 1933 (line J + line K)	385,776	344,084	125,207	120,515	875,582
M.	Estimated net savings in total taxes for state purposes, ad valorem and occupational, which said companies would, on this assumption, realize in 1934 under new tax plan (ln. I − ln. L)	$329,468	$227,644	$148,403	$120,828	$826,343

(a) Based on $105,000,000 full value as used in settlement.
(b) Actual reassessment value.
(c) 4,934,603 + 5,599,270, equals 88.129399%.

[fol. 344] PLAINTIFF'S EXHIBIT "45"

Is a work sheet showing how the figures on Plaintiff's Exhibits "43" and "44" were applied (St. 461).

[fol. 345] DEFENDANT'S EXHIBIT "46"

Purports to be a copy of the Washington State Statistics embodied in the N. P's annual report to the D. P. W. for the year ending December 31, 1931. This is omitted for the reason that pertinent parts can be readily referred to in the briefs.

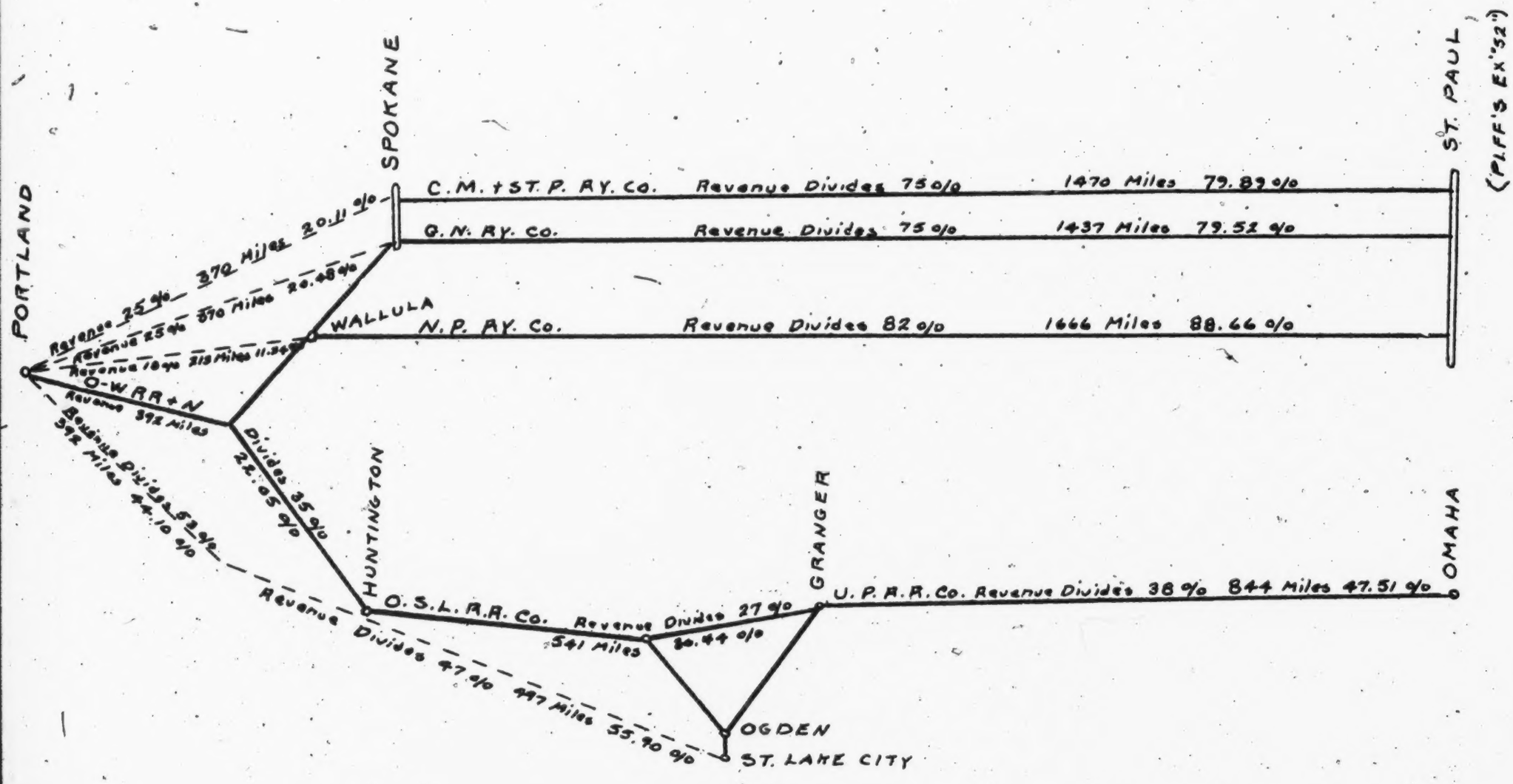
[fol. 346] PLFF'S EXS. "46"–"51"

Plaintiff's Exhibits "46" to "51" inclusive:

Are certified copies of Business Tax Returns made by the Northern Pacific Railway Company (by Wm. C. Pinger, Assistant General Auditor), for each of the months of August to December, 1933, inclusive, and contain the following data:

	August to December, 1933, inclusive					
	August 1933	September 1933	October 1933	November 1933	December 1933	Aug. 1933 to Dec. 1933
Gross Amount	$1,188,452.81	$1,138,425.09	$1,052,912.40	$993,785.95	$926,213.81	$5,299,790.06
Proceeds of sales or income derived wholly in interstate or foreign commerce	684,842.42	620,268.03	549,659.95	461,523.92	458,358.78	2,774,553.10
Proceeds of sales to the United States Government, its departments or institutions	8,954.34	3,162.60	6,224.54	5,198.37	4,892.09	28,431.94
Proceeds of sales to the state of Washington, its departments or institutions	15,312.50	15,312.50	18,312.50	20,312.50	22,300.00	91,550.00
Total amount of deductions	709,109.26	638,743.13	574,196.99	487,034.79	485,450.87	2,894,535.04
Taxable amount	479,343.55	499,681.96	478,715.41	506,751.16	440,762.94	2,405,255.02
Amount of tax	7,190.15	7,495.23	7,180.73	7,601.27	6,611.44	36,078,82

(Here follows 1 drawing, folio 347.)


PORTLAND
SPOKANE
ST. PAUL
(PLFF'S EX'32')
C.M.+ST.P. RY. CO. Revenue Divides 75 o/o 1470 Miles 79.89 o/o
G.N. RY. CO. Revenue Divides 75 o/o 1437 Miles 79.52 o/o
N.P. RY. CO. Revenue Divides 82 o/o 1666 Miles 88.66 o/o
WALLULA
Revenue 25 o/o 370 Miles 20.11 o/o
Revenue 25 o/o 370 Miles 20.48 o/o
Revenue 18 o/o 213 Miles 11.34 o/o
O-W RR+N
Revenue 392 Miles
Revenue Divides 52 o/o
392 Miles 44.10 o/o
Revenue Divides 35 o/o
22.05 o/o
HUNTINGTON
O.S.L. R.R. Co. Revenue Divides 27 o/o
541 Miles
30.44 o/o
GRANGER
U.P.R.R. Co. Revenue Divides 38 o/o 844 Miles 47.51 o/o
OMAHA
Revenue Divides 47 o/o 497 Miles 55.90 o/o
OGDEN
ST. LAKE CITY

[fol. 348]

DEF.'S EX. 53
(Sheet 1)

Northern Pacific Railway Company

Results of Intrastate Operations
State of Washington
Year 1933

If tentative allowance is made for intrastate proportion of mail and express revenue and proportion of net taxes credited under joint facility rents—net:

1. Gross Operating Revenue	$5,271,893
2. Operating Expenses	4,575,081
3. Net Revenue from Railway Operation	696,812
4. Railway taxes on operating property	766,309
5. Railway operating income & Deficit	69,497R

R Indicates Red Figure.

[fol. 349]

Def.'s Ex. 53
(Sheet 2)

Northern Pacific Railway Company

State of Washington—Year 1933

Passenger proportion of Operating Expenses, Intrastate.

Total passenger proportion of Operating Expenses year 1933, intra and interstate			$3,142,708
Revenue Passenger miles		%	
Intrastate	18,052,604	47.76	
Interstate	19,749,788	52.24	
	37,802,392	100.00	
Passenger proportion of Operating Expenses as applicable to Intrastate Traffic 47.76% of $3,142,708 or			1,500,957
Less Intrastate proportion of mail and express revenue as below			221,359
			1,279,598
1. Mail and express revenue (Accts. 106 and 107) total state		$463,485	
2. Intrastate proportion 47.76% (Based on relation of intrastate revenue passenger miles to total passenger miles in State.)			
3. Assignment to intrastate 47.76% of $463,485			$221,359

[fol. 350]

Def.'s Ex. 53
(Sheet 3)

Northern Pacific Railway Company
State of Washington—Operating Expenses
Year ended December 31, 1933.

State Taxes.

Taxes for 1933 on operating property as assessed			$2,005,015	
Less bills versus other companies for taxes on joint lines			237,299	
			1,767,716	
Add amount included in 1933 for taxes paid to other companies on joint property			21,334	
			1,789,050	
Operating Expenses Washington—1933				
Freight	$8,002,334	71.80	1,284,538	
Passenger	3,142,708	28.20	504,512	
Total	11,145,042	100%	1,789,050	
Inspection and filing fee 1/10th of 1% of intrastate revenues				5,272
Washington intrastate proportion of freight on relation of net ton miles 39.86%			512,016	
Washington intrastate proportion of passenger on relation of passenger miles		47.76%	240,955	752,971
Total State Taxes				758,243
Federal taxes system $72,797				
System operating revenue		$47,578,677		
Washington Intrastate revenue		5,271,893		
Ratio of Wash. Intrastate		11.080%		
Federal taxes Washington intrastate				8,066
				$766,309

[fol. 351]

Def.'s Ex. 53
(Sheet 4)

Northern Pacific Railway Company
State of Washington, Year 1933.
Joint Facilities Rents—Net.

	Freight	Passenger	Total
Joint Facility Rents—Net	$815,241	$539,823	$1,355,064
Less amount included amount of taxes collected from tenant lines less amount paid other companies	136,932	90,669	227,601
	678,309	449,154	1,127,463
Intrastate proportion of freight based on ratio of intrastate net ton miles 1933 39.86%	270,374		270,374
Intrastate proportion of passenger based on ratio of passenger miles intrastate to total passenger miles 47.76%		214,516	214,516
Total	270,374	214,516	484,890

[fol. 352] DEFENDANT'S EXHIBIT "54"

Purports to be a typewritten report of certain excerpts from the testimony of W. M. Burn, a witness called in behalf of the G. N. in the case of State of Washington vs. Great Northern Railway Company, which is, in substance, as follows:

In the case of both maintenance of way and structures and maintenance of equipment I used three-year average cost figures. I used the three years ended December 31, 1933.

(The witness was then asked what he had to say of the propriety of using a three-year period instead of the figures for the year 1933. To this question plaintiff's counsel objected on the ground that the witness was an accountant and not an operating man, and it was not shown that he knew what the condition of the road was either at the beginning of 1933 or the end of 1933 and whether or not there was any deferred maintenance. The objection was overruled, whereupon the witness testified:)

I may answer in this way, that in my experience as an accountant and statistician I have never seen maintenance of way and structures and maintenance of equipment expenses based on one year alone. I have never seen any statistics to that effect. And by using only one year, especially for maintenance of way and structures, I don't think you get a complete picture of the situation. For example, I would take for an example if a road has some large washout or a bridge destroyed, it may cost a large sum to restore it, and they may elect, instead of putting all of that cost into the year in which it happened, to spread it over three or four years. And you can readily conceive of some yards whose business was so poor they spend little or no money for maintenance. And if you would take that year, your maintenance costs, of course, would not reflect the true condition.

(Plaintiff's counsel thereupon moved to strike said testimony on the ground that the witness was not qualified to testify. The motion was denied, whereupon the witness continued:)

[fol. 353] You ask if the money actually spent on the maintenance of the railroad in a given year measures the deterioration of its property during that year, necessarily. No, sir, the upkeep of your property is based on two factors, one due to the wear—due to weather conditions, and the other due to use. Now it has generally been conceded by maintenance engineers that two-thirds of your depreciation is due to wear and one-third to use. So one year would not reflect true conditions as regards maintenance of way. That is, a railroad might spend the money for maintenance when it had it, but nevertheless would be incurring the damage and deterioration of its property by the action of the elements when it did not have the money to spend. And the same may be said of locomotives and freight cars. They deteriorate too, through age and obsolescence, regardless of the use in a particular year.

[fol. 354] On November 13, 1934, the court, on motion of plaintiff, reopened the case for the purpose of permitting plaintiff to introduce further evidence as to the matters and things set forth in the affidavit of C. A. Manschreck hereinafter set forth (St. 524).

Pursuant to said order a further hearing was had on November 16, 1934, both parties being represented by counsel (St. 522). C. A. Manschreck was present and prepared to testify on behalf of plaintiff, and it was thereupon stipulated that the Manschreck affidavit hereinafter set forth should be accepted in lieu of his testimony, and that defendant might file an affidavit in rebuttal thereto, and if so received, would be accepted the same as if the witness were called and testified, but the plaintiff should have the right to cross examine such witness of defendant if counsel so desired (St. pp. 522-523).

The said affidavit of C. A. Manschreck is as follows (St. 525-541):

[fol. 355] Affidavit of C. A. Manschreck (St. — to —)

"C. A. Manschreck, being first duly sworn, on oath deposes and says: That he is the same "C. A. Manschreck" who has already testified in the within entitled action and who prepared Plaintiff's Exhibits '25' to '45,' inclusive, introduced in evidence in said action. That since testifying in said cause, affiant has made a study of N. P. Exhibit

'7' (introduced in evidence by defendant in said cause) for the purpose of determining what, if any, portion of the sum of $111,757 appearing in the last item of said N. P. Exhibit '7,' page 4, should be charged as part of the railway operating expenses incident to Washington 1933 intrastate freight traffic, in addition to the other charges of railway operating expenses elsewhere charged to such intrastate traffic for the year 1933, and from such study affiant finds that no part of such item of $111,757 should be charged as an operating expense as to such intrastate freight traffic save and except the sum of $8,026, and that from the total amount of operating expenses incident to Washington 1933 intrastate freight and passenger traffic as computed by plaintiff in Plaintiff's Exhibits '27' and '30' to-wit: the sum of $4,294,854, there should be consequently deducted the sum of $103,731 ($111,757 less $8,026), leaving a total of operating expenses incident to Washington 1933 intrastate freight and passenger traffic of not to exceed $4,191,123 and a corresponding increase in the item "Railway operating income" in Plaintiff's Exhibit '30' by the sum of $103,731, thereby making said item not less than $345,381.

"That the reasons for affiant's aforesaid conclusions are as follows:

"The railway operating expenses incident to all defendant's freight operations in Washington and chargeable against all freight revenues received by defendant in connection with its operations in Washington are reported to the Department of Public Works of the state of Washing-
[fol. 356] ton in reports filed annually with such Department as required by law, and in such report for the year 1933 and for many years theretofore, defendant has divided its railway operating expenses incident to its freight traffic in Washington (See N. P. Exhibits '8' and '9,' pp. 702-707) into eight main headings, and has further subdivided the first seven of said main headings into items of expense, each bearing an account number as follows:

"I. Maintenance of Way and Structures, Account Numbers 201-280, inclusive;

"II. Maintenance of Equipment, Account Numbers 301-338, inclusive;

"III. Traffic, Account Numbers 351-359, inclusive;

"IV. Transportation-Rail Line, Account Numbers 371-420, inclusive;

"V. Transportation-Water Line, Account Numbers 431-433, inclusive;

"VI. Miscellaneous Operations, Account Numbers 441-446, inclusive;

"VII. General, Account Numbers 451-462, inclusive;

"VIII. Transportation for Investment-Cr. (No account numbers).

"That in computing the amount of such railway operating expenses incident to defendant's freight traffic in Washington for the year 1933, defendant, in its calculations in N. P. Exhibit '7,' has first apportioned a certain amount of such railway operating expenses to its terminal freight switching operations at certain points in Washington for a one week test period in 1934, and by dividing the total number of engine hours during which its locomotives were engaged in various freight switching operations at such switching points during such test period, defendant has computed the cost per engine hour of such various switching operations, and from such engine hour costs has then computed the cost of terminal switching operations incident to the movement of all cars used in the movement of intrastate freight in Washington for said seven-day test period.

"That all of defendant's railway operating expenses incident to freight operations in Washington for 1933 other than those so apportioned to terminal switching operations [fol. 357] and other than 'VI. Miscellaneous Operations,' were apportioned by defendant in said N. P. Exhibit '7' for the week of October 22, 1933, as between such expenses as were incident to the movement of interstate freight as shown by the following detailed analysis thereof:

"I. Maintenance of Ways and Structures (Acct. Nos. 201-280).—The average annual railway operating expenses incident to this main heading for the years 1931 to 1933, inclusive, $1,526,796.23), were first apportioned to the said test week of October 22, 1933, by taking 7/365ths of said annual average, or $29,283.93, and from such proportion was deducted the sum of $3,888.57 theretofore apportioned to switching operations (the amount so deducted should have been $4,316.37 instead of only $3,888.57, as hereinafter explained) and all of the balance of said $29,283.93 so ap-

portioned to the test week, was apportioned to intrastate freight traffic on the basis of relative freight car miles used in intrastate and interstate freight operations (See N. P. Ex. '7,' p. 19). The resulting figure, to-wit: $11,202.01, was then carried to page 12 of the exhibit as an expense item chargeable wholly to defendant's intrastate freight traffic.

"I. Maintenance of Equipment (Acct. Nos. 301-338).—The account numbers included in this main division of expense include the following:

"Acct. No. 308: Steam locomotive—repairs;
"Acct. No. 309: Steam locomotive—depreciation;
"Acct. No. 310: Steam locomotive—retirements;
"Acct. No. 314: Freight-train cars—Repairs;
"Acct. No. 315: Freight-train cars—Depreciation; and
"Acct. No. 316: Freight-train cars—Retirements.

"Acct. No. 308: Steam locomotive—repairs.—A certain part of this expense item incident to freight operations was first apportioned to switching operations and as such, was included in defendant's engine hour costs, for the test week (See N. P. Ex. '11'), a total of $2,980.6- being so apportioned for the week. The expense 'steam locomotive—repairs,' for the week of October 22, 1933, incident to all [fol. 358] operations other than switching (a total of $10,597.37; N. P. Ex. '7,' p. 13), was then, according to defendant's showing, determined by an actual study for the week, and the resulting apportionment of $4,592.71 was then likewise carried to page 12 of N. P. Ex. '7' as an expense item chargeable wholly to defendant's intrastate freight traffic.

"Accts. Nos. 309 and 310: Steam locomotive—depreciation and retirements.—As to these items, the total Washington reported expense for 1933 ($212,615.26) was first apportioned to said test week of October 22, 1933, by taking 7/365ths thereof, or $4,077.96, from which amount was deducted the sum of $1,192.63 theretofore apportioned to switching operations. All of remaining portion of said $4,077.96 was then apportioned to intrastate freight traffic on the basis of relative gross ton miles hauled in intrastate and interstate freight operations. (See N. P. Ex. '7', p. 15.) The resulting figure, ($1,187.64) was then carried to page

12 of the exhibit as an expense item chargeable wholly to defendant's intrastate freight traffic.

"Accts. Nos. 314, 315 and 316: Freight-train car repairs, depreciation and retirements.—The three-year annual average expense incident to freight-train car repairs ($565,463.71) and the 1933 expense incident to freight train car depreciation ($594,307.22) and retirements ($17,579.23), were first apportioned to the said test week of October 22, 1933, by taking 7/365ths thereof, or a total of $22,581.58, the whole of which was apportioned to intrastate freight traffic on the basis of relative freight car miles used in intrastate and interstate freight operations during such test week. (See N. P. Ex. '7', p. 14.) The resulting figure, ($8,552.01) was then carried to page 12 of the exhibit as an item of expense chargeable wholly to such intrastate freight traffic.

"II. Maintenance of Equipment (continued).—All of the remaining freight expense items included in this main heading other than those hereinabove mentioned (Accts. [fol. 359] Nos. 308 to 310, and 314 to 316) were first apportioned to the said test week of October 22, 1933, by taking 7/365ths thereof, or $3,757.91, from which amount was deducted the sum of $203.82 theretofore apportioned to switching operations, and all of the remainder thereof allocated to such test week, was apportioned to intrastate freight traffic on the basis of relative freight car miles used in intrastate and interstate freight operations. (See N. P. Ex. '7', p. 18.) The resulting figure, ($1,477.30) was then carried to page 12 of the exhibit as an expense item chargeable wholly to such intrastate freight traffic.

"III. Traffic—(Accts. Nos. 351-359).—The freight expense items included in this main heading for 1933 ($246,089) were first apportioned to intrastate freight traffic on the basis of relative tonnage of intrastate and interstate freight and the resulting figure, ($160,918) apportioned to the said test week of October 22, 1933, by taking 7/365ths thereof, and the resulting figure, ($3,086.41) was then carried to page 12 of the exhibit as an expense item chargeable wholly to such intrastate freight traffic.

"IV. Transportation—Rail line (Accts. Nos. 371-420).—The account numbers included in this main division of expense include the following:

"Acct. No. 394: Fuel for train locomotives;
"Acct. No. 397: Water for train locomotives;
"Acct. No. 398: Lubricants for train locomotives;
"Acct. No. 399: Other supplies for train locomotives;
"Acct. No. 400: Engine-house expenses—train.

"The freight expense for the week of October 22, 1933, incident to each and all of these operations were, according to defendant's showing, determined by an actual study for such week (N. P. Ex. '7', p. 13), and the resulting apportionment of $6,683.07 was then carried to page 12 of N. P. [fol. 360] Ex. '7' as an expense item chargeable wholly to intrastate freight traffic.

"Acct. No. 392: Train Enginemen;
"Act. No. 401: Trainmen.

"The freight expense for the week of October 22, 1933, incident to these two transportation-rail line accounts (wages of trainmen and enginemen) were, according to defendant's showing, determined by an actual study for such week (N. P. Ex. '7' p. 13) and the resulting apportionment of $9,826.25, was then carried to page 12 of N. P. Ex. '7' as an expense item chargeable wholly to intrastate freight traffic.

"Acct. No. 373: Station employees;
"Acct. No. 376: Station supplies and expenses.

"The reported 1933 freight expenses included in these transportation-rail line accounts ($680,959) were first apportioned to intrastate freight traffic on the basis of relative intra and interstate tonnage of freight carried in Washington in 1933, (with a modification because of log tonnage), and the resulting figure ($500,709) apportioned to the test week of October 22, 1933, by taking 7/365ths thereof, of $9,603.60, (N. P. Ex. '7', p. 16), the whole of said amount being then carried to page 12 of the exhibit as an item apportionable wholly to intrastate freight expense.

"IV. Transportation—Rail line (continued).—All of the remaining freight expense items included in this main heading, other than those hereinabove mentioned (Accts. No. 394, 397-400, 392, 401, 373, and 376) were first apportioned to said test week of October 22, 1933, by taking 7/365ths thereof ($7,680.57) and from such average was deducted $788.42 theretofore apportioned to switching operations,

and all of the remainder so allocated to the test week, was then apportioned to intrastate freight traffic on the basis of relative freight car miles used in intrastate and interstate operations. (See N. P. Ex. '7' p. 17.) The resulting figure, ($2,877.65), was then carried to page 12 of the exhibit as an expense item chargeable wholly to such intrastate [fol. 361] freight traffic.

"V. Transportation—Water line.—No expenses were charged against Washington traffic as to this main heading for 1933 or prior years. (See N. P. Exs. "8" and "9", p. 706.

"VI. Miscellaneous Operations (Accts. Nos. 441-446).—The expenses included in this main heading are the only railway operating expenses itemized in defendant's report to the Department of Public Works but not included in defendant's study of operating freight expenses for 1933 (N. P. Ex. '7'). However, an examination of defendant's 1933 Report (N. P. Ex. '9', p. 707), will show that for the year 1933, the only "Miscellaneous Operations" items of expense incident to Washington traffic were included in accounts Nos. 441 and 442. Account No. 441 is entitled 'Dining and Buffet Service', and under this account the entire expense is apportioned to passenger service only.

"Under Account No. 442—"Hotels and restaurants",—$8,025.74, is charged to Washington freight traffic. Affiant concedes that this amount should be charged to intrastate freight operating expenses as stated in the beginning of this affidavit.

"VII. General Expenses (Accts. Nos. 451-462).—As to this main group of operating expenses defendant has first determined the ratio between the total amount charged to freight traffic under all "General Expense" accounts, and all other 1933 freight operating expenses, and has applied the resulting percentage (8.60%) to the total intrastate freight operating expenses (other than 'general expenses') found for the test week of October 22, 1933, to-wit: $69,-132.98, and has thereby reached a figure of $5,945.44 for 'general expenses'. (N. P. Ex. '7', p. 21) which it has carried to page 12 of the exhibit as an expense item chargeable wholly to intrastate freight traffic.

"VIII. Transportation for Investment—Cr.—This credit [fol. 362] item of $7,227.30 was first apportioned to the test week of October 22, 1933, on the basis of 7/365ths thereof,

and the resulting figure, to-wit: $138.62 was apportioned to intrastate freight traffic on the basis of relative car miles incident to intrastate and interstate freight traffic. (See N. P. Ex. '7', p. 22.) The resulting figure of $60.36 was carried to page 12 of the exhibit, and there credited to the total intrastate freight operating expenses for the test week.

Conclusions as to operating expenses charged.—It will thus be seen that, with the exception of the single expense item of Miscellaneous Operations, "Hotels and Restaurants," (Acct. No. 442), all items of freight operating expenses chargeable to freight service were determined for the test week of October 22, 1933, in either one or the other of the two following methods: (1) By taking 7/365ths of the total for the year 1933 or of the annual average for three years, and after allocating (in certain cases) a certain amount thereof to terminal switching service, apportioning the entire balance to freight operating expenses for the test week as shown on N. P. Exhibit '7', page 12; (2) by determining by an actual study, the expense corresponding to the particular account numbers apportionable to such terminal switching service and making such apportionment accordingly, and apportioning the entire balance for the test week to line-haul freight traffic, and carrying the intrastate proportion to page 12 of the Exhibit.

"Turning now, to page 12 of N. P. Exhibit '7', we find that all of these items or groups of freight operating expenses for the test week, including "Yard Expenses", (switching service), are added together, and the total ($75,078.42), is carried to page 10, where the entire amount is divided into the total revenue net ton miles of intrastate freight traffic to determine the cost per intrastate-freight revenue net ton mile. This per-ton-mile cost is then multiplied by the total revenue net ton miles of Washington intrastate freight for the year 1933, yielding a total of in-
[fol. 363] trastate freight operating expenses for 1933, of $3,291,785. It will thus be seen that with the exception of the single expense item—"Hotels and Restaurants," all of the operating expenses incident to Washington intrastate freight operations of all kinds are divided into, and thus treated as part of the expenses incident to the movement of intrastate freight.

"On page 4, N. P. Exhibit '7', defendant first finds the ratio between the said total freight operating expenses of

$3,291,785, and the single item of freight revenue credited to Account No. 101, namely, $4,836,839, and finds the ratio to be 68.06%.

"In this Defendant erred. Since the expenses charged included all costs of operation resulting in all freight revenues except from 'Hotels and Restaurants', and 'switching', it should with those two exceptions, have included all operating revenues as the divisor in computing the freight operating ratio.

"Defendant then applies this so-called freight operating ratio to the revenue from switching operations to ascertain the added operating expenses incident to this service. With this affiant makes no complaint except that, for the reason noted, the ratio is improperly computed to plaintiff's prejudice.

"But defendant then proceeds to apply this so-called operating ratio to all the items of freight revenue other than Account 101 'Freight' and Account 110, 'Switching', which additional items are as follows (Pltff's. Ex. 25):

"Acct. No. 111: Special service train	$1,149
"Acct. No. 112: Other freight train	102,002
"Acct. No. 132: Hotel and Restaurant	7,831
"Acct. No. 135: Storage—freight	825
"Acct. No. 137: Demurrage	8,741
"Acct. No. 142: Rent of Bldgs. & Other Property	5,569
"Acct. No. 143: Miscellaneous	46,504
"Accts. Nos. 151-2: Joint facility—net debit	9,417
Total	164,204

[fol. 364] "As has already been shown, the operating expenses incident to each and all of these items of revenues (other than 'Hotel & Restaurant') have been divided into the intrastate freight ton miles as a basis for determining the cost per intrastate ton mile of freight, and such ton mile cost has been multiplied by the total freight operating expenses. Thus, the addition of any part of the item of $111,757 (other than the $8,025.74 charged to 'Hotels and Restaurants' under Account No. 442) would be, to that extent, a duplication of freight operating expenses and should be eliminated from the ultimate figures of operating expenses incident to intrastate freight traffic contained in all N. P. Exhibits and in Plaintiff's Exhibits '27' and '30' as heretofore explained.

"That affiant has prepared the computations and explanations thereof set forth on Exhibit 'B' hereto attached and made a part hereof, and that the same are true and correct. That said computations and the results thereof as shown by said Exhibit 'B' are intended to show and do show the reduction in computed operating expenses incident to defendant's 1933 intrastate freight traffic in Washington as compared with the results shown on N. P. Exhibit '7', page 20, which would have resulted had defendant, in his computations on said page 20, apportioned its 1933 Washington freight traffic expenses as between intrastate traffic and interstate traffic on the basis of the relative amount of revenues derived from said respective kinds of traffic instead of apportioning the same on the basis of relative tonnage of revenue freight of said respective kinds of traffic.

Exhibit "B" attached to said Manschreck affidavit is as follows:

[fol. 365]

EXHIBIT "B" TO AFFIDAVIT

"Restatement of N. P. Exhibit "7", p. 20, as to traffic expenses chargeable to Washington 1933 intrastate freight traffic, showing difference in results of apportioning such expense as between intra and interstate traffic on basis of relative revenues therefrom instead of on basis of relative tonnage of revenue freight as used by defendant.

"(a) Gross railway operating revenue from Washington 1933 intra and interstate freight traffic (Plff.'s Ex. "25").....	$10,713,872.00	
"(b) Gross railway operating revenue from Washington 1933 intrastate freight traffic only (Plff.'s Ex. "25").....	5,372,895.00	
"(c) Ratio of (b) to (a).....	50.149%	
"(d) Traffic expenses as to Washington 1933 freight traffic (N. P. Ex. "7" p. 20)..	.....	$246,089.00
"(e) Amount of traffic expenses chargeable to Washington 1933 intrastate freight traffic by apportioning same on a relative revenue basis ("d" x "c").....	.....	123,411.00
"(f) Same for one day ("e" + 365).....	.....	338.11
"(g) Same for one week ("f" x 7).....	.....	2,366.77
"(h) Amount for week of October 22, 1933, as charged by defendant (N. P. Ex. "7," p. 20).....	.....	3,086.41
"(i) Excess for one week of amount charged by defendant for one week over amount resulting from apportionment as between intrastate and interstate freight traffic on relative revenue basis ("h"—"g").....	.....	719.84
"(j) Same—Amount of such excess for one day ("i" + 7).....	.....	102.81
"(k) Same—Amount of such excess for one year ("j" x 365).....	.....	37,525.65

[fol. 366] The court reconvened on November 26, 1934, all parties being present, whereupon defendant offered in evidence the affidavit of E. V. Peterson (St. 542), to which offer plaintiff objected unless said Peterson were produced for cross-examination (St. 542-549). Said affidavit was thereupon received in evidence on the understanding that said Peterson be produced for cross examination (St. 549). Said affidavit is as follows:

AFFIDAVIT OF E. V. PETERSON

"E. V. Peterson, being sworn, states the following facts in answer to the affidavit of C. A. Manschreck:

"(1) Manschreck objects to an expense item of $111,757, shown on page 4 of defendant's exhibit 7, on the ground that this amount had already been included in the expenses shown by defendant's cost study. Mr. Manschreck is mistaken.

"(2) The amount of $102,002.00 in Account 112, Other Freight Train Revenue, as shown on page 9 of Manschreck's affidavit, is also shown on page 9 of defendant's exhibit 7. This sum of $102,002.00 is the net amount received by the Northern Pacific from the Northern Pacific Transport Company. In defendant's cost study an allowance was made as to car miles and net ton miles of the traffic of the Transport Company and same was not considered in arriving at the cost of intrastate freight traffic as covered by Revenue Account 101 and reference to this fact was made in (St. 550) my testimony, as shown on page 242 of the transcript. No expense having been included in the cost study on account of this item of $102,002.00 it was necessary to take it into account in order to obtain the total expense for all intrastate freight business. For this purpose affiant used, as was proper, the general expense ratio of 68.06% as is shown at the bottom of page 4 of defendant's exhibit 7. Applying the operating expense ratio of 68.06% to the $102,002.00, gives $69,423, which is to be deducted from $111,757, leaving $42,334. As Mr. Manschreck concedes, at the bottom of page 1 and top of page 2, that $8,026.00 is [fol. 367] properly charged as an operating expense, this item is deducted from $42,334, leaving $34,308 alleged duplication of expense under Mr. Manschreck's affidavit.

"(3) In connection with foreign commerce, a deduction of $369,606 was made from local revenue on page 4 of defendant's exhibit 7. It was therefore considered proper that a deduction be made corresponding to this revenue in the matter of operating expenses, and this was done by the use of the operating freight ratio of 68.06%, resulting in a credit to intrastate operating expense of $251,554.00. In applying this general ratio of intrastate traffic to the item of foreign commerce, shown on page 4 of exhibit 7, entirely too great a credit was given to intrastate operating expenses in this connection, for the reason that the large movement of foreign commerce was on main line with resultant lower unit costs than the average of the total of intrastate traffic on both main and branch lines. For instance, for a period of the study, October 22-28, 1933, the percentage of the net ton miles of the foreign (St. 551) commerce moving over main lines was 86.41% as contrasted with 13.59% over branch lines. For the year 1931 in the state of Washington, that being the last year for which a separation as between main line and branch line expenses is available, the cost per net ton mile for main line including so-called larger terminals was 84¢ per hundred net ton miles as compared with $1.32 on the branch lines, or, in other words, the branch line unit operating cost was 57.1% higher than the main line unit operating cost. I could go into this computation and give the figures, but, even if the $34,308, which Mr. Manschreck contends has been twice included, should be conceded, there would still be a substantial deficit from intrastate operations.

"(4) There is another consideration and that is that, by reason of the fact that the period selected for the study—October 22-28, 1933—showed a traffic movement that was greatly in excess of the average for 1/52 of a year, and if proper adjustment be made for this situation so far as the [fol. 368] overhead accounts are concerned, but the train and engine expenses, yard expenses and locomotive repair expenses be allowed to stand as used, the operating expenses as stated for the intrastate freight traffic in defendant's exhibit 7, page 1, would be increased by $251,000, estimated in my testimony, page 502, as about $300,000.

"(5) In Mr. Manschreck's affidavit, Exhibit A, a deduction of $4,316.37 is shown for terminal maintenance. Mr.

Manschreck is in error. He has deducted from the total maintenance of way and structures freight expense an amount which represents the freight and passenger expense as (St. 552) included in the terminal study. The amount deducted in defendant's exhibit 7 is proper and is based on the freight proportion of the amount as included in the terminal study. It is quite obvious that it would not be proper to deduct the full amount unless we were deducting it from the total of freight and passenger maintenance of way and expenses. Even if Mr. Manschreck were correct, which he is not, the method of arriving at the difference of $10,519.30 is improper for this reason; that is, in stating my costs for the year I first determined the cost per ton mile for the week of the study and then brought that to a year's basis by use of the ton miles for the year in intrastate freight traffic. If a similar method had been used by Mr. Manschreck, instead of having a total of $10,519.30 as purported overcharge, he would have $8,844.01.

"(6) As to Exhibit B, traffic expenses, extended comment does not appear necessary as to the method used by Mr. Manschreck, but the theory of dividing expenses on the basis of the operating revenue is not used in railroad accounting and is improper. The method that was used by me in defendant's exhibit 7 was to divide traffic expenses on the relation of the tonnage of freight intrastate and interstate and is the correct one. It is apparent that the traffic expenses would vary in relation to the tonnage rather than the revenue involved. Even if the assumption made [fol. 369] were correct, which it is not, the method of arriving at the purported overcharge of $37,525.65 is not proper because of the facts stated in my comments as to Exhibit A, and the revised figure, if used on the basis as shown by defendant's exhibit 7, would be $31,552.81 instead of $37,525.65 (St. 553).

"(7) Defendant's exhibit 7, page 4, shows a deduction of $161,031 from intrastate freight revenue state of Washington, year 1933, account of reduction of amount of interstate switching revenue included in annual report to Department of Public Works of Washington as intrastate.

"As noted in exhibit amount for January to July 1933 was estimated on basis referred to.

"As indicated by Mr. daPonte on page 40 of transcript we agreed to furnish actual amount for year before close of case.

"An analysis has been made for year 1933 which shows that deduction for interstate switching (Account 110 Switching Revenue) should be $207,965 instead of partially estimated amount of $161,031 as shown by defendant's exhibit 7, page 4" (St. 554).

On November 27, 1934, all parties being present, the following proceedings were had (St. 555):

E. V. PETERSON, being recalled for cross-examination respecting the foregoing affidavit, testified as follows:

I am E. V. Peterson who signed said affidavit (St. 555). On Def.'s Ex. "7", page 19, I divided the expense first between Idaho and Tacoma Divisions, and then set forth a total. I have taken a three-year average of the freight expense as reported to the D. P. W. (St. 556). In the second line I took 7/365ths of the first line. Mr. Manschreck did the same in line "b", Exhibit "A". You ask where I got the amount shown as "less amount used in terminal studies." The amount shown by Mr. Manschreck is not the freight operation, it is the total operation. You ask where I got the freight proportion. It isn't shown in the [fol. 370] detail there. We had to work it out to deduct it properly. You ask if there is anything *is anything* in the record to show how it is worked out. I have the working papers here (St. 558). The division between freight and passenger is shown in the report to the D. P. W., not by yard of course, but the total for the state of Washington is shown (St. 559). You ask if the matter contained in paragraph 5 of my affidavit is shown by any matter or evidence or exhibit received in evidence in this case. It is if I qualify it in this way. In arriving at the freight proportion of the maintenance of way structures, we took the various amounts shown in the yard accounts for 1933 as shown in the report to the State of Washington, and from that report reduced the proportion used in preparing this freight proportion. I think it is an exhibit in this case—"8" is

1932 and "9" is 1933 (St. 560). You ask where it is in the record. Def.'s Ex. "9" was the Annual Report to the D. P. W. for the year 1933. In that report was included the operations in the state of Washington, and from the amount shown under the various maintenance of way accounts, yard, freight, and passenger, we made the percentages by account affected and applied those to the individual accounts in our present terminal studies. On page 19 I say "less amount as used in terminal studies", not amount as shown, but as used (St. 561).

Referring to paragraph 6 of my affidavit: I am familiar with exhibit "B" attached to the Manschreck affidavit. You ask if traffic expenses as a group are expenses incurred in the solicitation of traffic, both freight and passenger. We so stated, yes. We have apportioned those expenses assigned to freight service for the year reduced to terms of one week, and apportioned them on the relative tonnage basis. Mr. Manschreck, instead of computing it in that way, took the total traffic expenses assigned to freight and the one-week proportion, and assigned them on a relative revenue basis. Might I state, on Exhibit "B" the [fol. 371] amount of $246,000 shown for traffic expenses as to Washington 1933 intrastate traffic is improperly noted. It should be traffic freight, not intrastate. Item "d" on Exhibit "B", Item "d" on Exhibit "B". Intrastate should be eliminated (St. 562). You ask if the purpose of the traffic department is to produce revenue for the company. That is the primary purpose, yes. The character of traffic that produces the greatest revenue of the company is the long-haul traffic (St. 564). The purpose of the traffic department is to produce revenue; traffic solicitation (St. 566). You ask if it is not a fact that I divide my traffic expenses on a mere tonnage basis, and apportion as much of that expense to a ton hauled just one mile as to a ton hauled 400 miles. Expenses should not be based on the revenues involved, but on the expense incurred. You ask if that doesn't depend on the character of the expense, whether it is the maintenance of structures or equipment, or a traffic expense for the solicitation of business. That statement still stands. It should be on the basis of the service performed and not on revenue (St. 567). You ask if we spend as much to get a ton of traffic hauled one mile as 400. We have to take the traffic that is offered. We can't select it.

You ask what these traffic expenses are. Some of it is the salaries and expenses of the people more or less directly supervisory of the traffic department, and the second account, outside account, would be the men engaged along the line, in the solicitation of traffic (St. 568). You ask whether or not it is not a fact that if our business was all non-competitive, we wouldn't need a traffic department at all. I wouldn't make that statement. It is as necessary to a railroad company as an engineering department. I am familiar with the traffic in the state of Washington. You ask to what extent we solicit business on logs. The total tons of logs hauled in the state is 2,000,000 and the total of all traffic, 5,575,000. You ask if we need any traffic department [fol. 372] for our logs. Yes. You ask to what extent the log traffic is competitive. Not because it is competitive, but because log traffic in the last few years has been subject to a great deal of extra work in litigation and raising of tariffs, etc. You ask if we charge that to traffic expense. We do the tariff expenses and the data for the cases, etc. You ask to what extent we spend money in soliciting log business, and use our agents to solicit log haul business. I am not a traffic man. You ask if it is not a fact that I don't know anything about it. I have no expert traffic knowledge of the subject, no (St. 570).

I do not know to what extent we solicit any of this local business (St. 571). The results reached by Manschreck in Exhibit "B" are $37,000. It would be $34,000 if the proper method were used as shown by my affidavit, i. e., if Mr. Manschreck had used his own method in the proper say. In building up our figures on the exhibit, we arrived at a basis based on the ton miles for a week and applied it to the year. In the affidavit of Mr. Manschreck, he has simply built up the figure for the year by multiplying by 52. If he had used the method used by us in Page 20 of Exhibit 7, he would have had $31,552.81. And that likewise applies to the maintenance of way and structures referred to.

In Paragraph 7, page 4, of my affidavit I say that Def.'s Ex. "7", page 4, shows a deduction of $161,031.00 from intrastate freight revenue State of Washington, year 1933, account of reduction of amount of intrastate switching revenue included in annual (St. 571) report to D. P. W. of Washington as intrastate. That whole $161,031 was included in our report to the D. P. W. for 1933. You ask

from what source these figures came to change this from interestate over to intrastate. We made a special study because it wasn't of record. It wasn't in our accounts reported for 1933. You ask if it was in our books. Let me state this my own way, what we did. For the year 1933, the entire amount of switching revenue that was received in the state of Washington, the amount of $317,000.00, was [fol. 373] credited to the state for intrastate without regard that some of it might have accrued as a result of interstate traffic. Because of this proceeding, we went through the individual switching abstracts and made a record of all the cars involved in the switching revenue and divided it according to the actual facts in the case. And that is how we arrived at the figure we are now stating, of $369,606. I spoke of $161,031.00 as shown by the defendant's Exhibit No. 7, was, as clearly pointed out, partly (St. 572) for the year, estimated, and we have now gone through the record from January to July, so that the amount of $207,965 is the actual figure. You ask if it is not a fact that there is no record in the state of Washington anywhere, that would show these facts. No, the only report we furnished to the D. P. W. for 1933 was in Ex. "9", the annual report, in which it showed the entire amount of switching revenue. It was all shown as intrastate. That was sworn to by our officers and filed. It was made March 4, 1934, and was made on the same basis of previous years. The record in the state would be available at the various stations (St. 573). You ask if there is any record here to show the change in our book accounts (St. 574). No, there is no record here. There is no record offered in exhibits of any kind that would tend to show whether these were interstate or intrastate movements. I couldn't do that without going to our records scattered around throughout different parts of the state or our records in St. Paul. You ask if it is not a fact that the court couldn't determine from the record before him whether we were correct in making the modification. We are offering them as being the correct figures.

(At this point, plaintiff's counsel moved to strike paragraph 7 of the Peterson affidavit as not being based on anything before the court in the form of books or original records or anything from which the facts claimed or alleged or set forth in paragraph 7 can be checked or verified, and [fol. 374] that they are based on record evidence some-

where, but not produced (St. 574). The Motion to strike was denied (St. 575). Whereupon the witness continued:)

Referring to paragraph 4 of the Peterson affidavit: On page 10, def.'s Ex. "7" is shown the method whereby the freight expenses for the year 1933 were developed, and from that it will appear that the cost as developed for the one week of the cost study, the cost per revenue net ton mile, was applied to the entire net ton miles of revenue service, Washington intrastate, for the year 1933.

Now, this cost for the one week was made up of the detail of items shown on page 12, where the accounts are set forth in detail. Now, it is perfectly obvious when dealing with the train and engine wages, the fuel for locomotives, water, lubricants, other supplies and engine-house expenses, locomotive repairs, and yard expenses, they were developed on the basis of the traffic for the week, and it is perfectly obvious that the cost for those would be less for the volume of traffic that we used, the amount I used in the previous analysis of those accounts.

So far as those analyses are concerned, I am not making any change in the previous statement, but the other overhead expenses, all of those listed below yard expenses, the method used was to assign one week. Now (St. 576) if you assign only one week's expenses, but the traffic for that particular week is 2.28% rather than 1.91, it is clear that you are getting a cost very much below what it should be as cost for the year, because the cost for the week is based on a very low revenue net ton miles. For instance, if you were to adopt that plan for each week of the year, you would find you provided for all those expenses for the year's business. Unless you apply the overhead in relation to the volume of business for the week, you get an under-[fol. 375] estimate of the cost. I worked it out in detail. You ask why I didn't put in my original study. I was prevented from doing so by Mr. Sharpe. (Question by defendant's counsel.) The amount of $251,000 is the amount I say I worked out in detail and is the understatement due to the fact that the test week was better than an average week (St. 577). I mean if there is due allowance for the equated ton miles for the week involved, our expenses for the year would have been $251,000.00 more than is stated on page 10 of defendant's exhibit "7". You ask where

my underlying figures in the record are, to substantiate that. It is in the record there. You ask where they are (St. 578). (It was thereupon understood that paragraph 4 of the Peterson affidavit was to be considered only in connection and in explanation of evidence already in the record. (St. 580). (Question by defendant's counsel.) You ask if that is based on matters in the record. It is, and the reference shown is page 502 (St. 580).

You ask if there is anything in the record to substantiate the facts I attempt to state and conclusions I attempt to reach in paragraph 3 of my affidavit. I don't recall of any direct item on that off-hand (St. 581).

You ask where the data is located showing the facts set forth in paragraph 3 of my affidavit. I have all the summarized data with me here on which the conclusions were based. It includes, as I have indicated the source in my affidavit, from the report to the D. P. W. for 1931, and also from our detailed record at the main branch line located at St. Paul. They are in St. Paul, and are not here at all.

(Whereupon plaintiff's counsel moved to strike paragraph 3 of the affidavit and all that is in it, because not supported by anything in the record (St. 582). The motion was denied (St. 583). Whereupon the witness continued:)

In Def.'s Ex. "7", page 4, I first found the total operat-
[fol. 376] ing expenses connected with interstate freight service, and found that to be $3,291,785, and found the intrastate revenue to be $4,836,839. Then I found the operating ratio between them. I proceeded on the theory that the expenses I found related only to the revenues credited under account 101. You ask me to point out any added item of expense which would be incident to any of the revenues received for the year 1933 in intrastate business other than account 101 (St. 583). There would be the expenses incurred in connection with the switching revenue. I have accounted for that separately. You ask what other than that. Hotels and restaurants. We have discussed that, and I think it has been agreed upon. You ask what else. (The witness then explained to the satisfaction of counsel for plaintiff why the operating ratio should be applied to the $102,000 referred to in the affidavit as revenue received in connection with the N. P. Transport Company (St. 584-587). Whereupon the witness continued:)

You ask if it is not true that outside of that $102,000, and hotels and restaurants, the balance is duplication as stated by Mr. Manschreck: No, it is not, and I will tell you why. If we were dealing with all the operating expenses of the freight service, and if this situation didn't involve intrastate, but the matter of freight rates of the state as a whole, there might be some argument of the state of that case. We are dealing with the selected amount of those which we have as intrastate. We have not charged the intrastate, going to 101, originally, with all expenses that would appear in those revenues. The matter of weighing expense in Washington intrastate is several thousand dollars a year. We have not charged in our expenses for yard service anything but road haul service. In other words, we have not set up any other expenses for weighing cars. Therefore, it seems proper that expense should (St. 587) be included the same as the switching. I say, the Miscellaneous Reve- [fol. 377] nue Account, 143, includes, among other things, weighing revenue. You ask how much that is. The proportion of the intrastate is $2,300.00, not a very large item, but I cited that as being typical of the general situation. You ask what other expenses I did not include in the general expenses in my studies, other than weighing. Well, all the expenses were included in the detail except the miscellaneous operations in getting our costs. I will say this: all of the expenses were used in arriving at the expenses of intrastate traffic (St. 588). You ask what expenses other than those I have itemized at $3,291,785 are involved in the production of these revenues other than account 101 and switching service and this other freight revenue of $102,- 000 and this weighing service. I haven't made any direct analysis of that. As I say, the Miscellaneous Revenue Account includes any number of different items of all descriptions and a minute analysis of that wasn't considered necessary for the purpose we had in hand in view of what I said in my affidavit about the $369,000 feature. We didn't consider it necessary to go into all that detail because we felt we were so grossly overestimating the credit. Referring to "rents of buildings" and other property" you ask what expense item that I haven't taken care of in my cost study already is involved in that item. I don't know of any. That would all be under maintenance of way and structures. Referring to "Joint facility, net debit", that

is a debit item largely, the joint facility account adjustment in connection with pool service (St. 589). You ask what expenses other than those I have accounted for already in that item of three million plus, are involved in the production of the item of revenue "demurrage". It is hard to indicate that. The correspondence and legal expenses. You ask if it is not a fact that that has all been accounted for in my study of three million plus. So far as the total amount is concerned, yes, but not the amount to charge intrastate traffic. That is the point I am making. There [fols. 378-404] are a large number of miscellaneous items in account 143. You ask what specific items of expense, I have omitted in my full charge of three million plus that should be charged in connection with the production of that particular item of expense, $46,000. Well, as I stated a moment ago, there is the matter of weighing, is one item, and also other miscellaneous revenues. I wanted to make this clear, that we have other accessorial revenues besides weighing. For instance (St. 590) we have expenses for refrigeration cars, and items of that kind, that is not included in the expense, $3,291,785. The yard expense was only the actual road haul movement of the cars, not any accessorial movement at all. You ask if it is not a fact that I have not made a study to determine whether or not any expense was incurred in the production of that particular revenue other than the expenses charged, $3,291,785.00, other than the weighing expense. That is the only thing that stands out in my mind now (St. 591).

[fol. 405] In Superior Court of Thurston County

Appeal

On the 6th day of April, 1935, the plaintiff appealed from the judgment by serving a written notice (Tr. 105). The transcript on appeal was prepared and filed in the office of the clerk of the superior court on the 19th day of April, 1935; the statement of facts was served on the 25 day of April, 1935; and the statement was settled and certified by the trial judge on the 6 day of May, 1935.

G. W. Hamilton, Attorney General; R. G. Sharpe, Assistant Attorney General, Attorneys for Plaintiff.

Due and timely service of written abstract by receipt of a true copy thereof acknowledged this 6th day of May, 1935.

L. B. duPonte, Attorneys for Defendant and Respondent.

[fols. 406 & 407] DEFENDANT'S EXHIBIT 8

[fols. 408-457] Annual Report of Northern Pacific Railway Company

to the

Department of Public Works of the State of Washington

for the

Year Ended December 31, 1932

Name of officer in charge of correspondence with the Commission regarding this report: F. W. Sweney.
Official title: Comptroller.
Office address: 176 East Fifth St., St. Paul, Minn.

300 I. INCOME ACCOUNT FOR THE YEAR.

See instructions on lower section of page 300.

Line No.	Item. (a)	Amount applicable to the year. (b)	Comparison with preceding year. (Increase in black, decrease in red.) (c)	Offsetting debits and credits. (d)	Remarks. (e)
1	I. Operating Income.			None	State the amount of "Net railway operating income," i. e., the net of returns on lines 7, 15–20, 35–40: $1,990,389.21
2	(501) *Railway operating revenues (p. 302),	47 084 176 47	D 15 227 910 38		
3	(531) * Railway operating expenses (p. 309, 310 or 311),	41 433 179 52	D 10 649 667 73		
4	*Net revenue † from railway operations,	5 650 996 95	D 4 578 242 65		
5	(532) *Railway tax accruals (p. 312),	6 677 354 57	D 139 032 61		
6	(533) *Uncollectible railway revenues,	23 209 27	13 137 10		
7	*Railway operating income,†	Def. 1 049 566 89	D 4 452 346 94		
8	(502) Revenues from miscellaneous operations (p. 303),				
9	(534) Expenses of miscellaneous operations (p. 303),				
10	Net revenue † from miscellaneous operations,				
11	(535) Taxes on miscellaneous operating property (p. 303),				
12	Miscellaneous operating income,†				
13	Total operating income,†	Def. 1 049 566 89	D 4 452 346 94		
14	II. Nonoperating Income.				
15	(503) Hire of freight cars—Credit balance (p. 315),	385 266 25	D 266 123 87		
16	(504) Rent from locomotives,	191 770 35	D 52 545 47		
17	(505) Rent from passenger-train cars,	105 470 82	346 06		
18	(506) Rent from floating equipment,				
19	(507) Rent from work equipment,	87 196 34	D 25 447 56		
20	(508) Joint facility rent income,	3 256 867 84	D 89 751 90		
21	(509) Income from lease of road (p. 313),	357 410 97	4 276 74		
22	(510) Miscellaneous rent income (p. 313),	474 742 36	D 51 582 17		
23	(511) Miscellaneous nonoperating physical property (p. 315),	177 169 82	D 2 475 47		
24	(512) Separately operated properties—Profit (p. 315),				
25	(513) Dividend income,	9 119 425 44	D 5 304 288 04		
26	(514) Income from funded securities,	273 566 17	D 487 228 38		
27	(515) Income from unfunded securities and accounts,	156 477 61	D 428 085 86		
28	(516) Income from sinking and other reserve funds,				
29	(517) Release of premiums on funded debt,				
30	(518) Contributions from other companies,				
31	(519) Miscellaneous income,	44 835 32	20 424 67		
32	Total nonoperating income,†	14 630 199 29	D 6 682 481 25		
33	Gross income,†	13 580 632 40	D 11 134 828 19		
34	III. Deductions from Gross Income.				
35	(536) Hire of freight cars—Debit balance (p. 315),				
36	(537) Rent for locomotives,	61 595 91	D 4 479 47		
37	(538) Rent for passenger-train cars,	131 257 98	10 699 76		
38	(539) Rent for floating equipment,				
39	(540) Rent for work equipment,	3 288 51	D 1 335 69		
40	(541) Joint facility rents,	790 473 10	D 79 723 69		
41	(542) Rent for leased roads (p. 321),	51 418 87	02		
42	(543) Miscellaneous rents (p. 321),	11 679 72	1 136 05		
43	(544) Miscellaneous tax accruals,	79 711 13	36 092 27		
44	(545) Separately operated properties—Loss (p. 315),				
45	(546) Interest on funded debt,	14 264 259 37	D 127 482 45		
46	(547) Interest on unfunded debt,	5 597 70	D 44 580 23		
47	(548) Amortization of discount on funded debt,				
48	(549) Maintenance of investment organization,				
49	(550) Income transferred to other companies,				
50	(551) Miscellaneous income charges,	172 756 31	D 31 412 53		
51	Total deductions from gross income,	15 572 038 60	D 241 085 96		
52	Net income,†	Def. 1 991 406 20	D 10 893 742 23		
53	IV. Disposition of Net Income,				
54	(552) Income applied to sinking and other reserve funds (p. 322,)				
55	(553) Dividend appropriations of income (p. 300),				
56	(554) Income appropriated for investment in physical property (p. 322),				
57	(555) Stock discount extinguished through income,				
58	(556) Miscellaneous appropriations of income (p. 322),				
59	Total appropriations of income,				
60	Income † balance transferred to Profit and Loss,	Def. 1 991 406 20	D 10 893 742 23		

458–460

State Commission Form—Steam.

* Includes operation of water lines, if any.

† Deficit, if in red.

(D- denotes decrease)

51

310. RAILWAY OPERATING REVENUES.

State the railway operating revenues of the respondent for the year (classified in accordance with the Uniform System of Accounts for Steam Railway Corporations), and distribute the various accounts as a whole, so as to group those assignable to freight or to passenger and allied services or those common to both services. The proportion of joint traffic receipts belonging to other carriers should not be included.

Line No.	Class of Railway Operating Revenues. (a)	Amount of revenue for the year. (b)	Assignable to freight service. (c)	Assignable to passenger and allied services. (d)	Not assignable to freight or to passenger and allied services. (e)	Remarks. (f)
		$ c.	$ c.	$ c.	$ c.	
1	(101) Freight,*	38 789 246 46	38 789 246 46		• • • • • • • •	
2	(102) Passenger,	3 648 155 53	• • • • • • • •	3 648 155 53	• • • • • • • •	
3	(103) Excess baggage,	31 219 07	• • • • • • • •	31 219 07	• • • • • • • •	
4	(104) Sleeping car,	235 10	• • • • • • • •	235 10	• • • • • • • •	
5	(105) Parlor and chair car,	12 398 75	• • • • • • • •	12 398 75	• • • • • • • •	
6	(106) Mail,	1 570 809 60	• • • • • • • •	1 570 809 60	• • • • • • • •	
7	(107) Express,	686 054 87	• • • • • • • •	868 054 87	• • • • • • • •	
8	(108) Other passenger-train,	93 639 93	• • • • • • • •	93 639 93	• • • • • • • •	
9	(109) Milk,	212 793 37		212 793 37	• • • • • • • •	
10	(110) Switching,	737 720 00	737 720 00		• • • • • • • •	
11	(111) Special service train,	26 342 58	11 810 50	14 532 08		
12	(112) Other freight-train,	132 709 86	132 709 86	• • • • • • • •	• • • • • • • •	
13	(113) Water transfers—Freight,			• • • • • • • •	• • • • • • • •	
14	(114) Water transfers—Passenger,		• • • • • • • •		• • • • • • • •	
15	(115) Water transfers—Vehicles and [live stock,			• • • • • • • •	• • • • • • • •	
16	(116) Water transfers—Other,					
17	Total rail-line transporta- [tion revenue,	45 941 325 12	39 671 486 82	6 269 838 30		
18	(121) Freight,			• • • • • • • •	• • • • • • • •	
19	(122) Passenger,		• • • • • • • •		• • • • • • • •	
20	(123) Excess baggage,		• • • • • • • •		• • • • • • • •	
21	(124) Other passenger service,		• • • • • • • •		• • • • • • • •	
22	(125) Mail,		• • • • • • • •		• • • • • • • •	
23	(126) Express,		• • • • • • • •		• • • • • • • •	
24	(127) Special service,					
25	(128) Other,					
26	Total water-line transpor- [tation revenue,					
27	(131) Dining and buffet,	230 737 05	• • • • • • • •	230 737 05	• • • • • • • •	
28	(132) Hotel and restaurant,	392 830 07		46 291 55	346 538 52	
29	(133) Station, train, and boat privi- [leges,	8 383 13		8 383 13		
30	(134) Parcel room,	8 934 25	• • • • • • • •	8 934 25	• • • • • • • •	
31	(135) Storage—Freight,	23 622 36	23 622 36	• • • • • • • •	• • • • • • • •	
32	(136) Storage—Baggage,	4 036 58	• • • • • • • •	4 036 58	• • • • • • • •	
33	(137) Demurrage,	47 524 03	47 524 03	• • • • • • • •	• • • • • • • •	
34	(138) Telegraph and telephone,	66 158 11			66 158 11	
35	(139) Grain elevator,			• • • • • • • •	• • • • • • • •	
36	(140) Stockyard,			• • • • • • • •	• • • • • • • •	
37	(141) Power,					
38	(142) Rents of buildings and other [property,	36 055 04	11 258 53	5 453 33	19 343 18	
39	(143) Miscellaneous,	246 351 99	192 533 08	5 278 40	48 540 51	
40	Total incidental operat- [ing revenues,	1 064 632 61	274 938 00	309 114 29	480 580 32	
41	(151) Joint facility—Cr.,	227 842 90	60 329 04	167 513 86		
42	(152) Joint facility—Dr.,	149 624 16	12 164 12	137 460 04		
43	Total joint facility oper- [ating revenue,	78 218 74	48 164 92	30 053 82		
44	Total railway operating [revenues,	47 084 176 47	39 994 589 74	6 609 006 41	480 580 32	

*Among the items charged to this account is $ representing amount paid to others in connection with a system of pick up and delivery service.

461-502

531. STATISTICS OF RAIL-LINE OPERATIONS—ENTIRE LINE.

[FOR COMPANIES MAKING OPERATING REPORT.]

Give the various statistical items called for concerning the rail-line operations of respondent's road during the year. *If the respondent for its own purposes uses more accurate methods than are provided below for computing the required averages, the more accurate figures should be given in the returns, and the method of computing each average should be indicated in a footnote.* Train-miles, locomotive-miles, car-miles, motor car-miles and other particulars are to be classified in accordance with the Uniform System of Accounts for Steam Railway Corporations. Motor car and trailer miles, if any, should be included in column (d). In computing averages per locomotive-mile (Items 151-158), motor car and trailer train-miles and car-miles should be excluded.

INSTRUCTIONS REGARDING VARIOUS ITEMS DESIGNATED BY NUMBERS.

1 includes road operated under trackage rights. If the average mileage used for freight or passenger service notably differs from the mileage reportable for Item No. 1, the respective "Averages per mile of road" (Items Nos. 111-127) affected, should be computed accordingly, and pertinent details given in a footnote.

91 includes all freight the revenue from which is includable in account No. 101, "Freight."

92 includes not only nonrevenue freight which is hauled on transportation trains, but also a proportion of the weight of exclusive work equipment, based on the relationship of net tons to gross tons of revenue freight for the reporting period.

94 relates to freight included in 91. 95 relates to freight included in 92.

108 is the aggregate of revenue accounts Nos. 102 to 109, inclusive. (See page 302.)

111=13+1.
112=14+1.
113=15+1.
114=16+1.
115=17+1.
116=18+1.
117=41+1.
118=(56+62+63+64+65+71+72+73+74)÷1.
119=(61+66+67+68+69+75+76+77+78)÷1.
120=101+1.
121=103+1.
122=104+1.
123=105+1.
124=106+1.
125= 94+1.
126= 96+1.
127=100+1.
131= 51+13.
132= 62+15.
133= 52+13.
134= 63+15.
135= 94+(13+freight-car proportion of 15).
136= 96+(13+freight-car proportion of 15).
137= 61+14.
138=(66+67+68+69)+15.
139=100+(14+passenger-car proportion of 15).
140=101+(13+freight-car proportion of 15).
141=103+(14+passenger-car proportion of 15).
142=104+17.
143=105+17.
144=106+17.
151= 13+24.
152= 56+24.
153= 14+28.
154= 61+28.
155= 15+32.
156= 70+32.
157= 16+36.
158= 70+36.
162= 96+(51+62).
163=101+(51+62).
171=100+(57+58+66+67).
172=102+(57+58+66+67).
181= 94+91.
182= 95+92.
183= 96+93.
184=100+99.
185=101+91.
186=101+94.
187=102+99.
188=102+100.
189=105+104.

(See notes on page 510)

Item No.	Item. (a)	With steam locomotives. (b)	With electric and other locomotives. (c)	Without locomotives. (d)	Total. (e)
1	Average mileage of road operated,† (miles),	* * *	* * *	* * *	6,735.58
	TRAIN-MILES.	* * *	* * *	* * *	* * *
11	Freight—ordinary,	5 297 009			5 297 009
12	" —light,	22 650			22 650
13	" —total,	5 319 659			5 319 659
14	Passenger,	5 188 294		1 100 582	6 288 876
15	Mixed, (Frt. 681 257 , Pass. 157 936),	839 193			839 193
16	Special,	3 564			3 564
17	Total transportation service,	11 350 710		1 100 582	12 451 292
18	Work service,	123 683			123 683
	LOCOMOTIVE-MILES.	* * *	* * *	* * *	* * *
21	Freight—principal,	5 323 141		* * *	5 323 141
22	" —helper,	345 159		* * *	345 159
23	" —light,	358 014		* * *	358 014
24	" —total,	6 026 314		* * *	6 026 314
25	Passenger—principal,	5 188 294		* * *	5 188 294
26	" —helper,	164 952		* * *	164 952
27	" —light,	148 164		* * *	148 164
28	" —total,	5 501 410		* * *	5 501 410
29	Mixed train—principal,	839 213		* * *	839 213
30	" " —helper,	468		* * *	468
31	" " —light,	23 563		* * *	23 563
32	" " —total,	863 244		* * *	863 244
33	Special—principal,	3 564		* * *	3 564
34	" —helper,	1 041		* * *	1 041
35	" —light,	796		* * *	796
36	" —total,	5 401		* * *	5 401
37	Train switching,	638 877		* * *	638 877
38	Yard switching—freight,	2 668 668		* * *	2 668 668
39	" " —passenger,	211 427		* * *	211 427
40	" " —total,	2 880 095		* * *	2 880 095
41	Total transportation service,	15 915 341		* * *	15 915 341
42	Work service,	157 216		* * *	157 216
	CAR-MILES.	* * *	* * *	* * *	* * *
51	Freight train—loaded,	159 201 620			159 201 620
52	" " —empty,	79 608 909			79 608 909
53	Sum of loaded and empty,	238 810 529			238 810 529
54	Freight train—caboose,	5 900 091			5 900 091
55	" " —exclusive work equipment,	1 509 179			1 509 179
56	" " —total,	246 219 799			246 219 799
57	Passenger train—passenger,	8 911 776		1 197 244	10 109 020
58	" " —sleeping, parlor, and observation,	12 343 165		25 666	12 368 831
59	" " —dining,	1 627 541			1 627 541
60	" " —other,	13 804 345		445 272	14 249 617
61	" " —total,	36 686 827		1 668 182	38 355 009

† Two decimal places required.

STATE COMMISSION FORM—STEAM.

531. STATISTICS OF RAIL-LINE OPERATIONS—ENTIRE LINE—Concluded.

Item No.	Item. (a)	With steam locomotives. (b)			With electric and other locomotives. (c)			Without locomotives. (d)			Total. (e)		
	Car-miles—Continued.	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *
62	Mixed train—freight—loaded,	3	620	214							3	620	214
63	" " —freight—empty,	2	377	144							2	377	144
64	" " —caboose		90	662								90	662
65	" " —exclusive work equipment,		106	397								106	397
66	" " —passenger,		775	276								775	276
67	" " —sleeping, parlor, and observation,			440									440
68	" " —dining,												
69	" " —other passenger-train,		568	306								568	306
70	" " —total,	7	538	439							7	538	439
71	Special train—freight—loaded,		40	148								40	148
72	" " —freight—empty,												
73	" " —caboose,		2	724								2	724
74	" " —exclusive work equipment,												
75	" " —passenger,		13	783								13	783
76	" " —sleeping, parlor, and observation,		3	352								3	352
77	" " —dining,			686									686
78	" " —other passenger-train,		1	992								1	992
79	" " —total,		62	685								62	685
80	Total transportation service,	290	507	750				1	668	182	292	175	932
81	Work service,		508	005								508	005

Item No.	Item. (f)	Amount. (g)	Item No.	Item. (h)	Amount. (i)
	Freight Service.	* * * * *		Averages per Train-mile.	* * * * *
91	Tons—revenue freight,	11,503,689	131	Loaded freight car-miles—freight trains,†	29.93
92	" —nonrevenue freight,	2,646,251	132	" " " " —mixed trains,†	4.31
93	" —total,	14,149,940	133	Empty freight car-miles—freight trains,†	14.97
94	Ton-miles—revenue freight,	3,087,635,928	134	" " " " —mixed trains,†	2.83
95	" " —nonrevenue freight,	614,512,538	135	Ton-miles—revenue freight,†	514.53
96	" " —total,	3,702,147,566	136	" —all freight,†	616.93
97	Gross ton-miles, incl. locomotives and tenders,	, ,	137	Passenger train car-miles—passenger trains,†	6.10
98	" " " excl. locomotives and tenders,	, ,	138	" " " " —mixed trains,†	1.60
	Passenger Service.	* * * * *	139	Revenue passenger-miles,†	24.18
99	Passengers carried—revenue,	, 768,775	140	Freight revenue,†	$ 6.46
100	Passenger-miles—revenue,	155,891,317	141	Passenger service train revenue,†	.97
	Revenues and Expenses.	$ * * * * *	142	Operating revenues,†	3.78
101	Freight revenue,†	38,789,246.46	143	" expenses,†	3.33
102	Passenger revenue,†	3,648,155.53	144	Net operating revenues,†	.45
103	Passenger service train revenue,†	6,255,306.22		Averages per Locomotive-mile.	* * * * *
104	Operating revenues,†	47,084,176.47	151	Train-miles—freight trains,†	.88
105	" expenses,†	41,433,179.52	152	Car-miles—freight trains,†	40.86
106	Net operating revenues,†	5,650,996.95	153	Train-miles—passenger trains,†	.94
	Averages per Mile of Road.*	* * * * *	154	Car-miles—passenger trains,†	6.67
111	Freight-train miles, 5,328.31	, 998	155	Train-miles—mixed trains,†	.97
112	Passenger-train miles, 4,412.73	, 1,425	156	Car-miles—mixed trains,†	8.73
113	Mixed-train miles, 1,436.76	, 584	157	Train-miles—special trains,†	.66
114	Special-train miles, 6,426.73	, 1	158	Car-miles—special trains,†	11.61
115	Transportation service train-miles 6,426.73	, 1,937		Averages per Loaded Freight Car-mile.	* * * * *
116	Work-train miles, 6,426.73	, 19	162	Ton-miles—all freight,†	# 22.51
117	Locomotive-miles—transportation 6,426.73	, 2,476	163	Freight revenue,‡	$ .23825
118	Freight service car-miles, 6,397.39	, 39,463		Averages per Car-mile—Passenger.	* * * * *
119	Passenger service car-miles, 5,646.52	, 7,034	171	Passenger-miles—revenue,†	6.70
120	Freight revenue,† 6,686.63	$ 5,801.02	172	Passenger revenue,‡	$ .15689
121	Passenger service train revenue,† 5,871.55	1,065.36		Miscellaneous Averages.	* * * * *
122	Operating revenues,† 6,735.58	6,990.37	181	Miles hauled—revenue freight,†	268.40
123	" expenses,† 6,735.58	6,151.39	182	" " —nonrevenue freight,†	232.22
124	Net operating revenues,† 6,735.58	, 838.98	183	" " —all freight,†	261.64
125	Ton-miles—revenue freight, 6,686.63	, 461,763	184	Miles carried—revenue passengers,†	202.78
126	" —all freight, 6,686.63	, 553,664	185	Revenue per ton of freight,‡	$ 3.37190
127	Passenger-miles—revenue, 5,871.55	, 26,550	186	" " ton-mile of freight,‡	.01256
			187	" " passenger,‡	4.74541
			188	" " passenger-mile,‡	.02340
			189	Operating ratio,†	% 88.00

Miles of road

504-530

710. RAILWAY OPERATING REVENUES EARNED WITHIN THE STATE.

[FOR ROADS MAKING OPERATING REPORTS.]

State the railway operating revenues of the respondent for the year (classified in accordance with the Uniform System of Accounts for Steam Railway Corporations), and the comparison of such revenues with those of the preceding year (showing increases in black and decreases in red) for each of the several classes. The proportion of joint traffic receipts belonging to other carriers should not be included in column (b).

Line No.	Class of Railway Operating Revenues (a)	Total amount of revenue for the year. (b)	Comparison with total revenue of preceding year. (Increases in black, decreases in red.) (c)	Revenues Earned Within the State. On intrastate traffic. (d)	On interstate traffic. (e)	Total. (f)
		$ c.	$ c.	$ c.	$ c.	$ c.
1	(101) Freight,			5 497 481 52	5 073 127 87	10 570 609 39
2	(102) Passenger,			379 715 40	563 535 33	943 250 73
3	(103) Excess baggage,			3 268 50	4 850 93	8 119 53
4	(104) Sleeping car,			6 11	45 39	51 50
5	(105) Parlor and chair car,			6 292 77	3 617 28	9 910 05
6	(106) Mail,				361 952 57	361 952 57
7	(107) Express,				166 838 45	166 838 45
8	(108) Other passenger-train,			7 765 59	19 217 01	26 982 60
9	(109) Milk,			17 129 00	8 843 30	25 972 30
10	(110) Switching,			348 218 15		348 218 15
11	(111) Special service train,			9 977 25	4 286 15	14 263 40
12	(112) Other freight-train,			132 541 87		132 641 87
13	(113) Water transfers—Freight,					
14	(114) Water transfers—Passenger,					
15	(115) Water transfers—Vehicles and live stock,					
16	(116) Water transfers—Other,					
17	Total rail-line transportation revenue,			6 402 496 26	6 206 314 28	12 608 810 54
18	(121) Freight,					
19	(122) Passenger,					
20	(123) Excess baggage,		Data for columns (b) and (c) not required.			
21	(124) Other passenger service,					
22	(125) Mail,					
23	(126) Express,					
24	(127) Special service,					
25	(128) Other,					
26	Total water-line transportation revenue,					
27	(131) Dining and buffet,			26 188 02	38 859 22	65 047 24
28	(132) Hotel and restaurant,			100 434 25		100 434 25
29	(133) Station, train, and boat privileges,			2 717 36		2 717 36
30	(134) Parcel room,			4 318 85		4 318 85
31	(135) Storage—Freight,			2 589 81		2 589 81
32	(136) Storage—Baggage,			2 155 76		2 155 76
33	(137) Demurrage,			21 852 00		21 852 00
34	(138) Telegraph and telephone,				23 906 52	23 906 52
35	(139) Grain elevator,					
36	(140) Stockyard,					
37	(141) Power,					
38	(142) Rents of buildings and other property,			7 331 71		7 331 71
39	(143) Miscellaneous,			47 516 59	18 145 96	65 662 55
40	Total incidental operating revenue,			215 104 35	80 911 70	296 016 05
41	(151) Joint facility—Cr.,			4 561 91	75 317 57	79 879 48
42	(152) Joint facility—Dr.,			8 203 53	131 176 92	139 380 45
43	Total joint facility operating revenue,			Dr. 3 641 62	Dr. 55 859 35	Dr. 59 500 97
44	Total railway operating revenues,			6 615 958 99	6 231 366 63	12 845 325 62

50. State the rule or rules used by the respondent in assigning revenues from interstate traffic to the several States in which such traffic moves.

(See note on page 707 regarding apportionment.)

531-532

720. RAILWAY OPERATING EXPENSES—CLASS I COMPANIES—WITHIN THE STATE.

[FOR COMPANIES HAVING ANNUAL OPERATING REVENUES ABOVE $1,000,000.]

State the railway operating expenses on respondent's road for the year, classifying them in accordance with the Uniform System of Accounts for Steam Railway Corporations, and analyzing them in accordance with the Commission's Rules Governing the Separation of Operating Expenses, effective on January 1, 1920. The returns against "Yard" in accounts Nos. 202–226 should be those applying to tracks in yards where a separate switching service is maintained, as provided for by instructions pertaining to those accounts in the effective Rules.

Line No.	Name of Railway Operating Expense Account. (a)	Amount of operating expenses for the year. (b)	Expenses related solely to freight service. (c)	Expenses related solely to passenger and allied services. (d)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to freight service. (e)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to passenger and allied services. (f)	Expenses not related to either freight service or passenger and allied services. (g)
1	I. Maintenance of Way and Structures.	$ . . c.	$ . . c.	$ . . c.	$ . . c.	$ . . c.	$ . . c.
2	(201) Superintendence,	231 211 44			164 559 19	66 652 25	
3	(202) Roadway maintenance—Yard,	36 810 44	16 995 93	543 72	17 333 11	1 937 68	
4	Roadway maintenance—Other,	216 449 61			143 405 82	73 045 79	
5	(203) Roadway—Depreciation—Yard,						
6	Roadway—Depreciation—Other,						
7	(204) Underground power tubes—Yard,						
8	Underground power tubes—Other,						
9	(205) Underground power tubes—Depreciation—Yard,						
10	Underground power tubes—Depreciation—Other,						
11	(206) Tunnels and subways—Yard,	Cr. 1 99		Cr. 1 99			
12	Tunnels and subways—Other,	18 607 11			12 885 42	5 721 69	
13	(207) Tunnels and subways—Depreciation—Yard,						
14	Tunnels and subways—Depreciation—Other,						
15	(208) Bridges, trestles, and culverts—Yard,	119 547 38	110 927 36		7 669 53	750 49	
16	Bridges, trestles, and culverts—Other,	200 924 65			137 541 56	63 383 09	
17	(209) Bridges, trestles, and culverts—Depreciation—Yard,						
18	Bridges, trestles, and culverts—Depreciation—Other,						
19	(210) Elevated structures—Yard,						
20	Elevated structures—Other,						
21	(211) Elevated structures—Depreciation—Yard,						
22	Elevated structures—Depreciation—Other,						
23	(212) Ties—Yard,	91 717 66	25 933 74	999 20	58 605 35	6 179 37	
24	Ties—Other,	402 766 63			266 521 28	136 245 35	
25	(213) Ties—Depreciation—Yard,						
26	Ties—Depreciation—Other,						
27	(214) Rails—Yard,	27 233 06	2 557 92	290 57	23 016 35	1 368 22	
28	Rails—Other,	3 977 01			3 028 87	948 14	
29	(215) Rails—Depreciation—Yard,						
30	Rails—Depreciation—Other,						
31	(216) Other track material—Yard,	45 597 18	11 769 59	776 44	31 203 60	2 847 55	
32	Other track material—Other,	40 780 18			27 065 49	13 714 69	
33	(217) Other track material—Depreciation—Yard,						
34	Other track material—Depreciation—Other,						
35	(218) Ballast—Yard,	Cr. 9 188 52	81 48	Cr.	8 351 32	Cr. 918 68	
36	Ballast—Other,	Cr. 464 55		Cr.	345 55	Cr. 119 00	
37	(219) Ballast—Depreciation—Yard,						
38	Ballast—Depreciation—Other,						

39	(220) Track laying and surfacing—Yard,		73	062	72		24	393	68		2	491	35		42	050	98		4	126	71				
40	Track laying and surfacing—Other,		312	489	39										204	919	84		107	569	55				
41	(221) Right-of-way fences—Yard,			397	17			95	95							278	40			22	82				
42	Right-of-way fences—Other,		5	470	37										3	512	82		1	957	55				
43	(222) Right-of-way fences—Depreciation—Yard,																								
44	Right-of-way fences—Depreciation—Other,																								
45	(223) Snow and sand fences and snowsheds—Yard,																								
46	Snow and sand fences and snowsheds—Other,			253	41											162	50			90	91				
47	(224) Snow and sand fences and snowsheds—Depreciation—Yard,																								
48	Snow and sand fences and snowsheds—Depreciation—Other,																								
49	(225) Crossings and signs—Yard,		24	286	87		10	954	88			96	70		12	000	00		1	235	29				
50	Crossings and signs—Other,		20	492	60										13	343	44		7	149	16				
51	(226) Crossings and signs—Depreciation—Yard,																								
52	Crossings and signs—Depreciation—Other,																								
53	(227) Station and office buildings,		11	147	05	Cr.	22	297	50		15	758	32		12	812	98		4	873	25				
54	(228) Station and office buildings—Depreciation,																								
55	(229) Roadway buildings,		6	250	20										4	600	80		1	649	40				
56	(230) Roadway buildings—Depreciation,																								
57	(231) Water stations,		21	260	24										14	887	18		6	373	06				
58	(232) Water stations—Depreciation,																								
59	(233) Fuel stations,		12	664	64										8	810	98		3	853	66				
60	(234) Fuel stations—Depreciation,																								
61	(235) Shops and enginehouses,		107	061	09			5	59						81	753	12		25	302	38				
62	(236) Shops and enginehouses—Depreciation,																								
63	(237) Grain elevators,																								
64	(238) Grain elevators—Depreciation,																								
65	(239) Storage warehouses,																								
66	(240) Storage warehouses—Depreciation,																								
67	(241) Wharves and docks,		1	403	16		1	403	16																
68	(242) Wharves and docks—Depreciation,																								
69	(243) Coal and ore wharves,		1	007	64		1	007	64																
70	(244) Coal and ore wharves—Depreciation,																								
71	(245) Gas producing plants,			288	86											218	52			70	33				
72	(246) Gas producing plants—Depreciation,																								
73	(247) Telegraph and telephone lines,		93	096	81										60	893	09		32	203	72				
74	(248) Telegraph and telephone lines—Depreciation,																								
75	(249) Signals and interlockers,		59	608	54			17	09			48	05		38	620	58		20	922	82				
76	(250) Signals and interlockers—Depreciation,																								
77	(251) Power plant dams, canals, and pipe lines,																								
78	(252) Power plant dams, canals, and pipe lines—Depreciation,																								
79	(253) Power plant buildings,		1	955	00										1	468	56			486	44				
80	(254) Power plant buildings—Depreciation.																								
81	(255) Power substation buildings,																								
82	(256) Power substation buildings—Depreciation,																								
83	(257) Power transmission systems,			714	27			4	83							462	01			247	43				
84	(258) Power transmission systems—Depreciation,																								
85	(259) Power distribution systems,		1	613	52										1	148	54			465	18				
86	(260) Power distribution systems—Depreciation,																								
87	Carried forward,		2	181	290	83		183	851	34		21	002	86	1	386	080	84		590	356	29				

720. RAILWAY OPERATING EXPENSES—CLASS I COMPANIES—WITHIN THE STATE—Concluded.

Line No.	Name of Railway Operating Expense Account. (a)	Amount of operating expenses for the year. (b)	Expenses related solely to freight service. (c)	Expenses related solely to passenger and allied services. (d)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to freight service. (e)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to passenger and allied services. (f)	Expenses not related to either freight service or passenger and allied services. (g)
		$ c.	$ c.	$ c.	$ c.	$ c.	$ c.
88	Maintenance of Way and Structures—Brought forward,	2 181 290 83	183 851 34	21 002 36	1 386 080 84	590 356 29	
89	(261) Power line poles and fixtures	2 083 43			1 387 70	695 73	
90	(262) Power line poles and fixtures—Depreciation,						
91	(263) Underground conduits,	Cr. 1 607 00			Cr. 1 215 70	Cr. 391 30	
92	(264) Underground conduits—Depreciation,						
93	(265) Miscellaneous structures,	340 17			257 34	82 83	
94	(266) Miscellaneous structures—Depreciation,						
95	(267) Paving,	11 469 99			8 705 61	2 764 38	
96	(268) Paving—Depreciation,						
97	(269) Roadway machines,	17 177 03	32 60		12 619 09	4 525 34	
98	(270) Roadway machines—Depreciation,						
99	(271) Small tools and supplies,	31 112 78	80 75		22 687 87	8 344 16	
100	(272) Removing snow, ice, and sand,	30 167 63	375 16		21 478 17	8 314 30	
101	(273) Assessments for public improvements,	3 170 14			2 230 16	939 98	
102	(274) Injuries to persons,	16 632 26	1 330 00	450 00	10 834 97	4 017 29	
103	(275) Insurance,	23 93	57 38		Cr. 27 69	Cr. 5 76	
104	(276) Stationery and printing,	3 601 74			2 618 62	983 12	
105	(277) Other expenses,	67 35			50 95	16 40	
106	Total of accounts Nos. 201 to 277,	2 295 530 28	185 727 23	21 452 36	1 467 707 93	620 642 76	
107	(278) Maintaining joint tracks, yards, and other facilities—Dr.,	49 777 07	28 039 80	Cr. 373 14	14 403 16	7 707 25	
108	(279) Maintaining joint tracks, yards, and other facilities—Cr.,	370 592 58	45 893 55	4 863 50	199 471 69	120 364 04	
109	(280) Equalization—Way and structures,						
110	Total—All depreciation accounts,						
111	Total—All other maintenance of way and structure accounts,						
112	Total maintenance of way and structures,	1 974 714 77	167 873 58	16 215 72	1 282 639 40	507 985 97	
113	II. Maintenance of Equipment.	* * * * *	* * * * *	* * * * *	* * * * *	* * * * *	* * * * *
114	(301) Superintendence,	124 684 35	24 51	338 29	95 586 52	28 735 03	
115	(302) Shop machinery,	35 989 88			26 213 58	9 776 30	
116	(303) Shop machinery—Depreciation,						
117	(304) Power plant machinery,	5 596 04			4 073 21	1 522 83	
118	(305) Power plant machinery—Depreciation,						
119	(306) Power substation apparatus,	6 75			4 99	1 76	
120	(307) Power substation apparatus—Depreciation,						
121	(308) Steam locomotives—Repairs,	820 068 48	382 370 40	160 098 60	246 605 86	30 993 62	
122	(309) Steam locomotives—Depreciation,	342 516 75			264 754 81	77 761 94	
123	(310) Steam locomotives—Retirements,	4 723 79			3 649 98	1 073 81	
124	(311) Other locomotives—Repairs,						
125	(312) Other locomotives—Depreciation,						
126	(313) Other locomotives—Retirements,						
127	(314) Freight-train cars—Repairs	521 920 06	521 920 06				
128	(315) Freight-train cars—Depreciation,	602 479 29	602 479 29				
129	(316) Freight-train cars—Retirements,	17 958 76	17 958 76				

130	(317) Passenger-train cars—Repairs,		211	892	56					211	892	56															
131	(318) Passenger-train cars—Depreciation,		105	367	49					105	367	49															
132	(319) Passenger-train cars—Retirements,			100	95						100	95															
133	(320) Motor equipment of cars—Repairs,																										
134	(321) Motor equipment of cars—Depreciation,																										
135	(322) Motor equipment of cars—Retirements,																										
136	(323) Floating equipment—Repairs,																										
137	(324) Floating equipment—Depreciation,																										
138	(325) Floating equipment—Retirements,																										
139	(326) Work equipment—Repairs,		41	387	70									29	649	21		11	738	49							
140	(327) Work equipment—Depreciation,		38	910	20									27	592	67		11	317	53							
141	(328) Work equipment—Retirements,		3	308	56									2	345	94			962	62							
142	(329) Miscellaneous equipment—Repairs,			463	99			182	36			3	95		212	30			65	38							
143	(330) Miscellaneous equipment—Depreciation,			551	83										421	92			129	91							
144	(331) Miscellaneous equipment—Retirements,			142	19										108	72			33	47							
145	(332) Injuries to persons,		8	543	54			553	23					6	166	75		1	823	56							
146	(333) Insurance,		3	522	91						936	80		1	962	32			623	79							
147	(334) Stationery and printing,		2	078	96									1	603	46			475	50							
148	(335) Other expenses,			35	91						2	19			24	49			7	23							
149	Total of accounts Nos. 301 to 335,	2	892	248	94	1	525	488	61		478	740	83	710	976	73		177	042	77							
150	(336) Maintaining joint equipment—Dr.,		40	506	15		34	867	08		2	592	63	2	309	40			757	04							
151	(337) Maintaining joint equipment—Cr.,		26	392	86		28	167	23	Dr.	6	931	21	3	908	70		1	248	14							
152	(338) Equalization—Equipment,																										
153	Total—All depreciation accounts,																										
154	Total—All other maintenance of equipment accounts,																										
155	Total maintenance of equipment,	2	906	362	23	1	532	188	46		488	264	67	709	377	43		176	531	67							
156	III. TRAFFIC.	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
157	(351) Superintendence,		127	003	81		69	663	13		32	506	24	12	553	65		12	280	79							
158	(352) Outside agencies,		270	665	75		101	415	91		102	337	22	33	727	28		33	185	34							
159	(353) Advertising,		75	337	88		1	049	84		73	364	32		476	76			446	96							
160	(354) Traffic associations,		13	151	12		11	587	69		1	563	43														
161	(355) Fast freight lines,		4	422	07		4	422	07																		
162	(356) Industrial and immigration bureaus,		27	935	47									14	001	57		13	933	90							
163	(357) Insurance,			290	69			59	99			34	32		103	48			92	90							
164	(358) Stationery and printing,		35	693	44		27	327	55		4	327	58	2	041	99		1	996	32							
165	(359) Other expenses,		2	384	67		1	921	67			467	61	Cr.	3	11	Cr.		1	50							
166	Total of accounts Nos. 351 to 359,		556	884	90		217	447	85		214	600	72	62	901	62		61	954	71							
167	IV. TRANSPORTATION—RAIL LINE.	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
168	(371) Superintendence,		159	917	68		14	705	65		6	326	57	101	568	87		37	316	59							
169	(372) Dispatching trains,		186	336	81		4	148	16					88	964	01		93	224	64							
170	(373) Station employees,		966	047	68		410	939	66		161	957	08	287	962	51		105	188	43							
171	(374) Weighing, inspection, and demurrage bureaus,		26	753	64		26	753	64																		
172	(375) Coal and ore wharves,			338	71			338	71																		
173	(376) Station supplies and expenses,		80	115	11		25	360	53		29	784	62	18	352	94		6	637	02							
174	(377) Yardmasters and yard clerks,		300	137	94		278	554	64		21	583	30														
175	(378) Yard conductors and brakemen,		426	212	51		385	735	30		40	477	21														
176	Carried forward,																										

720. RAILWAY OPERATING EXPENSES—CLASS I COMPANIES—WITHIN THE STATE—Concluded.

Line No.	Name of Railway Operating Expense Account. (a)	Amount of operating expenses for the year. (b)	Expenses related solely to freight service. (c)	Expenses related solely to passenger and allied services. (d)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to freight service. (e)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to passenger and allied services. (f)	Expenses not related to either freight service or passenger and allied services. (g)
		$ c.	$ c.	$ c.	$ c.	$ c.	$ c.
177	TRANSPORTATION—RAIL LINE—Brought forward,						
178	(379) Yard switch and signal tenders,	50 809 81	45 792 28	5 017 53			
179	(380) Yard enginemen,	278 930 44	252 418 42	26 512 02			
180	(381) Yard motormen,						
181	(382) Fuel for yard locomotives,	204 107 66	182 582 64	21 525 02			
182	(383) Yard switching power produced,						
183	(384) Yard switching power purchased,						
184	(385) Water for yard locomotives,	5 571 38	4 987 20	584 18			
185	(386) Lubricants for yard locomotives,	2 506 51	2 257 60	248 91			
186	(387) Other supplies for yard locomotives,	2 897 41	2 647 81	249 60			
187	(388) Enginehouse expenses—Yard,	78 616 10	73 849 67	4 766 43			
188	(389) Yard supplies and expenses,	14 080 80	13 156 12	924 68			
189	(392) Train enginemen,	633 525 21	413 932 04	196 735 68	20 143 76	2 713 73	
190	(393) Train motormen,	22 538 27		22 538 27			
191	(394) Fuel for train locomotives,	974 772 29	633 836 74	322 272 49	16 608 55	2 054 41	
192	(395) Train power produced,						
193	(396) Train power purchased,						
194	(397) Water for train locomotives,	28 374 62			18 752 68	9 621 94	
195	(398) Lubricants for train locomotives,	15 525 00	9 034 72	6 169 96	283 35	36 97	
196	(399) Other supplies for train locomotives,	9 279 64	5 603 04	3 462 38	187 71	26 51	
197	(400) Enginehouse expenses—Train,	217 928 95	149 382 99	57 336 10	10 002 79	1 207 07	
198	(401) Trainmen,	829 688 74	545 273 38	254 369 53	26 566 43	3 479 40	
199	(402) Train supplies and expenses,	196 263 74	74 082 54	122 181 20			
200	(403) Operating sleeping cars,						
201	(404) Signal and interlocker operation,	48 563 11	306 36	Cr. 52 55	30 215 86	18 093 44	
202	(405) Crossing protection,	67 658 92	60 92		44 420 29	23 177 71	
203	(406) Drawbridge operation,	39 649 47	3 242 25		28 002 13	8 405 09	
204	(407) Telegraph and telephone operation,	39 515 46	17 07	13 58	28 687 14	10 797 57	
205	(408) Operating floating equipment,						
206	(409) Express service,						
207	(410) Stationery and printing,	25 534 69	9 485 42	3 428 92	9 311 10	3 309 25	
208	(411) Other expenses,	9 895 70	3 762 40	2 107 53	2 820 92	1 204 75	
209	(414) Insurance,	1 502 90	357 68		810 97	334 25	
210	(415) Clearing wrecks,	6 542 24	6 684 45	521 28	172 44	64 07	
211	(416) Damage to property,	18 132 54	3 584 54	1 003 90	10 010 52	3 534 48	
212	(417) Damage to live stock on right of way,	17 487 72	2 696 09	3 481 06	8 237 67	3 072 90	
213	(418) Loss and damage—Freight,	67 390 76	67 390 76				
214	(419) Loss and damage—Baggage,	96 16		96 16			
215	(420) Injuries to persons,	81 372 09	47 151 45	19 550 59	10 639 80	3 930 15	
216	Total of accounts Nos. 371 to 389, 392 to 411, and 414 to 420,	6 134 618 41	3 699 112 87	1 335 372 53	762 702 54	337 430 37	

217	(390) Operating joint yards and terminals—Dr.,		55	543	06		43	942	02	Cr.		109	74		7	552	99		4	057	79				
218	(391) Operating joint yards and terminals—Cr.,		209	923	16		144	716	71		54	724	18		6	855	07		3	627	20				
219	(412) Operating joint tracks and facilities—Dr.,		42	630	11		25	316	69		4	208	92		8	771	13		4	333	37				
220	(413) Operating joint tracks and facilities—Cr.,		223	939	21		40	627	34		59	998	86		80	181	18		43	131	83				
221	Total transportation—Rail line,	5	798	929	21	3	583	027	53	1	224	748	77		592	090	41		299	062	50				
222	V. TRANSPORTATION—WATER LINE.																								
223	(431) Operation of vessels,																								
224	(432) Operation of terminals,																								
225	(433) Incidental,																								
226	Total transportation—Water line,																								
227	VI. MISCELLANEOUS OPERATIONS.																								
228	(441) Dining and buffet service,		104	970	81						104	970	81												
229	(442) Hotels and restaurants,		107	254	29						40	398	03		23	517	91		43	338	35				
230	(443) Grain elevators,																								
231	(444) Stockyards,																								
232	(445) Producing power sold,																								
233	(446) Other miscellaneous operations,																								
234	Total miscellaneous operations,		212	225	10						145	368	84		23	517	91		43	338	35				
235	VII. GENERAL.																								
236	(451) Salaries and expenses of general officers,		101	834	23		8	720	56		1	420	58		65	888	60		25	804	49				
237	(452) Salaries and expenses of clerks and attendants,		402	948	57		114	390	31		23	025	72		190	808	39		74	724	15				
238	(453) General office supplies and expenses,		25	156	33			938	63			53	79		17	366	52		6	797	39				
239	(454) Law expenses,		49	037	54		2	247	64			122	39		33	530	71		13	136	80				
240	(455) Insurance,		1	393	48										1	002	73			390	75				
241	(456) Relief department expenses,																								
242	(457) Pensions,*		276	300	95										198	540	16		77	760	79				
243	(458) Stationery and printing,		21	332	44		4	453	65			328	25		11	897	05		4	653	49				
244	(459) Valuation expenses,		12	668	34										9	103	09		3	565	25				
245	(460) Other expenses,		19	944	64			209	85			736	96		13	714	14		5	283	69				
246	Total of accounts Nos. 451 to 460,		910	616	52		130	960	64		25	687	69		541	851	39		212	116	80				
247	(461) General joint facilities—Dr.,		8	655	57		6	077	25			544	77		1	498	43			535	12				
248	(462) General joint facilities—Cr.,		8	689	77		1	532	36			73	08		5	304	75		1	779	58				
249	Total general expenses,		910	582	32		135	505	53		26	159	38		538	045	07		210	872	34				
250	VIII. TRANSPORTATION FOR INVESTMENT—Cr.,		22	879	89		22	860	50			19	39												
251	GRAND TOTAL RAILWAY OPERATING EXPENSES,	12	336	818	64	5	613	182	55	2	115	338	71	3	308	571	84	1	299	725	54				

252 Operating ratio (ratio of operating expenses to operating revenues), 96.04 per cent.

State briefly the rule or rules in accordance with which expenses common to operations in two or more States are assigned to the State; if such rules are in print, file a copy thereof with this report or give reference to such copy previously filed.

NOTE:

The statements herein either of revenues or expenses attributed to Washington are misleading unless properly understood. They are necessarily based on arbitrary assumptions as follows:

Revenues contain (first) the revenues of business wholly local within the State and in addition a proportion of interstate revenues determined by the proportion of mileage which each interstate freight shipment or passenger is carried within the State.

Charges for expenses contain (first) those expenses incurred in each state, that are considered wholly applicable to that state, and in addition some mileage proportion of expenses which can not be localized. Apportioning either such revenues or such expenses on a mileage basis is purely arbitrary and has been adopted for want of any other basis.

931. STATISTICS OF RAIL-LINE OPERATIONS—WITHIN THE STATE.

Give the various statistical items called for concerning the rail-line operations of respondent's road during the year. *If the respondent for its own purposes uses more accurate methods than are provided below for computing the required averages, the more accurate figures should be given in the returns, and the method of computing each average should be indicated in a footnote.* Train-miles, locomotive-miles, car-miles, motor car-miles and other particulars are to be classified in accordance with the Uniform System of Accounts for Steam Railway Corporations. Motor car and trailer miles, if any, should be included in column (d). In computing averages per locomotive-mile (Items 151–155), motor car and trailer train-miles and car-miles should be excluded.

Instructions Regarding Various Items Designated by Numbers.

1 includes road operated under trackage rights. If the average mileage used for freight or passenger service notably differs from the mileage reportable for Item No. 1, the respective "Averages per mile of road" (Items Nos. 111–127) affected, should be computed accordingly, and pertinent details given in a footnote.

91 includes all freight the revenue from which is includable in account No. 101, "Freight."

92 includes not only nonrevenue freight which is hauled on transportation trains, but also a proportion of the weight of exclusive work equipment, based on the relationship of net tons to gross tons of revenue freight for the reporting period.

94 relates to freight included in 91.

95 relates to freight included in 92.

108 is the aggregate of revenue accounts Nos. 102 to 109, inclusive. (See page 700.)

111=12+1.
112=14+1.
113=15+1.
114=16+1.
115=17+1.
116=18+1.
117=41+1.
118=(56+62+63+64+65+71+72+73+74)+1.
119=(61+66+67+68+69+75+76+77+78)+1.
120=101+1.

121=108+1.
122=104+1.
123=105+1.
124=106+1.
125= 94+1.
126= 96+1.
127=100+1.
131= 51+13.
132= 62+15.
133= 52+13.
134= 63+15.
135= 94+(13+freight-car proportion of 15).

136= 96+(13+freight-car proportion of 15).
137= 61+14.
138=(66+67+68+69)+15.
139=100+(14+passenger-car proportion of 15).
140=101+(13+freight-car proportion of 15).
141=103+(14+passenger-car proportion of 15).
142=104+17.
143=105+17.

144=106+17.
151= 13+24.
152= 56+24.
153= 14+28.
154= 61+28.
155= 15+32.
156= 70+32.
157= 16+36.
158= 79+36.
162= 96+(51+62).
163=101+(51+62).

171=100+(57+58+66+67).
172=102+(57+58+66+67).
181= 94+91.
182= 95+92.
183= 96+93.
184=100+99.
185=101+91.
186=101+94.
187=102+90.
188=102+100.
189=105+104.

(See notes on page 906).

Item No.	Item (a)	With steam locomotives. (b)			With electric and other locomotives. (c)			Without locomotives. (d)			Total. (e)		
1	Average mileage of road operated,† (miles),	* *	* *	* *	* *	* *	* *	* *	* *	* *	1	945	97
	Train-miles:	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *
11	Freight—ordinary,	1	668	261							1	668	261
12	" —light,		15	893								15	893
13	" —total,	1	684	154							1	684	154
14	Passenger,	1	532	937					319	686	1	852	623
15	Mixed, (Frt. 80,473 , Pass. 11,116),		91	589								91	589
16	Special,		1	096								1	096
17	Total transportation service,	3	309	776					319	686	3	629	462
18	Work service,		53	635								53	635
	Locomotive-miles.	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *
21	Freight—principal,	1	687	161				* *	* *	* *	1	687	161
22	" —helper,		66	580				* *	* *	* *		66	580
23	" —light,		64	278				* *	* *	* *		64	278
24	" —total,	1	818	019				* *	* *	* *	1	818	019
25	Passenger—principal,	1	532	937				* *	* *	* *	1	532	937
26	" —helper,		66	745				* *	* *	* *		66	745
27	" —light,		38	429				* *	* *	* *		38	429
28	" —total,	1	638	111				* *	* *	* *	1	638	111
29	Mixed train—principal,		91	589				* *	* *	* *		91	589
30	" " —helper,			16				* *	* *	* *			16
31	" " —light,		2	219				* *	* *	* *		2	219
32	" " —total,		93	824				* *	* *	* *		93	824
33	Special—principal,		1	096				* *	* *	* *		1	096
34	" —helper,		1	011				* *	* *	* *		1	011
35	" —light,			713				* *	* *	* *			713
36	" —total,		2	820				* *	* *	* *		2	820
37	Train switching,		230	118				* *	* *	* *		230	118
38	Yard switching—freight,		912	026				* *	* *	* *		912	026
39	" " —passenger,		101	633				* *	* *	* *		101	633
40	" " —total,	1	013	659				* *	* *	* *	1	013	659
41	Total transportation service,	4	796	551				* *	* *	* *	4	796	551
42	Work service,		62	621				* *	* *	* *		62	621
	Car-miles:	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *
51	Freight train—loaded,	36	252	436							36	252	436
52	" " —empty,	16	776	775							16	776	775
53	Sum of loaded and empty,	53	029	211							53	029	211
54	Freight train—caboose,	1	712	875							1	712	875
55	" " —exclusive work equipment,		508	519								508	519
56	" " —total,	55	250	605							55	250	605
57	Passenger train—passenger,	2	878	301					350	483	3	228	784
58	" " —sleeping, parlor, and observation,	3	336	059						40	3	336	099
59	" " —dining,		457	715								457	715
60	" " —other,	3	506	860					5	087	3	511	947
61	" " —total,	10	178	935					355	610	10	534	545

† Two decimal places required.

931. STATISTICS OF RAIL-LINE OPERATIONS—WITHIN THE ST[illegible]—Continued.

Item No.	Item. (a)	With steam locomotives. (b)			With electric and other locomotives. (c)			Without locomotives. (d)			Total. (e)		
	Car-miles—Continued.	* *	* *	* *	* *	* *	* *	* *	* *	*	* *	* *	* *
62	Mixed train—freight—loaded,		185	236								185	236
63	" " —freight—empty,		143	412								143	412
64	" " —caboose		50	643								50	643
65	" " —exclusive work equipment,		5	086								5	086
66	" " —passenger,		44	078								44	078
67	" " —sleeping, parlor, and observation,												
68	" " —dining,												
69	" " —other passenger-train,			77									77
70	" " —total,		428	532								428	532
71	Special train—freight—loaded,		8	691								8	691
72	" " —freight—empty,												
73	" " —caboose,			656									656
74	" " —exclusive work equipment,												
75	" " —passenger,		2	555								2	555
76	" " —sleeping, parlor, and observation,		1	900								1	900
77	" " —dining,			323									323
78	" " —other passenger-train,		1	266								1	266
79	" " —total,		15	391								15	391
80	Total transportation service,	65	873	463					355	610	66	229	073
81	Work service,		182	000								182	000

Item No.	Item. (f) Miles of road	Amount. (g)	Item No.	Item. (h)	Amount. (i)
	Freight Service.	* * * * *		Averages per Train-mile.	* * * * *
91	Tons—revenue freight,	5 104 476	131	Loaded freight car-miles—freight trains,†	21 53
92	" —nonrevenue freight,	816 617	132	" " " " —mixed trains,†	2 02
93	" —total,	5,920 093	133	Empty freight car-miles—freight trains,†	9 96
94	Ton-miles—revenue freight,	753,721 797	134	" " " " —mixed trains,†	1 57
95	" " —nonrevenue freight,	108,870 536	135	Ton-miles—revenue freight,†	427 15
96	" " —total,	862,592 333	136	" —all freight,†	488 82
97	Gross ton-miles, incl. locomotives and tenders,	, ,	137	Passenger train car-miles—passenger trains,†	5 69
98	" " " excl. locomotives and tenders,	, ,	138	" " " ", —mixed trains,†	48
	Passenger Service.	* * * * *	139	Revenue passenger-miles,†	22 95
99	Passengers carried—revenue,	280 521	140	Freight revenue,†	$ 5 99
100	Passenger-miles—revenue,	42,735 770	141	Passenger service train revenue,†	83
	Revenues and Expenses.	$ * * * * *	142	Operating revenues,†	3 54
101	Freight revenue,†	10,570 ,609 39	143	" expenses,†	3 40
102	Passenger revenue,†	,943 ,250 73	144	Net operating revenues,†	14
103	Passenger service train revenue,†	1,543 ,077 73		Averages per Locomotive-mile.	* * * * *
104	Operating revenues,†	12,845 ,325 62	151	Train-miles—freight trains,†	93
105	" expenses,†	12,336 ,818 64	152	Car-miles—freight trains,†	30 39
106	Net operating revenues,†	,508 ,506 98	153	Train-miles—passenger trains,†	94
	Averages per Mile of Road.*	* * * * *	154	Car-miles—passenger trains,†	6 21
111	Freight-train miles, 1,732.82	,972	155	Train-miles—mixed trains,†	98
112	Passenger-train miles, 1,185.46	1,563	156	Car-miles—mixed trains,†	4 57
113	Mixed-train miles, 126.95	,721	157	Train-miles—special trains,†	39
114	Special-train miles, 1,846.11	1	158	Car-miles—special trains,†	5 46
115	Transportation service train-miles, 1,846.11	1,966		Averages per Loaded Freight Car-mile.	* * * * *
116	Work-train miles, 1,846.11	29	162	Ton-miles—all freight,†	23 34
117	Locomotive-miles—transportation, 1,846.11	2,598	163	Freight revenue,‡	$ .29010
118	Freight service car-miles, 1,840.68	30,230		Averages per Car-mile—Passenger.	* * * * *
119	Passenger service car-miles, 1,302.98	8,123	171	Passenger-miles—revenue,†	6 47
120	Freight revenue,† 1,917.52	$ 5,512 65	172	Passenger revenue,‡	$ .14272
121	Passenger service train revenue,† 1,396.50	1,104 96		Miscellaneous Averages.	* * * * *
122	Operating revenues,† 1,945.97	6,600 99	181	Miles hauled—revenue freight,†	147 56
123	" expenses,† 1,945.97	6,339 68	182	" " —nonrevenue freight,†	153 34
124	Net operating revenues,† 1,945.97	,261 81	183	" " —all freight,†	145 68
125	Ton-miles—revenue freight, 1,917.52	393,071	184	Miles carried—revenue passengers,†	152 34
126	" —all freight, 1,917.52	449,848	185	Revenue per ton of freight,‡	$ 2.07085
127	Passenger-miles—revenue, 1,396.50	30,602	186	" " ton-mile of freight,‡	.01402
			187	" " passenger,‡	3.36250
			188	" " passenger-mile,‡	.02207
			189	Operating ratio,†	% 96.04

See note on page 707

State Commission Form—Steam. * See instructions for Item No. 1. † Two decimal places required. ‡ Five decimal places required. 341

2912

VERIFICATION.

The foregoing report must be verified by the oath of the officer having control of the accounting of the respondent. It should be verified, also, by the oath of the president or other chief officer of the respondent, unless the respondent states on the last preceding page of this report that such chief officer has no control over the accounting of the respondent. Under the provisions of section 20 of the Interstate Commerce Act, "the oath required * * * may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken."

OATH.

(To be made by the officer having control of the accounting of the respondent.)

State of Minnesota }
County of Ramsey } ss:

F. W. Sweney (Insert here the name of the affiant.) makes oath and says that he is Comptroller (Insert here the official title of the affiant.)

of Northern Pacific Railway Company (Insert here the exact legal title or name of the respondent.)

that it is his duty to have supervision over the books of account of the respondent and to control the manner in which such books are kept; that he knows that such books have, during the period covered by the foregoing report, been kept in good faith in accordance with the accounting and other orders of the Interstate Commerce Commission, effective during the said period; that he has carefully examined the said report and to the best of his knowledge and belief the entries contained in the said report have, so far as they relate to matters of account, been accurately taken from the said books of account and are in exact accordance therewith; that he believes that all other statements of fact contained in the said report are true, and that the said report is a correct and complete statement of the business and affairs of the above-named respondent during the period of time from and including Jan. 1, 1932, to and including Dec. 31, 1932

(sgnd) F. W. Sweney
(Signature of affiant.)

Subscribed and sworn to before me, a _____, in and for the State and county above named, this _____ day of _____, 193

My commission expires _____ [L. S. Use an impression seal.]

_____
(Signature of officer authorized to administer oaths.)

SUPPLEMENTAL OATH.

(By the president or other chief officer of the respondent.)

State of Minnesota }
County of Ramsey } ss:

B. W. Scandrett (Insert here the name of the affiant.) makes oath and says that he is Vice President (Insert here the official title of the affiant.)

of Northern Pacific Ry. Co. (Insert here the exact legal title or name of the respondent.)

that he has carefully examined the foregoing report; that he believes that all statements of fact contained in the said report are true, and that the said report is a correct and complete statement of the business and affairs of the above-named respondent and the operations of its property during the period of time from and including Jan. 1, 1932, to and including Dec. 31, 1932

(Sgnd) B. W. Scandrett
(Signature of affiant.)

Subscribed and sworn to before me, a _____, in and for the State and county above named, this _____ day of _____, 193

My commission expires _____ [L. S. Use an impression seal.]

_____
(Signature of officer authorized to administer oaths.)

558-562

[fol. 563] DEFENDANT'S EXHIBIT 9

[fols. 564-613] Annual Report of Northern Pacific Railway Company

to the

Department of Public Works of the State of Washington

for the

Year Ended December 31, 1933

Name of officer in charge of correspondence with the Commission regarding this report: F. W. Sweney.
Official title: Comptroller.
Office address: 176 East Fifth Street, St. Paul, Minn.

300 I. INCOME ACCOUNT FOR THE YEAR.

See instructions on lower section of page 300.

Line No.	Item. (a)	Amount applicable to the year. (b)	Comparison with preceding year. (Increase in black, decrease in red.) (c)	Offsetting debits and credits. (d)	Remarks. (e)
1	I. Operating Income.	$ c.	$ c.	$ None c.	State the amount of "Net railway operating income," i. e., the net of returns on lines 7, 15-20, 35-40: $5,975,972.63
2	(501) *Railway operating revenues (p. 302),	47 578 676 54	494 500 17		
3	(531) * Railway operating expenses (p. 309, 310 or 311),	38 993 492 56	D 2 439 687 16		
4	*Net revenue † from railway operations,	8 585 184 28	2 934 187 33		
5	(532) *Railway tax accruals (p. 312),	5 883 250 75	D 794 103 82		
6	(533) *Uncollectible railway revenues,	23 847 74	638 47		
7	*Railway operating income,†	2 678 085 79	3 727 652 68		
8	(502) Revenues from miscellaneous operations (p. 303),				
9	(534) Expenses of miscellaneous operations (p. 303),				
10	Net revenue † from miscellaneous operations,				
11	(535) Taxes on miscellaneous operating property (p. 303),				
12	Miscellaneous operating income,†				
13	Total operating income,†	2 678 085 79	3 727 652 68		
14	II. Nonoperating Income.				
15	(503) Hire of freight cars—Credit balance (p. 315),	590 539 34	205 273 09		
16	(504) Rent from locomotives,	172 747 79	D 19 022 56		
17	(505) Rent from passenger-train cars,	78 652 64	D 26 818 18		
18	(506) Rent from floating equipment,				
19	(507) Rent from work equipment,	86 893 35	D 302 99		
20	(508) Joint facility rent income,	3 337 228 94	80 361 10		
21	(509) Income from lease of road (p. 313),	351 366 88	D 6 044 09		
22	(510) Miscellaneous rent income (p. 313),	448 475 27	D 26 267 09		
23	(511) Miscellaneous nonoperating physical property (p. 315),	140 388 84	D 36 780 98		
24	(512) Separately operated properties—Profit (p. 315),				
25	(513) Dividend income,	7 501 693 58	D 1 617 731 86		
26	(514) Income from funded securities,	295 734 58	22 168 41		
27	(515) Income from unfunded securities and accounts,	116 912 69	D 39 564 92		
28	(516) Income from sinking and other reserve funds,				
29	(517) Release of premiums on funded debt,				
30	(518) Contributions from other companies,				
31	(519) Miscellaneous income,	38 337 03	D 6 498 29		
32	Total nonoperating income,†	13 158 970 93	D 1 471 228 36		
33	Gross income,†	15 837 056 72	2 256 424 32		
34	III. Deductions from Gross Income.				
35	(536) Hire of freight cars—Debit balance (p. 315),				
36	(537) Rent for locomotives,	43 717 60	D 17 878 31		
37	(538) Rent for passenger-train cars,	151 914 79	20 656 81		
38	(539) Rent for floating equipment,				
39	(540) Rent for work equipment,	3 302 90	14 39		
40	(541) Joint facility rents,	769 239 93	D 21 233 17		
41	(542) Rent for leased roads (p. 321),	51 418 87	--		
42	(543) Miscellaneous rents (p. 321),	9 611 43	D 2 068 29		
43	(544) Miscellaneous tax accruals,	86 019 69	6 308 56		
44	(545) Separately operated properties—Loss (p. 315),				
45	(546) Interest on funded debt,	14 241 028 13	D 23 231 24		
46	(547) Interest on unfunded debt,	13 965 05	8 367 35		
47	(548) Amortization of discount on funded debt,				
48	(549) Maintenance of investment organization,				
49	(550) Income transferred to other companies,				
50	(551) Miscellaneous income charges,	162 859 80	D 9 896 51		
51	Total deductions from gross income,	15 533 078 19	D 38 960 41		
52	Net income,†	303 978 53	2 295 384 73		
53	IV. Disposition of Net Income.				
54	(552) Income applied to sinking and other reserve funds (p. 322,)				
55	(553) Dividend appropriations of income (p. 300),				
56	(554) Income appropriated for investment in physical property (p. 322),				
57	(555) Stock discount extinguished through income,				
58	(556) Miscellaneous appropriations of income (p. 322),				
59	Total appropriations of income,				
60	Income † balance transferred to Profit and Loss,	303 978 53	2 295 384 73		

State Commission Form—Steam.

* Includes operation of water lines, if any.

† Deficit, if in red. (D - denotes decrease)

310. RAILWAY OPERATING REVENUES.

State the railway operating revenues of the respondent for the year (classified in accordance with the Uniform System of Accounts for Steam Railway Corporations), and distribute the various accounts as a whole, so as to group those assignable to freight or to passenger and allied services or those common to both services. The proportion of joint traffic receipts belonging to other carriers should not be included.

Line No.	Class of Railway Operating Revenues. (a)	Amount of revenue for the year. (b)				Assignable to freight service. (c)				Assignable to passenger and allied services. (d)				Not assignable to freight or to passenger and allied services. (e)				Remarks. (f)
		$			c.	$			c.	$			c.	$			c.	
1	(101) Freight,*	40	224	391	50	40	224	391	50					• •	• •	• •	•	
2	(102) Passenger,	3	208	870	87	• •	• •	• •	•	3	208	870	87	• •	• •	• •	•	
3	(103) Excess baggage,		24	378	75	• •	• •	• •	•		24	378	75	• •	• •	• •	•	
4	(104) Sleeping car,			67	55	• •	• •	• •	•			67	55	• •	• •	• •	•	
5	(105) Parlor and chair car,		4	929	14	• •	• •	• •	•		4	929	14	• •	• •	• •	•	
6	(106) Mail,	1	477	375	59	• •	• •	• •	•	1	477	375	59	• •	• •	• •	•	
7	(107) Express,		540	409	05	• •	• •	• •	•		540	409	05	• •	• •	• •	•	
8	(108) Other passenger-train,	Dr.	7	175	31	• •	• •	• •	•	Dr.	7	175	31	• •	• •	• •	•	
9	(109) Milk,		141	431	99						141	431	99	• •	• •	• •	•	
10	(110) Switching,		781	241	16		781	241	16					• •	• •	• •	•	
11	(111) Special service train,		10	133	73		4	164	30		5	969	43					
12	(112) Other freight-train,		109	064	88		109	064	88	• •	• •	• •	•	• •	• •	• •	•	
13	(113) Water transfers—Freight,									• •	• •	• •	•	• •	• •	• •	•	
14	(114) Water transfers—Passenger,					• •	• •	• •	•					• •	• •	• •	•	
15	(115) Water transfers—Vehicles and [live stock,									• •	• •	• •	•	• •	• •	• •	•	
16	(116) Water transfers—Other,																	
17	Total rail-line transporta- [tion revenue,	46	515	118	90	41	118	861	84	5	396	257	06					
18	(121) Freight,									• •	• •	• •	•	• •	• •	• •	•	
19	(122) Passenger,					• •	• •	• •	•					• •	• •	• •	•	
20	(123) Excess baggage,					• •	• •	• •	•					• •	• •	• •	•	
21	(124) Other passenger service,					• •	• •	• •	•					• •	• •	• •	•	
22	(125) Mail,					• •	• •	• •	•					• •	• •	• •	•	
23	(126) Express,					• •	• •	• •	•					• •	• •	• •	•	
24	(127) Special service,																	
25	(128) Other,																	
26	Total water-line transpor- [tation revenue,																	
27	(131) Dining and buffet,		199	516	86	• •	• •	• •	•		199	516	86	• •	• •	• •	•	
28	(132) Hotel and restaurant,		330	007	36						37	918	26		292	095	10	
29	(133) Station, train, and boat privi- [leges,		7	706	83						7	706	83					
30	(134) Parcel room,		7	730	09	• •	• •	• •	•		7	730	09	• •	• •	• •	•	
31	(135) Storage—Freight,		16	393	67		16	393	67	• •	• •	• •	•	• •	• •	• •	•	
32	(136) Storage—Baggage,		3	090	49	• •	• •	• •	•		3	090	49	• •	• •	• •	•	
33	(137) Demurrage,		59	449	12		59	449	12	• •	• •	• •	•	• •	• •	• •	•	
34	(138) Telegraph and telephone,		71	934	62										71	934	62	
35	(139) Grain elevator,									• •	• •	• •	•	• •	• •	• •	•	
36	(140) Stockyard,									• •	• •	• •	•	• •	• •	• •	•	
37	(141) Power,																	
38	(142) Rents of buildings and other [property,		32	734	89		6	233	56		5	941	43		22	559	90	
39	(143) Miscellaneous,		240	844	03		179	857	40		5	197	50		55	789	13	
40	Total incidental operat- [ing revenues,		969	407	96		261	933	75		265	095	46		442	378	75	
41	(151) Joint facility—Cr.,		114	742	68		65	103	98		49	638	70					
42	(152) Joint facility—Dr.,		20	592	90		9	748	09		10	844	81					
43	Total joint facility oper- [ating revenue,		94	149	78		55	355	89		38	793	89					
44	Total railway operating [revenues,	47	578	676	64	41	436	151	48	5	700	146	41		442	378	75	

*Among the items charged to this account is $ representing amount paid to others in connection with a system of pick up and delivery service.

617-658

531. STATISTICS OF RAIL-LINE OPERATIONS—ENTIRE LINE.

[FOR COMPANIES MAKING OPERATING REPORT.]

Give the various statistical items called for concerning the rail-line operations of respondent's road during the year. - *If the respondent for its own purposes uses more accurate methods than are provided below for computing the required averages, the more accurate figures should be given in the returns, and the method of computing each average should be indicated in a footnote.* Train-miles, locomotive-miles, car-miles, motor car-miles and other particulars are to be classified in accordance with the Uniform System of Accounts for Steam Railway Corporations. Motor car and trailer miles, if any, should be included in column (d). In computing averages per locomotive-mile (Items 151-158), motor car and trailer train-miles and car-miles should be excluded.

INSTRUCTIONS REGARDING VARIOUS ITEMS DESIGNATED BY NUMBERS.

1 includes road operated under trackage rights. If the average mileage used for freight or passenger service notably differs from the mileage reportable for Item No. 1, the respective "Averages per mile of road" (Items Nos. 111-127) affected, should be computed accordingly, and pertinent details given in a footnote.

91 includes all freight the revenue from which is includable in account No. 101, "Freight."

92 includes not only nonrevenue freight which is hauled on transportation trains, but also a proportion of the weight of exclusive work equipment, based on the relationship of net tons to gross tons of revenue freight for the reporting period.

94 relates to freight included in 91.

95 relates to freight included in 92.

108 is the aggregate of revenue accounts Nos. 102 to 109, inclusive. (See page 302.)

111=13+1.
112=14+1.
113=15+1.
114=16+1.
115=17+1.
116=18+1.
117=41+1.
118=(56+62+63+64+65+71+72+73+74)+1.
119=(61+66+67+68+69+75+76+77+78)+1.
120=101+1.
121=103+1.
122=104+1.
123=105+1.
124=106+1.
125= 94+1.
126= 96+1.
127=100+1.
131= 51+13.
132= 62+15.
133= 52+13.
134= 63+15.
135= 94+(13+freight-car proportion of 15).
136= 96+(13+freight-car proportion of 15).
137= 61+14.
138=(66+67+68+69)+15.
139=100+(14+passenger-car proportion of 15).
140=101+(13+freight-car proportion of 15).
141=103+(14+passenger-car proportion of 15).
142=104+17.
143=105+17.
144=106+17.
151= 13+24.
152= 56+24.
153= 14+28.
154= 61+28.
155= 15+32.
156= 70+32.
157= 16+36.
158= 79+36.
162= 96+(51+62).
163=101+(51+62)
171=100+(57+58+66+67).
172=102+(57+58+66+67).
181= 94+91.
182= 95+92.
183= 96+93.
184=100+99.
185=101+91.
186=101+94.
187=102+99.
188=102+100.
189=105+104.

(See notes on page 510)

Item No.	Item. (a)	With steam locomotives. (b)			With electric and other locomotives. (c)			Without locomotives. (d)			Total. (e)		
1	Average mileage of road operated,† (miles),	* *	* *	* *	* *	* *	* *	* *	* *	* *		6,740	.59
	TRAIN-MILES.	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *
11	Freight—ordinary,	5	470	638							5	470	638
12	" —light,		15	992								15	992
13	" —total,	5	486	630							5	486	630
14	Passenger,	4	907	490					971	800	5	879	290
15	Mixed, (Frt. 630,733 , Pass. 132,437),		763	170								763	170
16	Special,		4	612								4	612
17	Total transportation service,	11	161	902					971	800	12	133	702
18	Work service,		137	151								137	151
	LOCOMOTIVE-MILES.	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *
21	Freight—principal,	5	493	173				* *	* *	* *	5	493	173
22	" —helper,		434	331				* *	* *	* *		434	331
23	" —light,		405	113				* *	* *	* *		405	113
24	" —total,	6	332	617				* *	* *	* *	6	332	617
25	Passenger—principal,	4	907	490				* *	* *	* *	4	907	490
26	" —helper,		229	697				* *	* *	* *		229	697
27	" —light,		185	648				* *	* *	* *		185	648
28	" —total,	5	322	835				* *	* *	* *	5	322	835
29	Mixed train—principal,		763	230				* *	* *	* *		763	230
30	" " —helper,			376				* *	* *	* *			376
31	" " —light,		21	095				* *	* *	* *		21	095
32	" " —total,		784	701				* *	* *	* *		784	701
33	Special—principal,		4	612				* *	* *	* *		4	612
34	" —helper,		2	241				* *	* *	* *		2	241
35	" —light,		1	359				* *	* *	* *		1	359
36	" —total,		8	212				* *	* *	* *		8	212
37	Train switching,		543	101				* *	* *	* *		543	101
38	Yard switching—freight,	2	650	636				* *	* *	* *	2	650	636
39	" " —passenger,		174	951				* *	* *	* *		174	951
40	" " —total,	2	825	587				* *	* *	* *	2	825	587
41	Total transportation service,	15	817	053				* *	* *	* *	15	817	053
42	Work service,		174	462				* *	* *	* *		174	462
	CAR-MILES.	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *
51	Freight train—loaded,	172	673	170							172	673	170
52	" " —empty,	88	047	798							88	047	798
53	Sum of loaded and empty,	260	720	968							260	720	968
54	Freight train—caboose,	6	171	193							6	171	193
55	" " —exclusive work equipment,	1	717	985							1	717	985
56	" " —total,	268	610	146							268	610	146
57	Passenger train—passenger,	8	687	022				1	112	064	9	799	086
58	" " —sleeping, parlor, and observation,	11	789	953						52	11	790	005
59	" " —dining,	1	564	830						22	1	564	852
60	" " —other,	13	362	724					343	413	13	706	137
61	" " —total,	35	404	529				1	455	551	36	860	080

659

† Two decimal places required.

531. STATISTICS OF RAIL-LINE OPERATIONS—ENTIRE LINE—Concluded.

Item No.	Item. (a)	With steam locomotives. (b)			With electric and other locomotives. (c)			Without locomotives. (d)			Total. (e)		
	CAR-MILES—Continued.	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *
62	Mixed train—freight—loaded,	3	621	227							3	621	227
63	" " —freight—empty,	2	311	667							2	311	667
64	" " —caboose		67	862								67	862
65	" " —exclusive work equipment,		86	533								86	533
66	" " —passenger,		710	411								710	411
67	" " —sleeping, parlor, and observation,												
68	" " —dining,												
69	" " —other passenger-train,		466	839								466	839
70	" " —total,	7	264	539							7	264	539
71	Special train—freight—loaded,		113	445								113	445
72	" " —freight—empty,		10	238								10	238
	" " —caboose,		3	015								3	015
	" " —exclusive work equipment,												
75	" " —passenger,		6	911								6	911
76	" " —sleeping, parlor, and observation,		5	666								5	666
77	" " —dining,		1	074								1	074
78	" " —other passenger-train,		4	401								4	401
79	" " —total,		144	750								144	750
80	Total transportation service,	311	423	964				1	455	551	312	879	515
81	Work service,		426	410								426	410

Item No.	Item. (f) Miles of road	Amount. (g)	Item No.	Item. (h)	Amount. (i)
	FREIGHT SERVICE.	* * * * *		AVERAGES PER TRAIN-MILE.	* * * * *
91	Tons—revenue freight,	12,464,110	131	Loaded freight car-miles—freight trains,†	31.47
92	" —nonrevenue freight,	2,647,238	132	" " " " —mixed trains,†	4.74
93	" —total,	15,111,348	133	Empty freight car-miles—freight trains,†	16.05
94	Ton-miles—revenue freight,	3,568,371,982	134	" " " " —mixed trains,†	3.03
95	" " —nonrevenue freight,	644,313,637	135	Ton-miles—revenue freight,†	583.32
96	" " —total,	4,212,685,619	136	" —all freight,†	688.64
97	Gross ton-miles, incl. locomotives and tenders,	, ,	137	Passenger train car-miles—passenger trains,†	6.27
98	" " " excl. locomotives and tenders,	, ,	138	" " " " —mixed trains,†	1.54
	PASSENGER SERVICE.	* * * * *	139	Revenue passenger-miles,†	27.47
99	Passengers carried—revenue,	, 748,810	140	Freight revenue,†	$ 6.58
100	Passenger-miles—revenue,	165,142,886	141	Passenger service train revenue,†	.90
	REVENUES AND EXPENSES.	$ * * * * *	142	Operating revenues,†	3.92
101	Freight revenue,†	40,224,391.50	143	" expenses,†	3.21
102	Passenger revenue,†	3,208,870.87	144	Net operating revenues,†	.71
103	Passenger service train revenue,†	5,390,287.63		AVERAGES PER LOCOMOTIVE-MILE.	* * * * *
104	Operating revenues,†	47,578,676.64	151	Train-miles—freight trains,†	.87
105	" expenses,†	38,993,492.36	152	Car-miles—freight trains,†	42.42
106	Net operating revenues,†	8,585,184.28	153	Train-miles—passenger trains,†	.92
	AVERAGES PER MILE OF ROAD.*	* * * * *	154	Car-miles—passenger trains,†	6.65
111	Freight-train miles, 5,203.29	, 1,054	155	Train-miles—mixed trains,†	.97
112	Passenger-train miles, 4,075.51	, 1,443	156	Car-miles—mixed trains,†	9.26
113	Mixed-train miles, 1,378.92	, 553	157	Train-miles—special trains,†	.56
114	Special-train miles, 6,431.74	, 1	158	Car-miles—special trains,†	17.53
115	Transportation service train-miles 6,431.74	, 1,887		AVERAGES PER LOADED FREIGHT CAR-MILE.	* * * * *
116	Work-train miles, 6,431.74	, 21	162	Ton-miles—all freight,†	23.65
117	Locomotive-miles—transportation 6,431.74	, 2,459	163	Freight revenue,‡	$ .22817
118	Freight service car-miles, 6,409.00	, 42,881		AVERAGES PER CAR-MILE—PASSENGER.	* * * * *
119	Passenger service car-miles, 5,587.34	, 6,811	171	Passenger-miles—revenue,†	7.41
120	Freight revenue,† 6,686.79	$ 6,015.50	172	Passenger revenue,‡	$ .14590
121	Passenger service train revenue,† 5,812.37	, 927.68		MISCELLANEOUS AVERAGES.	* * * * *
122	Operating revenues,† 6,740.59	7,058.53	181	Miles hauled—revenue freight,†	286.29
123	" expenses,† 6,740.59	5,784.88	182	" " —nonrevenue freight,†	245.39
124	Net operating revenues,† 6,740.59	1,273.65	183	" " —all freight,†	278.78
125	Ton-miles—revenue freight, 6,686.79	, 533,645	184	Miles carried—revenue passengers,†	220.54
126	" —all freight, 6,686.79	, 630,001	185	Revenue per ton of freight,‡	$ 3.22722
127	Passenger-miles—revenue, 5,812.37	, 28,412	186	" " ton-mile of freight,‡	.01127
			187	" " passenger,‡	4.28529
			188	" " passenger-mile,‡	.01943
			189	Operating ratio,†	% 81.96

STATE COMMISSION FOR M—STEAM.

* See instructions for Item No. 1. † Two decimal places required. ‡ Five decimal places required.

274

710. RAILWAY OPERATING REVENUES EARNED WITHIN THE STATE:

[FOR ROADS MAKING OPERATING REPORTS.]

State the railway operating revenues of the respondent for the year (classified in accordance with the Uniform System of Accounts for Steam Railway Corporations), and the comparison of such revenues with those of the preceding year (showing increases in black and decreases in red) for each of the several classes. The proportion of joint traffic receipts belonging to other carriers should not be included in column (b).

Line No.	Class of Railway Operating Revenues. (a)	Total amount of revenue for the year. (b)	Comparison with total revenue of preceding year. (Increases in black, decreases in red.) (c)	Revenues Earned Within the State. On intrastate traffic. (d)	On interstate traffic. (e)	Total. (f)
		$ c.	$ c.	$ c.	$ c.	$ c.
1	(101) Freight,			4 836 839 24	5 316 514 76	10 153 354 00
2	(102) Passenger,			312 449 06	419 806 90	732 255 96
3	(103) Excess baggage,			2 443 75	3 283 42	5 727 17
4	(104) Sleeping car,			8 40	4 82	13 22
5	(105) Parlor and chair car,			2 837 71	1 060 82	3 898 53
6	(106) Mail,				332 851 39	332 851 39
7	(107) Express,				130 633 90	130 633 90
8	(108) Other passenger-train,			5 935 34	Dr. 8 846 71	Dr. 2 911 37
9	(109) Milk,			11 035 85	3 896 25	14 932 10
10	(110) Switching,			371 852 09		371 852 09
11	(111) Special service train,			1 241 20	767 50	2 008 70
12	(112) Other freight-train,			102 001 88	28 08	102 029 96
13	(113) Water transfers—Freight,					
14	(114) Water transfers—Passenger,					
15	(115) Water transfers—Vehicles and live stock,					
16	(116) Water transfers—Other,					
17	Total rail-line transportation revenue,			5 646 644 52	6 200 001 13	11 846 645 65
18	(121) Freight,					
19	(122) Passenger,					
20	(123) Excess baggage,					
21	(124) Other passenger service,					
22	(125) Mail,					
23	(126) Express,					
24	(127) Special service,					
25	(128) Other,					
26	Total water-line transportation revenue,					
27	(131) Dining and buffet,			22 426 62	30 131 67	52 558 29
28	(132) Hotel and restaurant,			68 994 43		68 994 43
29	(133) Station, train, and boat privileges,			2 465 40		2 465 40
30	(134) Parcel room,			3 708 15		3 708 15
31	(135) Storage—Freight,			824 57		824 57
32	(136) Storage—Baggage,			1 661 03		1 661 03
33	(137) Demurrage,			9 741 00		9 741 00
34	(138) Telegraph and telephone,				25 726 81	25 726 81
35	(139) Grain elevator,					
36	(140) Stockyard,					
37	(141) Power,					
38	(142) Rents of buildings and other property,			6 014 01		6 014 01
39	(143) Miscellaneous,			50 220 24	14 339 74	64 559 98
40	Total incidental operating revenue,			166 055 45	70 198 22	236 253 67
41	(151) Joint facility—Cr.,			Dr. 5 283 92	Dr. 7 589 76	Dr. 12 873 68
42	(152) Joint facility—Dr.,			4 885 93	185 39	5 071 32
43	Total joint facility operating revenue,			Dr. 10 169 85	Dr. 7 775 15	Dr. 17 945 00
44	Total railway operating revenues,			5 802 530 12	6 262 424 20	12 064 954 32

Data for columns (b) and (c) not required.

50. State the rule or rules used by the respondent in assigning revenues from interstate traffic to the several States in which such traffic moves.

See note on page 707 regarding apportionment.

687-689

720. RAILWAY OPERATING EXPENSES—CLASS I COMPANIES—WITHIN THE STATE.

[FOR COMPANIES HAVING ANNUAL OPERATING REVENUES ABOVE $1,000,000.]

State the railway operating expenses on respondent's road for the year, classifying them in accordance with the Uniform System of Accounts for Steam Railway Corporations, and analyzing them in accordance with the Commission's Rules Governing the Separation of Operating Expenses, effective on January 1, 1920. The returns against "Yard" in accounts Nos. 202–226 should be those applying to tracks in yards where a separate switching service is maintained, as provided for by instructions pertaining to those accounts in the effective Rules.

Line No.	Name of Railway Operating Expense Account. (a)	Amount of operating expenses for the year. (b)				Expenses related solely to freight service. (c)				Expenses related solely to passenger and allied services. (d)				Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to freight service. (e)				Apportioned to passenger and allied services. (f)				Expenses not related to either freight service or passenger and allied services. (g)			
		$			c.	$			c.	$			c.	$			c.	$			c.	$			c.
1	I. Maintenance of Way and Structures.																								
2	(201) Superintendence,		201	416	82										143	199	16		58	217	66				
3	(202) Roadway maintenance—Yard,		31	480	24		9	112	48			319	64		20	258	46		1	789	66				
4	Roadway maintenance—Other,		247	983	91										169	646	81		78	337	10				
5	(203) Roadway—Depreciation—Yard,																								
6	Roadway—Depreciation—Other,																								
7	(204) Underground power tubes—Yard,																								
8	Underground power tubes—Other,																								
9	(205) Underground power tubes—Depreciation—Yard,																								
10	Underground power tubes—Depreciation—Other,																								
11	(206) Tunnels and subways—Yard,																								
12	Tunnels and subways—Other,		16	497	96										11	733	35		4	764	61				
13	(207) Tunnels and subways—Depreciation—Yard,																								
14	Tunnels and subways—Depreciation—Other,																								
15	(208) Bridges, trestles, and culverts—Yard,		50	060	94		40	058	27	Cr.		109	69		9	555	51			556	85				
16	Bridges, trestles, and culverts—Other,		152	233	19										105	254	00		46	979	19				
17	(209) Bridges, trestles, and culverts—Depreciation—Yard,																								
18	Bridges, trestles, and culverts—Depreciation—Other,																								
19	(210) Elevated structures—Yard,																								
20	Elevated structures—Other,																								
21	(211) Elevated structures—Depreciation—Yard,																								
22	Elevated structures—Depreciation—Other,																								
23	(212) Ties—Yard,		60	595	97		21	917	78		1	422	16		34	610	92		2	645	11				
24	Ties—Other,		304	698	02										208	067	70		96	630	32				
25	(213) Ties—Depreciation—Yard,																								
26	Ties—Depreciation—Other,																								
27	(214) Rails—Yard,		3	277	03		1	804	52			47	18		1	314	71			110	62				
28	Rails—Other,		6	121	48										4	035	58		2	085	90				
29	(215) Rails—Depreciation—Yard,																								
30	Rails—Depreciation—Other,																								
31	(216) Other track material—Yard,		18	256	36		9	588	20			630	62		7	479	40			558	14				
32	Other track material—Other,		41	831	65										27	833	14		13	998	51				
33	(217) Other track material—Depreciation—Yard,																								
34	Other track material—Depreciation—Other,																								
35	(218) Ballast—Yard,	Cr.		43	22	Cr.		43	15	Cr.			07												
36	Ballast—Other,	Cr.		244	64									Cr.		179	38	Cr.		65	26				
37	(219) Ballast—Depreciation—Yard,																								
38	Ballast—Depreciation—Other,																								

39	(220) Track laying and surfacing—Yard,		53	746	29		20	000	27		1	988	23		29	353	60		2	404	19				
40	Track laying and surfacing—Other,		294	101	33										199	361	14		94	740	19				
41	(221) Right-of-way fences—Yard,			181	20			117	27							59	63			4	30				
42	Right-of-way fences—Other,		5	203	32										3	579	64		1	623	68				
43	(222) Right-of-way fences—Depreciation—Yard,																								
44	Right-of-way fences—Depreciation—Other,																								
45	(223) Snow and sand fences and snowsheds—Yard,																								
46	Snow and sand fences and snowsheds—Other,			799	07											505	73			293	34				
47	(224) Snow and sand fences and snowsheds—Depreciation—Yard,																								
48	Snow and sand fences and snowsheds—Depreciation—Other,																								
49	(225) Crossings and signs—Yard,		21	901	32		9	289	29			73	21		11	891	38			647	44				
50	Crossings and signs—Other,		27	648	25										18	977	32		8	670	93				
51	(226) Crossings and signs—Depreciation—Yard,																								
52	Crossings and signs—Depreciation—Other,																								
53	(227) Station and office buildings,		58	207	01		22	031	54		18	232	92		12	639	40		5	303	15				
54	(228) Station and office buildings—Depreciation,																								
55	(229) Roadway buildings,		6	033	60										4	334	45		1	699	15				
56	(230) Roadway buildings—Depreciation,																								
57	(231) Water stations,		16	890	55										12	378	12		4	512	43				
58	(232) Water stations—Depreciation,																								
59	(233) Fuel stations,		9	405	91										6	961	09		2	444	82				
60	(234) Fuel stations—Depreciation,																								
61	(235) Shops and enginehouses,		52	497	16										40	318	67		12	178	49				
62	(236) Shops and enginehouses—Depreciation,																								
63	(237) Grain elevators,																								
64	(238) Grain elevators—Depreciation,																								
65	(239) Storage warehouses,																								
66	(240) Storage warehouses—Depreciation,																								
67	(241) Wharves and docks,	Cr.		88	39	Cr.		88	39																
68	(242) Wharves and docks—Depreciation,																								
69	(243) Coal and ore wharves,		8	122	40		8	122	40																
70	(244) Coal and ore wharves—Depreciation,																								
71	(245) Gas producing plants,			535	61											404	26			129	35				
72	(246) Gas producing plants—Depreciation,																								
73	(247) Telegraph and telephone lines,		51	164	47										35	795	03		15	369	44				
74	(248) Telegraph and telephone lines—Depreciation,																								
75	(249) Signals and interlockers,		43	713	90										28	870	75		14	843	17				
76	(250) Signals and interlockers—Depreciation,																								
77	(251) Power plant dams, canals, and pipe lines,																								
78	(252) Power plant dams, canals, and pipe lines—Depreciation,																								
79	(253) Power plant buildings,			867	81											618	14			249	67				
80	(254) Power plant buildings—Depreciation.																								
81	(255) Power substation buildings,																								
82	(256) Power substation buildings—Depreciation,																								
83	(257) Power transmission systems,			17	25											13	07			4	18				
84	(258) Power transmission systems—Depreciation,																								
85	(259) Power distribution systems,			474	63			2	90							350	99			120	74				
86	(260) Power distribution systems—Depreciation,																								
87	Carried forward,		1 785	586	40		141	913	58		22	604	20	1	149	221	75		471	847	07				

720. RAILWAY OPERATING EXPENSES—CLASS I COMPANIES—WITHIN THE STATE—Concluded.

Line No.	Name of Railway Operating Expense Account. (a)	Amount of operating expenses for the year. (b)	Expenses related solely to freight service. (c)	Expenses related solely to passenger and allied services. (d)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to freight service. (e)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to passenger and allied services. (f)	Expenses not related to either freight service or passenger and allied services. (g)
88	Maintenance of Way and Structures—Brought forward,	$ 1 785 586 40	$ 141 913 38	$ 22 604 20	$ 1 149 221 75	$ 471 847 07	$
89	(261) Power line poles and fixtures	267 62			185 33	82 29	
90	(262) Power line poles and fixtures—Depreciation,						
91	(263) Underground conduits,						
92	(264) Underground conduits—Depreciation,						
93	(265) Miscellaneous structures,						
94	(266) Miscellaneous structures—Depreciation,						
95	(267) Paving,	11 222 37			8 528 06	2 694 31	
96	(268) Paving—Depreciation,						
97	(269) Roadway machines,	15 543 57			11 318 22	4 225 35	
98	(270) Roadway machines—Depreciation,						
99	(271) Small tools and supplies,	29 458 61			21 208 07	8 250 54	
100	(272) Removing snow, ice, and sand,	28 018 82			20 309 42	7 709 40	
101	(273) Assessments for public improvements,	2 880 78			2 024 10	856 68	
102	(274) Injuries to persons,	28 746 72	118 00		20 369 81	8 258 91	
103	(275) Insurance,	5 419 30	1 400 00		2 985 44	1 033 86	
104	(276) Stationery and printing,	2 976 16	250 40		1 989 16	736 60	
105	(277) Other expenses,	20 35			14 82	5 53	
106	Total of accounts Nos. 201 to 277,	1 910 140 70	143 681 78	22 604 20	1 238 154 18	505 700 54	
107	(278) Maintaining joint tracks, yards, and other facilities—Dr.,	56 088 29	35 747 02	734 06	12 548 34	7 058 87	
108	(279) Maintaining joint tracks, yards, and other facilities—Cr.,	373 728 58	42 249 65	11 913 07	198 823 89	120 741 97	
109	(280) Equalization—Way and structures,						
110	Total—All depreciation accounts,						
111	Total—All other maintenance of way and structure accounts,						
112	Total maintenance of way and structures,	1 592 500 41	137 179 15	11 425 19	1 051 878 63	392 017 44	
113	II. Maintenance of Equipment.	* * *

130	(317) Passenger-train cars—Repairs,		212	140	74						212	140	74																
131	(318) Passenger-train cars—Depreciation,		96	939	70						96	939	70																
132	(319) Passenger-train cars—Retirements,	Cr.		426	88					Cr.		426	88																
133	(320) Motor equipment of cars—Repairs,																												
134	(321) Motor equipment of cars—Depreciation,																												
135	(322) Motor equipment of cars—Retirements,																												
136	(323) Floating equipment—Repairs,																												
137	(324) Floating equipment—Depreciation,																												
138	(325) Floating equipment—Retirements,																												
139	(326) Work equipment—Repairs,		49	629	15										35	698	73		13	930	42								
140	(327) Work equipment—Depreciation,		34	446	17										24	433	71		10	012	46								
141	(328) Work equipment—Retirements,		3	915	76										2	771	67		1	144	09								
142	(329) Miscellaneous equipment—Repairs,			372	27			117	30			1	93			184	02			69	02								
143	(330) Miscellaneous equipment—Depreciation,			519	71											377	96			141	75								
144	(331) Miscellaneous equipment—Retirements,																												
145	(332) Injuries to persons,		25	144	89		15	140	52			225	32		7	067	78		2	711	27								
146	(333) Insurance,		2	337	05							189	05		1	589	95			558	06								
147	(334) Stationery and printing,		1	331	78											963	91			367	87								
148	(335) Other expenses,																												
149	Total of accounts Nos. 301 to 335,	2	716	714	56	1	556	343	39		567	624	09		410	037	58		182	709	50								
150	(336) Maintaining joint equipment—Dr.,		20	915	42		26	690	34	Cr.	5	857	30			61	14			21	24								
151	(337) Maintaining joint equipment—Cr.,		30	473	53		28	357	76	Dr.		95	18		1	617	49			593	46								
152	(338) Equalization—Equipment,																												
153	Total—All depreciation accounts,																												
154	Total—All other maintenance of equipment accounts,																												
155	Total maintenance of equipment,	2	707	156	45	1	554	675	97		561	861	97		408	481	23		182	137	28								
156	III. Traffic.	* *	* *	* *	*	*	* *	* *	*	*	* *	* *	*	*	* *	* *	*	*	* *	* *	*	*	* *	* *	*				
157	(351) Superintendence,		120	337	92		66	420	41		31	181	16		11	341	56		11	394	79								
158	(352) Outside agencies,		250	159	04		95	028	48		93	303	81		30	877	14		30	949	61								
159	(353) Advertising,		67	379	79		1	001	40		64	779	38			756	84			842	17								
160	(354) Traffic associations,		11	110	86		9	912	74		1	198	12																
161	(355) Fast freight lines,																												
162	(356) Industrial and immigration bureaus,		22	205	85										11	119	04		11	086	81								
163	(357) Insurance,			318	21			44	32			62	82			116	11			94	96								
164	(358) Stationery and printing,		25	488	04		17	824	58		4	377	62		1	645	41		1	640	43								
165	(359) Other expenses,			400	56							407	25				68	Cr.		7	37								
166	Total of accounts Nos. 351 to 359,		497	400	27		190	231	93		195	310	16		55	856	78		56	001	40								
167	IV. Transportation—Rail Line.	* *	* *	* *	*	*	* *	* *	*	*	* *	* *	*	*	* *	* *	*	*	* *	* *	*	*	* *	* *	*				
168	(371) Superintendence,		154	622	02		13	300	12		6	445	58		98	781	97		36	094	35								
169	(372) Dispatching trains,		170	838	75		5	530	58						85	479	97		79	828	20								
170	(373) Station employees,		873	915	78		371	735	02		135	597	07		269	414	72		97	168	97								
171	(374) Weighing, inspection, and demurrage bureaus,		15	555	74		15	555	74																				
172	(375) Coal and ore wharves,			680	44			680	44																				
173	(376) Station supplies and expenses,		75	534	82		21	814	54		28	917	37		17	994	63		6	808	28								
174	(377) Yardmasters and yard clerks,		277	075	28		258	874	29		18	200	99																
175	(378) Yard conductors and brakemen,		392	422	46		360	373	15		32	049	31																
176	Carried forward,																												

720. RAILWAY OPERATING EXPENSES—CLASS I COMPANIES—WITHIN THE STATE—Concluded.

Line No.	Name of Railway Operating Expense Account. (a)	Amount of operating expenses for the year. (b)	Expenses related solely to freight service. (c)	Expenses related solely to passenger and allied services. (d)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to freight service. (e)	Apportioned to passenger and allied services. (f)	Expenses not related to either freight service or passenger and allied services. (g)
177	Transportation—Rail Line—Brought forward,	$ c.	$ c.	$ c.	$ c.	$ c.	$ c.
178	(379) Yard switch and signal tenders,	48 087 84	44 263 66	3 824 18			
179	(380) Yard enginemen,	265 781 19	243 796 68	21 984 51			
180	(381) Yard motormen,						
181	(382) Fuel for yard locomotives,	164 965 41	149 691 72	15 273 69			
182	(383) Yard switching power produced,						
183	(384) Yard switching power purchased,						
184	(385) Water for yard locomotives,	4 503 02	4 031 50	471 52			
185	(386) Lubricants for yard locomotives,	2 302 94	2 115 78	187 16			
186	(387) Other supplies for yard locomotives,	2 465 85	2 283 61	182 24			
187	(388) Enginehouse expenses—Yard,	70 542 17	66 679 32	3 862 85			
188	(389) Yard supplies and expenses,	12 487 16	11 609 84	877 32			
189	(392) Train enginemen,	636 532 28	415 068 98	199 935 44	18 816 99	2 710 87	
190	(393) Train motormen,	19 130 42		19 130 42			
191	(394) Fuel for train locomotives,	843 713 70	559 084 68	268 927 76	13 591 38	2 109 88	
192	(395) Train power produced,						
193	(396) Train power purchased,						
194	(397) Water for train locomotives,	26 304 62			17 719 03	8 585 59	
195	(398) Lubricants for train locomotives,	17 644 89	9 855 01	7 480 42	282 80	26 66	
196	(399) Other supplies for train locomotives,	8 231 66	4 936 12	3 095 39	178 14	22 01	
197	(400) Enginehouse expenses—Train,	186 973 54	129 840 39	52 096 17	4 272 50	764 48	
198	(401) Trainmen,	808 370 11	545 978 69	234 539 67	24 310 50	3 541 25	
199	(402) Train supplies and expenses,	184 010 94	88 806 62	95 204 32			
200	(403) Operating sleeping cars,						
201	(404) Signal and interlocker operation,	44 901 25			28 573 35	16 327 90	
202	(405) Crossing protection,	61 810 21			42 263 14	19 547 07	
203	(406) Drawbridge operation,	39 468 91	3 168 52		28 341 67	7 958 72	
204	(407) Telegraph and telephone operation,	37 869 23	4 96		27 110 41	10 753 86	
205	(408) Operating floating equipment,						
206	(409) Express service,						
207	(410) Stationery and printing,	21 355 08	7 714 82	3 100 45	7 813 34	2 726 47	
208	(411) Other expenses,	7 722 52	3 354 76	2 582 69	1 389 00	396 07	
209	(414) Insurance,	1 599 79	455 40	42	839 00	304 97	
210	(415) Clearing wrecks,	12 995 36	12 332 63	534 65	86 21	41 87	
211	(416) Damage to property,	27 673 75	10 953 05	1 746 76	10 695 68	4 278 26	
212	(417) Damage to live stock on right of way,	15 442 54	1 209 41	3 323 00	7 925 01	2 985 12	
213	(418) Loss and damage—Freight,	59 253 16	59 253 16				
214	(419) Loss and damage—Baggage,	1 048 11		1 048 11			
215	(420) Injuries to persons,	92 828 46	40 060 73	39 684 30	9 466 99	3 616 44	
216	Total of accounts Nos. 371 to 389, 392 to 411, and 414 to 420,	5 686 661 40	3 464 413 92	1 200 303 76	715 346 43	306 597 29	

State Commission Form—Steam.

217	(390) Operating joint yards and terminals—Dr.,		50	244	59		45	153	04					3	327	34		1	764	21				
218	(391) Operating joint yards and terminals—Cr.,		219	282	00		168	167	25		44	987	75	4	001	15		2	125	85				
219	(412) Operating joint tracks and facilities—Dr.,		34	203	31		24	433	64	Cr.	1	304	70	7	174	61		3	899	76				
220	(413) Operating joint tracks and facilities—Cr.,		199	410	53		38	944	52		39	180	02	79	153	05		42	132	94				
221	Total transportation—Rail line,	5	352	416	77	3	326	888	83	1	114	831	29	642	694	18		268	002	47				
222	V. TRANSPORTATION—WATER LINE.	* *	* *	* *	*	*	* *	* *	*	*	* *	* *	*	* *	* *	*	*	* *	* *	*	*	* *	* *	*
223	(431) Operation of vessels,																							
224	(432) Operation of terminals,																							
225	(433) Incidental,																							
226	Total transportation—Water line,																							
227	VI. MISCELLANEOUS OPERATIONS.	* *	* *	* *	*	*	* *	* *	*	*	* *	* *	*	* *	* *	*	*	* *	* *	*	*	* *	* *	*
228	(441) Dining and buffet service,		81	917	11						81	917	11											
229	(442) Hotels and restaurants,		70	732	81						31	774	61	8	025	74		30	932	46				
230	(443) Grain elevators,																							
231	(444) Stockyards,																							
232	(445) Producing power sold,																							
233	(446) Other miscellaneous operations,																							
234	Total miscellaneous operations,		152	649	92						115	691	72	8	025	74		30	932	46				
235	VII. GENERAL.	* *	* *	* *	*	*	* *	* *	*	*	* *	* *	*	* *	* *	*	*	* *	* *	*	*	* *	* *	*
236	(451) Salaries and expenses of general officers,		97	698	88		8	471	16			410	50	63	807	54		24	009	68				
237	(452) Salaries and expenses of clerks and attendants,		365	743	09		103	445	86		21	411	77	175	039	87		65	845	59				
238	(453) General office supplies and expenses,		23	050	37			840	79			50	09	16	105	46		6	054	03				
239	(454) Law expenses,		48	739	21		2	019	67			220	86	33	791	66		12	707	02				
240	(455) Insurance,			901	25										654	69			246	56				
241	(456) Relief department expenses,																							
242	(457) Pensions,*		267	954	03									194	689	27		73	264	76				
243	(458) Stationery and printing,		17	726	41		2	102	84			197	20	11	208	63		4	217	74				
244	(459) Valuation expenses,		9	093	69									6	608	26		2	485	43				
245	(460) Other expenses,		21	458	89			137	95			678	30	14	996	45		5	646	19				
246	Total of accounts Nos. 451 to 460,		852	365	82		117	018	27		23	968	72	516	901	83		194	477	00				
247	(461) General joint facilities—Dr.,		6	812	31		6	110	65			98	19		431	76			171	71				
248	(462) General joint facilities—Cr.,		8	875	72			119	77			81	82	6	694	33		1	979	80				
249	Total general expenses,		850	302	41		123	009	15		23	985	09	510	639	26		192	668	91				
250	VIII. TRANSPORTATION FOR INVESTMENT—Cr.,		7	384	04		7	227	30			156	74											
251	GRAND TOTAL RAILWAY OPERATING EXPENSES,	11	145	042	19	5	324	757	73	2	020	948	68	2	677	575	82	1	121	759	96			

252 Operating ratio (ratio of operating expenses to operating revenues), 92.38 per cent.

State briefly the rule or rules in accordance with which expenses common to operations in two or more States are assigned to the State; if such rules are in print, file a copy thereof with this report or give reference to such copy previously filed.

NOTE:

The statements herein either of revenues or expenses attributed to Washington are misleading unless properly understood. They are necessarily based on arbitrary assumptions as follows:

Revenues contain (first) the revenues of business wholly local within the State and in addition a proportion of interstate revenues determined by the proportion of mileage which each interstate freight shipment or passenger is carried within the State.

Charges for expenses contain (first) those expenses incurred in each state, that are considered wholly applicable to that state, and in addition some mileage proportion of expenses which can not be localised. Apportioning either such revenues or such expenses on a mileage basis is purely arbitrary and has been adopted for want of any other basis.

931. STATISTICS OF RAIL-LINE OPERATIONS—WITHIN THE STATE.

Give the various statistical items called for concerning the rail-line operations of respondent's road during the year. *If the respondent for its own purposes uses more accurate methods than are provided below for computing the required averages, the more accurate figures should be given in the returns, and the method of computing each average should be indicated in a footnote.* Train-miles, locomotive-miles, car-miles, motor car-miles and other particulars are to be classified in accordance with the Uniform System of Accounts for Steam Railway Corporations. Motor car and trailer miles, if any, should be included in column (d). In computing averages per locomotive-mile (Items 151–158), motor car and trailer train-miles and car-miles should be excluded.

Instructions Regarding Various Items Designated by Numbers.

1 includes road operated under trackage rights. If the average mileage used for freight or passenger service notably differs from the mileage reportable for Item No. 1, the respective "Averages per mile of road" (Items Nos. 111–127) affected, should be computed accordingly, and pertinent details given in a footnote.

91 includes all freight the revenue from which is includable in account No. 101, "Freight."

92 includes not only nonrevenue freight which is hauled on transportation trains, but also a proportion of the weight of exclusive work equipment, based on the relationship of net tons to gross tons of revenue freight for the reporting period.

94 relates to freight included in 91.

95 relates to freight included in 92.

103 is the aggregate of revenue accounts Nos. 102 to 109, inclusive. (See page 700.)

111=13÷1.
112=14÷1.
113=15÷1.
114=16÷1.
115=17÷1.
116=18÷1.
117=41÷1.
118=(56+62+63+64+65+71+72+73+74)÷1.
119=(61+66+67+68+69+75+76+77+78)÷1.
120=101÷1.
121=103÷1.
122=104÷1.
123=105÷1.
124=106÷1.
125= 94÷1.
126= 96÷1.
127=100÷1.
131= 51÷13.
132= 62÷15.
133= 52÷13.
134= 63÷15.
135= 94÷(13+freight-car proportion of 15).
136= 96÷(13+freight-car proportion of 15).
137= 61÷14.
138=(66+67+68+69)÷15.
139=100÷(14+passenger-car proportion of 15).
140=101÷(13+freight-car proportion of 15).
141=103÷(14+passenger-car proportion of 15).
142=104÷17.
143=105÷17.
144=106÷17.
151= 13÷24.
152= 56÷24.
153= 14÷28.
154= 61÷28.
155= 15÷32.
156= 70÷32.
157= 16÷36.
158= 79÷36.
162= 96÷(51+62).
163=101÷(51+62).
171=100÷(57+58+66+67).
172=102÷(57+58+66+67).
181= 94÷91.
182= 95÷92.
183= 96÷93.
184=100÷99.
185=101÷91.
186=101÷94.
187=102÷99.
188=102÷100.
189=105÷104.

(See notes on page 906)

Item No.	Item. (a)	With steam locomotives. (b)			With electric and other locomotives. (c)			Without locomotives. (d)			Total. (e)		
1	Average mileage of road operated,† (miles),	* *	* *	* *	* *	* *	* *	* *	* *	* *	1	942	90
	Train-miles.	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *
11	Freight—ordinary,	1	665	948							1	665	948
12	" —light,		11	230								11	230
13	" —total,	1	677	178							1	677	178
14	Passenger,	1	444	368					265	076	1	709	444
15	Mixed, (Frt. 73 184 , Pass. 7 871),		81	055								81	055
16	Special,		1	256								1	256
17	Total transportation service,	3	203	857					265	076	3	468	933
18	Work service,		66	404								66	404
	Locomotive-miles.	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *
21	Freight—principal,	1	682	704				* *	* *	* *	1	682	704
22	" —helper,		125	598				* *	* *	* *		125	598
23	" —light,		75	722				* *	* *	* *		75	722
24	" —total,	1	884	024				* *	* *	* *	1	884	024
25	Passenger—principal,	1	444	368				* *	* *	* *	1	444	368
26	" —helper,		86	571				* *	* *	* *		86	571
27	" —light,		47	646				* *	* *	* *		47	646
28	" —total,	1	578	585				* *	* *	* *	1	578	585
29	Mixed train—principal,		81	055				* *	* *	* *		81	055
30	" " —helper,							* *	* *	* *			
31	" " —light,		1	415				* *	* *	* *		1	415
32	" " —total,		82	470				* *	* *	* *		82	470
33	Special—principal,		1	256				* *	* *	* *		1	256
34	" —helper,		1	082				* *	* *	* *		1	082
35	" —light,			568				* *	* *	* *			568
36	" —total,		2	906				* *	* *	* *		2	906
37	Train switching,		166	741				* *	* *	* *		166	741
38	Yard switching—freight,		897	185				* *	* *	* *		897	185
39	" " —passenger,		81	007				* *	* *	* *		81	007
40	" " —total,		978	192				* *	* *	* *		978	192
41	Total transportation service,	4	692	918				* *	* *	* *	4	692	918
42	Work service,		77	385				* *	* *	* *		77	385
	Car-miles.	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *	* *
51	Freight train—loaded,	38	066	638							38	066	638
52	" " —empty,	17	022	352							17	022	352
53	Sum of loaded and empty,	55	088	990							55	088	990
54	Freight train—caboose,	1	755	683							1	755	683
55	" " —exclusive work equipment,		559	917								559	917
56	" " —total,	57	404	590							57	404	590
57	Passenger train—passenger,	2	592	087					310	929	2	903	016
58	" " —sleeping, parlor, and observation,	2	974	493							2	974	493
59	" " —dining,		378	392						22		378	414
60	" " —other,	3	380	878					3	829	3	384	707
61	" " —total,	9	325	850					314	780	9	640	630

† Two decimal places required.

703

282

931. STATISTICS OF RAIL-LINE OPERATIONS—WITHIN THE STATE—Continued.

Item No.	Item. (a)	With steam locomotives. (b)		With electric and other locomotives. (c)			Without locomotives. (d)			Total (e)		
	Car-miles—Continued.											
62	Mixed train—freight—loaded,		161 195								161 195	
63	" " —freight—empty,		133 545								133 545	
64	" " —caboose		45 316								45 316	
65	" " —exclusive work equipment,		4 942								4 942	
66	" " —passenger,		34 081								34 081	
67	" " —sleeping, parlor, and observation,											
68	" " —dining,											
69	" " —other passenger-train,		136								136	
70	" " —total,		379 215								379 215	
71	Special train—freight—loaded,		10 468								10 468	
72	" " —freight—empty,		384								384	
73	" " —caboose,		464								464	
74	" " —exclusive work equipment,											
75	" " —passenger,		4 043								4 043	
76	" " —sleeping, parlor, and observation,		2 965								2 965	
77	" " —dining,		743								743	
78	" " —other passenger-train,		2 783								2 783	
79	" " —total,		21 850								21 850	
80	Total transportation service,	67	131 505				314	780	67	446 285		
81	Work service,		201 700								201 700	

Item No.	Item. (f) Miles of road	Amount. (g)	Item No.	Item. (h)	Amount. (i)
	Freight Service.			Averages per Train-mile.	
91	Tons—revenue freight,	5,775,733	131	Loaded freight car-miles—freight trains,†	22.70
92	" —nonrevenue freight,	717,504	132	" " " " —mixed trains,†	1.99
93	" —total,	6,493,237	133	Empty freight car-miles—freight trains,†	10.15
94	Ton-miles—revenue freight,	839,237,509	134	" " " " —mixed trains,†	1.65
95	" " —nonrevenue freight,	91,674,372	135	Ton-miles—revenue freight,†	479.47
96	" " —total,	930,911,881	136	" —all freight,†	531.84
97	Gross ton-miles, incl. locomotives and tenders,	, ,	137	Passenger train car-miles—passenger trains,†	5.64
98	" " " excl. locomotives and tenders,	, ,	138	" " " " —mixed trains,†	.42
	Passenger Service.		139	Revenue passenger-miles,†	22.01
99	Passengers carried—revenue,	257,206	140	Freight revenue,†	$ 5.80
100	Passenger-miles—revenue,	37,802,392	141	Passenger service train revenue,†	.71
	Revenues and Expenses.	$	142	Operating revenues,†	3.48
101	Freight revenue,† See	10,153,354.00	143	" expenses,†	3.21
102	Passenger revenue,† note	732,255.96	144	Net operating revenues,†	.27
103	Passenger service train revenue,† on	1,217,400.90		Averages per Locomotive-mile.	
104	Operating revenues,† Page	12,064 954.32	151	Train-miles—freight trains,†	.89
105	" expenses,† 707	11,145,042.19	152	Car-miles—freight trains,†	30.47
106	Net operating revenues,†	919,912.13	153	Train-miles—passenger trains,†	.91
	Averages per Mile of Road.*		154	Car-miles—passenger trains,†	5.91
111	Freight-train miles, 1745.81	961	155	Train-miles—mixed trains,†	.98
112	Passenger-train miles, 1027.25	1,664	156	Car-miles—mixed trains,†	4.60
113	Mixed-train miles, 117.74	688	157	Train-miles—special trains,†	.43
114	Special-train miles, 1843.04	1	158	Car-miles—special trains,†	7.52
115	Transportation service train-miles, 1843.04	1,882		Averages per Loaded Freight Car-mile.	
116	Work-train miles, 1843.04	36	162	Ton-miles—all freight,†	24.00
117	Locomotive-miles—transportation, 1843.04	2,546	163	Freight revenue,‡	$ .26560
118	Freight service car-miles, 1840.80	31,378		Averages per Car-mile—Passenger.	
119	Passenger service car-miles, 1287.26	7,524	171	Passenger-miles—revenue,†	6.39
120	Freight revenue,† 1917.64	$ 5,294.71	172	Passenger revenue,‡	$ .12387
121	Passenger service train revenue,† 1380.78	881.68		Miscellaneous Averages.	
122	Operating revenues,† 1942.90	6,209.76	181	Miles hauled—revenue freight,†	145.30
123	" expenses,† 1942.90	5,736.29	182	" " —nonrevenue freight,†	127.77
124	Net operating revenues,† 1942.90	473.47	183	" " —all freight,†	143.37
125	Ton-miles—revenue freight, 1917.64	437,641	184	Miles carried—revenue passengers,†	146.97
126	" —all freight, 1917.64	485,447	185	Revenue per ton of freight,‡	$ 1.75793
127	Passenger-miles—revenue, 1380.78	27,378	186	" " ton-mile of freight,‡	.01210
			187	" " passenger,‡	2.84696
			188	" " passenger-mile,‡	.01937
			189	Operating ratio,†	% 92.38

State Commission Form—Steam.

* See instructions for Item No. 1. † Two decimal places required. ‡ Five decimal places required.

283

VERIFICATION.

The foregoing report must be verified by the oath of the officer having control of the accounting of the respondent. It should be verified, also, by the oath of the president or other chief officer of the respondent, unless the respondent states on the last preceding page of this report that such chief officer has no control over the accounting of the respondent. Under the provisions of section 20 of the Interstate Commerce Act, "the oath required * * * may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken."

OATH.

(To be made by the officer having control of the accounting of the respondent.)

State of _____ } ss:
County of _____

_____ makes oath and says that he is _____
(Insert here the name of the affiant.) (Insert here the official title of the affiant.)

of NORTHERN PACIFIC RAILWAY COMPANY
(Insert here the exact legal title or name of the respondent.)

that it is his duty to have supervision over the books of account of the respondent and to control the manner in which such books are kept; that he knows that such books have, during the period covered by the foregoing report, been kept in good faith in accordance with the accounting and other orders of the Interstate Commerce Commission, effective during the said period; that he has carefully examined the said report and to the best of his knowledge and belief the entries contained in the said report have, so far as they relate to matters of account, been accurately taken from the said books of account and are in exact accordance therewith; that he believes that all other statements of fact contained in the said report are true, and that the said report is a correct and complete statement of the business and affairs of the above-named respondent during the period of time from and including

_____, 193 , to and including _____, 193

(Signed) W. C. Pinger
(Signature of affiant.)

Subscribed and sworn to before me, a _____, in and for the State and county above named, this _____ day of _____, 193

My commission expires _____ [Use an impression seal. L. S.]

_____
(Signature of officer authorized to administer oaths.)

SUPPLEMENTAL OATH.

(By the president or other chief officer of the respondent.)

State of _____ } ss:
County of _____

_____ makes oath and says that he is _____
(Insert here the name of the affiant.) (Insert here the official title of the affiant.)

of NORTHERN PACIFIC RAILWAY COMPANY
(Insert here the exact legal title or name of the respondent.)

that he has carefully examined the foregoing report; that he believes that all statements of fact contained in the said report are true, and that the said report is a correct and complete statement of the business and affairs of the above-named respondent and the operations of its property during the period of time from and including _____, 193 , to and including _____, 193

(Signed) R. W. Scandrett
(Signature of affiant.)

Subscribed and sworn to before me, a _____, in and for the State and county above named, this _____ day of _____, 193

My commission expires _____ [Use an impression seal. L. S.]

_____
(Signature of officer authorized to administer oaths.)

[fol. 719] DEFENDANT'S EXHIBIT 11

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Spokane, Wash., from June 3, 1934 to June 9, 1934

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Way and Structures			
201	Superintendence	$87.61	564.37	.....
202	Roadway Maintenance	54.52	.....	.....
203	Bridges, Trestles and Culverts	14.07	.....	.....
212	Ties	131.93	.....	.....
214	Rails	68.14	.....	.....
216	Other Track Material	80.58	.....	.....
218	Ballast	.24	.....	.....
220	Track Laying and Surfacing	129.46	.....	.....
227	Stations and Office Buildings	2.66	.....	.....
231	Water Stations	1.05	.....	.....
233	Fuel Stations	.91	.....	.....
235	Shops and Engine Houses	30.91	.....	.....
274	Injuries to Persons	12.30	.....	.....
275	Insurance	.56	.....	.....
276	Stationery and Printing	.71	.....	.....
277	Other Expenses	.01	.....	.....
	Total	615.66	....	1.09
	Maintenance of Equipment			
301	Superintendence	22.59	.....	.....
302	Shop Machinery	7.21	.....	.....
308	Steam Locomotives—Repairs	541.29	.....	.....
309	Steam Locomotives—Depreciation	243.91	.....	.....
310	Steam Locomotives—Retirements	5.22	.....	.....
332	Injuries to Persons	9.29	.....	.....
333	Insurance	.13	.....	.....
334	Stationery and Printing	.31	.....	.....
335	Other Expenses	.....	.....	.....
	Total	829.95	.....	1.47
[fol. 720]	Transportation			
371	Superintendence	$139.62	.....	.....
377	Yardmasters and Yard Clerks	935.41	.....	.....
378	Yard Conductors and Brakemen	1,413.50	.....	.....
379	Yard Switch and Signal Tenders	93.90	.....	.....
380	Yard Enginemen	945.43	.....	.....
382	Fuel for Yard Locomotives	400.91	.....	.....
385	Water for Yard Locomotives	11.74	.....	.....
386	Lubricants for Yard Locomotives	9.09	.....	.....
387	Other Supplies for Yard Locomotives	9.35	.....	.....
388	Enginehouse Expenses Yard	288.57	.....	.....
389	Yard Supplies and Expenses	40.74	.....	.....
410	Stationery and Printing	18.58	.....	.....
411	Other Expenses	4.13	.....	.....
414	Insurance	1.54	.....	.....
	Total	4,312.51	.....	7.64

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Spokane, Wash., from June 3, 1934 to June 9, 1934—Continued

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	General			
451	Salaries and Expenses of General Officers	64.12	.....	.....
452	Salaries and Expenses of Clerks and Attendants	238.83	.....	.....
453	General Office Supplies and Expenses	15.08	.....	.....
454	Law Expenses	31.94	.....	.....
455	Insurance	.60	.....	.....
458	Stationery and Printing	11.61	.....	.....
460	Other Expenses	14.22	.....	.....
	Total	376.40	.....	.67
	Summary			
	M. of W. & S.	615.66	.....	1.09
	M. of E.	829.95	.....	1.47
	Transportation	4,312.51	.....	7.64
	General	376.40	.....	.67
	Grand Total	6,134.52	564.37	10.87

[fol. 721] Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Pasco, Wash., from June 3, 1934 to June 9, 1934

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Way and Structures			
201	Superintendence	$46.62	260.65	.....
202	Roadway Maintenance	55.62	.....	.....
203	Bridges, Trestles and Culverts	.....	.....	.....
212	Ties	75.41	.....	.....
214	Rails	12.32	.....	.....
216	Other Track Material	26.03	.....	.....
218	Ballast	.06	.....	.....
220	Track Laying and Surfacing	89.35	.....	.....
227	Stations and Office Buildings	.97	.....	.....
231	Water Stations	2.33	.....	.....
233	Fuel Stations	1.24	.....	.....
235	Shops and Engine Houses	10.44	.....	.....
274	Injuries to Persons	6.55	.....	.....
275	Insurance	.30	.....	.....
276	Stationery and Printing	.38	.....	.....
277	Other Expenses	.....	.....	.....
	Total	327.62	.....	1.26

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Pasco, Wash., from June 3, 1934 to June 9, 1934—Continued

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Equipment			
301	Superintendence	10.86	.....	.....
302	Shop Machinery	3.46	.....	.....
308	Steam Locomotives—Repairs	260.10	.....	.....
309	Steam Locomotives—Depreciation	117.21	.....	.....
310	Steam Locomotives—Retirements	2.50	.....	.....
332	Injuries to Persons	4.46	.....	.....
333	Insurance	.06	.....	.....
334	Stationery and Printing	.15	.....	.....
335	Other Expenses	.....	.....	.....
	Total	398.80	.....	1.53

[fol. 722] Form CS–C2

	Transportation			
371	Superintendence	74.45	.....	.....
377	Yardmasters and Yard Clerks	555.59	.....	.....
378	Yard Conductors and Brakemen	710.15	.....	.....
379	Yard Switch and Signal Tenders	15.34	.....	.....
380	Yard Enginemen	489.44	.....	.....
382	Fuel for Yard Locomotives	269.88	.....	.....
385	Water for Yard Locomotives	7.00	.....	.....
386	Lubricants for Yard Locomotives	4.51	.....	.....
387	Other Supplies for Yard Locomotives	3.09	.....	.....
388	Enginehouse Expenses Yard	118.59	.....	.....
389	Yard Supplies and Expenses	38.66	.....	.....
410	Stationery and Printing	9.91	.....	.....
411	Other Expenses	2.20	.....	.....
414	Insurance	.82	.....	.....
	Total	2,299.63	.....	8.82
	General			
451	Salaries and Expenses of General Officers	33.70	.....	.....
452	Salaries and Expenses of Clerks and Attendants	125.51	.....	.....
453	General Office Supplies and Expenses	7.92	.....	.....
454	Law Expenses	16.78	.....	.....
455	Insurance	.31	.....	.....
458	Stationery and Printing	6.10	.....	.....
460	Other Expenses	7.47	.....	.....
	Total	197.79	.....	.76
	Summary			
	M. of W. & S.	327.62	.....	1.26
	M. of E.	398.80	.....	1.53
	Transportation	2,299.63	.....	8.82
	General	197.79	.....	.76
	Grand Total	3,223.84	260.65	12.37

[fol. 723] Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Yakima, Wash., from June 3, 1934, to June 9, 1934

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Way and Structures			
201	Superintendence	27.45	260.93	.....
202	Roadway Maintenance	30.56	.....	.....
203	Bridges, Trestles and Culverts	6.46	.....	.....
212	Ties	26.71	.....	.....
214	Rails	46.46	.....	.....
216	Other Track Material	71.19	.....	.....
218	Ballast	Cr. 15.53	.....	.....
220	Track Laying and Surfacing	25.84	.....	.....
227	Stations and Office Buildings	.37	.....	.....
231	Water Stations	.61	.....	.....
233	Fuel Stations	.42	.....	.....
235	Shops and Engine Houses	4.86	.....	.....
274	Injuries to Persons	3.95	.....	.....
275	Insurance	1.06	.....	.....
276	Stationery and Printing	.51	.....	.....
277	Other Expenses	.....	.....	.....
	Total	230.92	.....	.88
	Maintenance of Equipment			
301	Superintendence	11.84	.....	.....
302	Shop Machinery	3.15	.....	.....
308	Steam Locomotives—Repairs	249.15	.....	.....
309	Steam Locomotives—Depreciation	92.25	.....	.....
310	Steam Locomotives—Retirements	1.93	.....	.....
332	Injuries to Persons	1.15	.....	.....
333	Insurance	.36	.....	.....
334	Stationery and Printing	.12	.....	.....
335	Other Expenses	.....	.....	.....
	Total	359.95	.....	1.38
[fol. 724]	**Transportation**			
371	Superintendence	$58.19	.....	.....
377	Yardmasters and Yard Clerks	542.09	.....	.....
378	Yard Conductors and Brakemen	703.29	.....	.....
379	Yard Switch and Signal Tenders	12.70	.....	.....
380	Yard Enginemen	454.39	.....	.....
382	Fuel for Yard Locomotives	239.21	.....	.....
385	Water for Yard Locomotives	6.13	.....	.....
386	Lubricants for Yard Locomotives	2.47	.....	.....
387	Other Supplies for Yard Locomotives	5.57	.....	.....
388	Enginehouse Expenses Yard	98.70	.....	.....
389	Yard Supplies and Expenses	19.53	.....	.....
410	Stationery and Printing	8.23	.....	.....
411	Other Expenses	3.67	.....	.....
414	Insurance	.57	.....	.....
	Total	2,154.74	.....	8.26

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Yakima, Wash., from June 3, 1934 to June 9, 1934—Continued

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	General			
451	Salaries and Expenses of General Officers	23.34	.....	.....
452	Salaries and Expenses of Clerks and Attendants	87.74	.....	.....
453	General Office Supplies and Expenses	5.52	.....	.....
454	Law Expenses	11.66	.....	.....
455	Insurance	.21	.....	.....
458	Stationery and Printing	4.24	.....	.....
460	Other Expenses	5.09	.....	.....
	Total	137.80	.....	.53
	Summary			
	M. of W. & S.	230.92	.....	.88
	M. of E.	359.95	.....	1.38
	Transportation	2,154.74	.....	8.26
	General	137.80	.....	.53
	Grand Total	2,883.41	260.93	11.05

[fol. 725] Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Everett, Wash., from June 3, 1934, to June 9, 1934

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Way and Structures			
201	Superintendence	$9.79	89.74	.....
202	Roadway Maintenance	7.25	.....	.....
203	Bridges, Trestles and Culverts	2.97	.....	.....
212	Ties	19.12	.....	.....
214	Rails	1.46	.....	.....
216	Other Track Material	8.64	.....	.....
218	Ballast	.....	.....	.....
220	Track Laying and Surfacing	29.24	.....	.....
227	Stations and Office Buildings	.....	.....	.....
231	Water Stations	.19	.....	.....
233	Fuel Stations	.....	.....	.....
235	Shops and Engine Houses	1.75	.....	.....
274	Injuries to Persons	1.41	.....	.....
275	Insurance	.38	.....	.....
276	Stationery and Printing	.18	.....	.....
277	Other Expenses	.....	.....	.....
	Total	82.38	.....	.92

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Everett, Wash., from June 3, 1934 to June 9, 1934—Continued

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Equipment			
301	Superintendence	4.03	.....	.....
302	Shop Machinery	1.07	.....	.....
308	Steam Locomotives—Repairs	84.80	.....	.....
309	Steam Locomotives—Depreciation	31.40	.....	.....
310	Steam Locomotives—Retirements	.66	.....	.....
332	Injuries to Persons	.39	.....	.....
333	Insurance	.12	.....	.....
334	Stationery and Printing	.04	.....	.....
335	Other Expenses	.....	.....	.....
	Total	122.51	.....	1.37
[fol. 726]	**Transportation**			
371	Superintendence	17.21	.....	.....
377	Yardmasters and Yard Clerks	87.85	.....	.....
378	Yard Conductors and Brakemen	229.87	.....	.....
379	Yard Switch and Signal Tenders	1.82	.....	.....
380	Yard Enginemen	156.00	.....	.....
382	Fuel for Yard Locomotives	106.47	.....	.....
385	Water for Yard Locomotives	3.01	.....	.....
386	Lubricants for Yard Locomotives	1.81	.....	.....
387	Other Supplies for Yard Locomotives	1.77	.....	.....
388	Enginehouse Expenses Yard	23.98	.....	.....
389	Yard Supplies and Expenses	3.82	.....	.....
410	Stationery and Printing	2.43	.....	.....
411	Other Expenses	1.09	.....	.....
414	Insurance	.17	.....	.....
	Total	637.30	.....	7.10
	General			
451	Salaries and Expenses of General Officers	7.16	.....	.....
452	Salaries and Expenses of Clerks and Attendants	26.91	.....	.....
453	General Office Supplies and Expenses	1.69	.....	.....
454	Law Expenses	3.58	.....	.....
455	Insurance	.07	.....	.....
458	Stationery and Printing	1.30	.....	.....
460	Other Expenses	1.56	.....	.....
	Total	42.27	.....	.47
	Summary			
	M. of W. & S.	82.38	.....	.92
	M. of E.	122.51	.....	1.37
	Transportation	637.30	.....	7.10
	General	42.27	.....	.47
	Grand Total	884.46	89.74	9.86

[fol. 727]

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Seattle, Wash., from June 3, 1934 to June 9, 1934

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Way and Structures			
201	Superintendence	$185.51	756.15	.....
202	Roadway Maintenance	105.03	.....	.....
203	Bridges, Trestles and Culverts	704.62	.....	.....
212	Ties	198.46	.....	.....
214	Rails	19.36	.....	.....
216	Other Track Material	86.60	.....	.....
218	Ballast	1.15	.....	.....
220	Track Laying and Surfacing	183.21	.....	.....
227	Stations and Office Buildings	8.19	.....	.....
231	Water Stations	2.41	.....	.....
233	Fuel Stations	6.69	.....	.....
235	Shops and Engine Houses	21.87	.....	.....
274	Injuries to Persons	26.72	.....	.....
275	Insurance	7.18	.....	.....
276	Stationery and Printing	3.46	.....	.....
277	Other Expenses	.02	.....	.....
	Total	1,560.48	.....	2.06
	Maintenance of Equipment			
301	Superintendence	35.68	.....	.....
302	Shop Machinery	9.49	.....	.....
308	Steam Locomotives—Repairs	750.89	.....	.....
309	Steam Locomotives—Depreciation	278.02	.....	.....
310	Steam Locomotives—Retirements	5.83	.....	.....
332	Injuries to Persons	3.46	.....	.....
333	Insurance	1.07	.....	.....
334	Stationery and Printing	.37	.....	.....
335	Other Expenses	.....	.....	.....
	Total	1,084.81	.....	1.43

[fol. 728]

	Transportation			
371	Superintendence	174.98	.....	.....
377	Yardmasters and Yard Clerks	1,158.44	.....	.....
378	Yard Conductors and Brakemen	2,018.95	.....	.....
379	Yard Switch and Signal Tenders	267.44	.....	.....
380	Yard Enginemen	1,438.31	.....	.....
382	Fuel for Yard Locomotives	834.97	.....	.....
385	Water for Yard Locomotives	21.17	.....	.....
386	Lubricants for Yard Locomotives	14.56	.....	.....
387	Other Supplies for Yard Locomotives	12.88	.....	.....
388	Enginehouse Expenses Yard	425.50	.....	.....
389	Yard Supplies and Expenses	74.76	.....	.....
410	Stationery and Printing	24.73	.....	.....
411	Other Expenses	11.05	.....	.....
414	Insurance	1.73	.....	.....
	Total	6,479.47	.....	8.57

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Seattle, Wash., from June 3, 1934 to June 9, 1934—Continued

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	General			
451	Salaries and Expenses of General Officers	77.58	.....	.....
452	Salaries and Expenses of Clerks and Attendant	291.59	.....	.....
453	General Office Supplies and Expenses	18.35	.....	.....
454	Law Expenses	38.76	.....	.....
455	Insurance	.71	.....	.....
458	Stationery and Printing	14.10	.....	.....
460	Other Expenses	16.92	.....	.....
	Total	458.01	.....	.61
	Summary			
	M. of W. & S.	1,560.48	.....	2.06
	M. of E.	1,084.81	.....	1.43
	Transportation	6,479.47	.....	8.57
	General	458.01	.....	.61
	Grand Total	9,582.77	756.15	12.67

[fol. 729]

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Auburn, Wash., from June 3, 1934 to June 9, 1934

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Way and Structures			
201	Superintendence	$38.86	325.74	.....
202	Roadway Maintenance	24.92	.....	.....
203	Bridges, Trestles and Culverts	4.52	.....	.....
212	Ties	94.47	.....	.....
214	Rails	3.73	.....	.....
216	Other Track Material	33.22	.....	.....
218	Ballast	.09	.....	.....
220	Track Laying and Surfacing	79.42	.....	.....
227	Stations and Office Buildings	7.93	.....	.....
231	Water Stations	.83	.....	.....
233	Fuel Stations	3.15	.....	.....
235	Shops and Engine Houses	27.95	.....	.....
274	Injuries to Persons	5.60	.....	.....
275	Insurance	1.51	.....	.....
276	Stationery and Printing	.72	.....	.....
277	Other Expenses	.....	.....	.....
	Total	326.92	.....	1.00

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Auburn, Wash., from June 3, 1934 to June 9, 1934—Continued

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Equipment			
301	Superintendence	16.31	.....	.....
302	Shop Machinery	4.34	.....	.....
308	Steam Locomotives—Repairs	343.33	.....	.....
309	Steam Locomotives—Depreciation	127.12	.....	.....
310	Steam Locomotives—Retirements	2.67	.....	.....
332	Injuries to Persons	1.58	.....	.....
333	Insurance	.49	.....	.....
334	Stationery and Printing	.17	.....	.....
335	Other Expenses	.....	.....	.....
	Total	496.01	.....	1.52
[fol. 730]	**Transportation**			
371	Superintendence	79.50	.....	.....
377	Yardmasters and Yard Clerks	818.05	.....	.....
378	Yard Conductors and Brakemen	811.67	.....	.....
379	Yard Switch and Signal Tenders	62.57	.....	.....
380	Yard Enginemen	559.26	.....	.....
382	Fuel for Yard Locomotives	382.40	.....	.....
385	Water for Yard Locomotives	7.79	.....	.....
386	Lubricants for Yard Locomotives	8.89	.....	.....
387	Other Supplies for Yard Locomotives	5.72	.....	.....
388	Enginehouse Expenses Yard	173.50	.....	.....
389	Yard Supplies and Expenses	17.53	.....	.....
410	Stationery and Printing	11.24	.....	.....
411	Other Expenses	5.02	.....	.....
414	Insurance	.79	.....	.....
	Total	2,943.93	.....	9.04
	General			
451	Salaries and Expenses of General Officers	32.03	.....	.....
452	Salaries and Expenses of Clerks and Attendant	120.37	.....	.....
453	General Office Supplies and Expenses	7.58	.....	.....
454	Law Expenses	16.00	.....	.....
455	Insurance	.29	.....	.....
458	Stationery and Printing	5.82	.....	.....
460	Other Expenses	6.98	.....	.....
	Total	189.07	.....	.58
	Summary			
	M. of W. & S.	326.92	.....	1.00
	M. of E.	496.01	.....	1.52
	Transportation	2,943.93	.....	9.04
	General	189.07	.....	.58
	Grand Total	3,955.93	325.74	12.14

[fol. 731]

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Tacoma, Wash., from June 3, 1934 to June 9, 1934

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Way and Structures			
201	Superintendence	$101.89	589.51	.....
202	Roadway Maintenance	96.19	.....	.....
203	Bridges, Trestles and Culverts	61.17	.....	.....
212	Ties	288.18	.....	.....
214	Rails	12.06	.....	.....
216	Other Track Material	63.69	.....	.....
218	Ballast	.55	.....	.....
220	Track Laying and Surfacing	191.97	.....	.....
227	Stations and Office Buildings	2.61	.....	.....
231	Water Stations	.51	.....	.....
233	Fuel Stations	3.23	.....	.....
235	Shops and Engine Houses	14.51	.....	.....
274	Injuries to Persons	14.68	.....	.....
275	Insurance	3.95	.....	.....
276	Stationery and Printing	1.90	.....	.....
277	Other Expenses	.01	.....	.....
	Total	857.10	.....	1.45
	Maintenance of Equipment			
301	Superintendence	27.18	.....	.....
302	Shop Machinery	7.23	.....	.....
308	Steam Locomotives—Repairs	572.05	.....	.....
309	Steam Locomotives—Depreciation	211.80	.....	.....
310	Steam Locomotives—Retirements	4.44	.....	.....
332	Injuries to Persons	2.63	.....	.....
333	Insurance	.82	.....	.....
334	Stationery and Printing	.28	.....	.....
335	Other Expenses	.....	.....	.....
	Total	826.43	.....	1.40

[fol. 732]

	Transportation			
371	Superintendence	$135.44	.....	.....
377	Yardmasters and Yard Clerks	951.14	.....	.....
378	Yard Conductors and Brakemen	1,510.66	.....	.....
379	Yard Switch and Signal Tenders	417.68	.....	.....
380	Yard Enginemen	1,053.86	.....	.....
382	Fuel for Yard Locomotives	639.91	.....	.....
385	Water for Yard Locomotives	15.78	.....	.....
386	Lubricants for Yard Locomotives	11.52	.....	.....
387	Other Supplies for Yard Locomotives	10.16	.....	.....
388	Enginehouse Expenses Yard	200.63	.....	.....
389	Yard Supplies and Expenses	39.50	.....	.....
410	Stationery and Printing	19.15	.....	.....
411	Other Expenses	8.55	.....	.....
414	Insurance	1.34	.....	.....
	Total	5,015.32	.....	8.51

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Tacoma, Wash., from June 3, 1934 to June 9, 1934—Continued

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	General			
451	Salaries and Expenses of General Officers	56.96	.....	.....
452	Salaries and Expenses of Clerks and Attendants	214.07	.....	.....
453	General Office Supplies and Expenses	13.47	.....	.....
454	Law Expenses	28.45	.....	.....
455	Insurance	.52	.....	.....
458	Stationery and Printing	10.35	.....	.....
460	Other Expenses	12.42	.....	.....
	Total	336.24	.....	.57
	Summary			
	M. of W. & S.	857.10	.....	1.45
	M. of E.	826.43	.....	1.40
	Transportation	5,015.32	.....	8.51
	General	336.24	.....	.57
	Grand Total	7,035.09	589.51	11.93

[fol. 733] Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Centralia, Wash., from June 3, 1934 to June 9, 1934

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Way and Structures			
201	Superintendence	20.68	80.58	.....
202	Roadway Maintenance	11.60	.....	.....
203	Bridges, Trestles and Culverts	.95	.....	.....
212	Ties	50.86	.....	.....
214	Rails	1.47	.....	.....
216	Other Track Material	12.56	.....	.....
218	Ballast			
220	Track Laying and Surfacing	30.34	.....	.....
227	Stations and Office Buildings	.08	.....	.....
231	Water Stations	6.03	.....	.....
233	Fuel Stations	11.07	.....	.....
235	Shops and Engine Houses	24.16	.....	.....
274	Injuries to Persons	2.98	.....	.....
275	Insurance	.80	.....	.....
276	Stationery and Printing	.39	.....	.....
277	Other Expenses	.....	.....	.....
	Total	173.97	.....	2.16

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Centralia, Wash., from June 3, 1934 to June 9, 1934—Continued

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Equipment			
301	Superintendence	4.03	.....	.....
302	Shop Machinery	1.07	.....	.....
308	Steam Locomotives—Repairs	84.80	.....	.....
309	Steam Locomotives—Depreciation	31.40	.....	.....
310	Steam Locomotives—Retirements	.66	.....	.....
332	Injuries to Persons	.39	.....	.....
333	Insurance	.12	.....	.....
334	Stationery and Printing	.04	.....	.....
335	Other Expenses	.....	.....	.....
	Total	122.51	.....	1.52
[fol. 734]	**Transportation**			
371	Superintendence	$19.20	.....	.....
377	Yardmasters and Yard Clerks	146.80	.....	.....
378	Yard Conductors and Brakemen	229.57	.....	.....
379	Yard Switch and Signal Tenders	8.37	.....	.....
380	Yard Enginemen	154.89	.....	.....
382	Fuel for Yard Locomotives	96.76	.....	.....
385	Water for Yard Locomotives	2.43	.....	.....
386	Lubricants for Yard Locomotives	1.63	.....	.....
387	Other Supplies for Yard Locomotives	1.46	.....	.....
388	Enginehouse Expenses Yard	39.02	.....	.....
389	Yard Supplies and Expenses	6.87	.....	.....
410	Stationery and Printing	2.71	.....	.....
411	Other Expenses	1.21	.....	.....
414	Insurance	.19	.....	.....
	Total	711.11	.....	8.82
	General			
451	Salaries and Expenses of General Officers	8.57	.....	.....
452	Salaries and Expenses of Clerks and Attendants	32.20	.....	.....
453	General Office Supplies and Expenses	2.03	.....	.....
454	Law Expenses	4.28	.....	.....
455	Insurance	.08	.....	.....
458	Stationery and Printing	1.56	.....	.....
460	Other Expenses	1.87	.....	.....
	Total	50.59	.....	.63
	Summary			
	M. of W. & S.	173.97	.....	2.16
	M. of E.	122.51	.....	1.52
	Transportation	711.11	.....	8.82
	General	50.59	.....	.63
	Grand Total	1,058.18	80.58	13.13

[fol. 735] Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Aberdeen, Wash., from June 3, 1934 to June 9, 1934

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Way and Structures			
201	Superintendence	$1.77	53.08	.....
202	Roadway Maintenance	1.04	.....	.....
203	Bridges, Trestles and Culverts	1.53	.....	.....
212	Ties	6.12	.....	.....
214	Rails	.18	.....	.....
216	Other Track Material	.98	.....	.....
218	Ballast	.....	.....	.....
220	Track Laying and Surfacing	2.14	.....	.....
227	Stations and Office Buildings	.39	.....	.....
231	Water Stations	.31	.....	.....
233	Fuel Stations	.10	.....	.....
235	Shops and Engine Houses	.....	.....	.....
274	Injuries to Persons	.26	.....	.....
275	Insurance	.07	.....	.....
276	Stationery and Printing	.03	.....	.....
277	Other Expenses	.....	.....	.....
	Total	14.92	.....	.28
	Maintenance of Equipment			
301	Superintendence	2.41	.....	.....
302	Shop Machinery	.64	.....	.....
308	Steam Locomotives—Repairs	50.74	.....	.....
309	Steam Locomotives—Depreciation	18.79	.....	.....
310	Steam Locomotives—Retirements	.39	.....	.....
332	Injuries to Persons	.23	.....	.....
333	Insurance	.07	.....	.....
334	Stationery and Printing	.03	.....	.....
335	Other Expenses	.....	.....	.....
	Total	73.30	.....	1.38
[fol. 736]	Transportation			
371	Superintendence	$9.25	.....	.....
377	Yardmasters and Yard Clerks	.....	.....	.....
378	Yard Conductors and Brakemen	137.29	.....	.....
379	Yard Switch and Signal Tenders	1.07	.....	.....
380	Yard Enginemen	94.74	.....	.....
382	Fuel for Yard Locomotives	59.49	.....	.....
385	Water for Yard Locomotives	1.79	.....	.....
386	Lubricants for Yard Locomotives	.81	.....	.....
387	Other Supplies for Yard Locomotives	.89	.....	.....
388	Enginehouse Expenses Yard	30.89	.....	.....
389	Yard Supplies and Expenses	4.48	.....	.....
410	Stationery and Printing	1.31	.....	.....
411	Other Expenses	.58	.....	.....
414	Insurance	.09	.....	.....
	Total	342.68	.....	6.46

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Aberdeen, Wash., from June 3, 1934 to June 9, 1934—Continued

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	General			
451	Salaries and Expenses of General Officers	3.66	.....	.....
452	Salaries and Expenses of Clerks and Attendants	13.77	.....	.....
453	General Office Supplies and Expenses	.87	.....	.....
454	Law Expenses	1.83	.....	.....
455	Insurance	.03	.....	.....
458	Stationery and Printing	.67	.....	.....
460	Other Expenses	.80	.....	.....
	Total	21.63	.....	.41
	Summary			
	M. of W. & S.	14.92	.....	.28
	M. of E.	73.30	.....	1.38
	Transportation	342.68	.....	6.46
	General	21.63	.....	.41
	Grand Total	452.53	53.08	8.53

[fol. 737]

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Hoquiam, Wash., from June 3, 1934 to June 9, 1934

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Way and Structures			
201	Superintendence	$15.03	48.59	.....
202	Roadway Maintenance	7.84	.....	.....
203	Bridges, Trestles and Culverts	35.95	.....	.....
212	Ties	31.47	.....	.....
214	Rails	.69	.....	.....
216	Other Track Material	3.57	.....	.....
218	Ballast	.15	.....	.....
220	Track Laying and Surfacing	24.94	.....	.....
227	Stations and Office Buildings	.06	.....	.....
231	Water Stations	.10	.....	.....
233	Fuel Stations	.04	.....	.....
235	Shops and Engine Houses	3.54	.....	.....
274	Injuries to Persons	2.16	.....	.....
275	Insurance	.58	.....	.....
276	Stationery and Printing	.28	.....	.....
277	Other Expenses	.....	.....	.....
	Total	126.40	.....	2.60

Northern Pacific Railway Company

Terminal Cost Study

Statement of Net Engine Hour Costs

Station Hoquiam, Wash., from June 3, 1934 to June 9, 1934—Continued

Acct. No.	Description	Expense for test period	Net engine hours	Cost per engine hour
	Maintenance of Equipment			
301	Superintendence	2.07	.....	.....
302	Shop Machinery	.55	.....	.....
308	Steam Locomotives—Repairs	43.47	.....	.....
309	Steam Locomotives—Depreciation	16.09	.....	.....
310	Steam Locomotives—Retirements	.34	.....	.....
332	Injuries to Persons	.20	.....	.....
333	Insurance	.06	.....	.....
334	Stationery and Printing	.02	.....	.....
335	Other Expenses	.....	.....	.....
	Total	62.80	.....	1.29
[fol. 738]				
	Transportation			
371	Superintendence	$8.72	.....	.....
377	Yardmasters and Yard Clerks	34.06	.....	.....
378	Yard Conductors and Brakemen	119.48	.....	.....
379	Yard Switch and Signal Tenders	1.48	.....	.....
380	Yard Enginemen	82.97	.....	.....
382	Fuel for Yard Locomotives	52.49	.....	.....
385	Water for Yard Locomotives	1.79	.....	.....
386	Lubricants for Yard Locomotives	.88	.....	.....
387	Other Supplies for Yard Locomotives	.65	.....	.....
388	Enginehouse Expenses Yard	17.21	.....	.....
389	Yard Supplies and Expenses	1.25	.....	.....
410	Stationery and Printing	1.23	.....	.....
411	Other Expenses	.55	.....	.....
414	Insurance	.09	.....	.....
	Total	322.85	.....	6.65
	General			
451	Salaries and Expenses of General Officers	4.35	.....	.....
452	Salaries and Expenses of Clerks and Attendants	16.36	.....	.....
453	General Office Supplies and Expenses	1.03	.....	.....
454	Law Expenses	2.17	.....	.....
455	Insurance	.04	.....	.....
458	Stationery and Printing	.79	.....	.....
460	Other Expenses	.95	.....	.....
	Total	25.69	.....	.53
	Summary			
	M. of W. & S.	126.40	.....	2.60
	M. of E.	62.80	.....	1.29
	Transportation	322.85	.....	6.65
	General	25.69	.....	.53
	Grand Total	537.74	48.59	11.07

[fol. 739]

DEFENDANT'S EXHIBIT 12

Northern Pacific Railway Company

Analysis of Engine Hours and Cost per Car in Connection with Switching Operations During Week June 3rd to 9th, 1934 at Spokane, Wash.

		Gross engine hours	Non productive service hours	Net engine hours	Number of loaded cars handled	No. of loaded cars handled per net engine hour	Cost per net engine hour	Cost per loaded car (cents)
1A	Classification—Yardley	214.75	.....	214.75	2705	12.60	$10.87	86.27
1B	Classification—Erie St.	41.83	.....	41.83	793	18.96	.....	57.33
2B	Transfer	41.75	.....	41.75	320	7.66	.....	141.91
2B	Interchange	28.25	.....	28.25	775	27.43	.....	39.63
3	Industry	86.58	.....	86.58	263	3.04	.....	357.57
4	Freight house	31.17	.....	31.17	82	2.63	.....	413.31
5	Team Track	.33	.....	.33	16	48.00	.....	22.65
6	Co. coal docks and ash pits	4.17	.46	3.71	....	.....	.....	.....
7	Passenger	52.67	.....	52.67	....	.....	.....	.....
8	Shop switching	37.42	.....	37.42	....	.....	.....	.....
9	Store Department	7.00	.....	7.00	....	.....	.....	.....
10	M. of W. Department	11.16	.....	11.16	....	.....	.....	.....
11	Weighing or ice house	7.75	.....	7.75	....	.....	.....	.....
12	Other service	.....	.....	.....	....	.....	.....	.....
	Meal-time, etc.	51.50	51.50	.....	....	.....	.....	.....
	Total	616.33	51.96	564.37	....	.....	.....	.....

[fol. 740]

Northern Pacific Railway Company

Analysis of Engine Hours and Cost per Car in Connection with Switching Operations During Week June 3rd to 9th, 1934 at Pasco, Wash.

		Gross engine hours	Non productive service hours	Net engine hours	Number of loaded cars handled	No. of loaded cars handled per net engine hour	Cost per net engine hour	Cost per loaded car (cents)
1A	Classification	172.00	.....	172.00	2533	14.73	$12.37	83.98
1B	Classification	.....	.....	.....	....	.....	.....	.....
2A	Transfer	1.00	.....	1.00	....	.....	.....	.....
2B	Interchange							
3	Industry	13.33	.....	13.33	22	1.65	.....	749.70
4	Freight house	8.33	.....	8.33	122	14.65	.....	84.44
5	Team Track	.....	.....	.....	....	.....	.....	.....
6	Co. coal docks and ash pits	3.50	.75	2.75	....	.....	.....	.....
7	Passenger	33.83	.....	33.83	....	.....	.....	.....
8	Shop switching	12.75	.....	12.75	....	.....	.....	.....
9	Store Department	1.58	.....	1.58	....	.....	.....	.....
10	M. of W. Department	1.08	.....	1.08	....	.....	.....	.....
11	Weighing or ice house	14.00	.....	14.00	....	.....	.....	.....
12	Other service	.....	.....	.....	....	.....	.....	.....
	Meal-time, etc.	27.67	27.67	.....	....	.....	.....	.....
	Total	289.07	28.42	260.65	....	.....	.....	.....

[fol. 741]

Northern Pacific Railway Company

Analysis of Engine-Hours and Cost per Car in Connection with Switching Operations
During Week June 3rd to 9th, 1934 at Yakima, Wash.

		Gross engine hours	Non productive service hours	Net engine hours	Number of loaded cars handled	No. of loaded cars handled per net engine hour	Cost per net engine hour	Cost per loaded car (cents)
1A	Classification	134.18	.....	134.18	2623	19.55	$11.05	56.52
1B	Classification	.....	.....	.....	....	.....	.....	.....
2A, 2B	Transfer / Interchange	12.95	.....	12.95	104	8.03	.....	137.61
3	Industry	51.12	.....	51.12	439	8.59	.....	128.64
4	Freight house	7.17	.....	7.17	93	12.97	.....	85.20
5	Team Track	1.08	.....	1.08	7	6.48	.....	170.52
6	Co. coal docks and ash pits	1.33	.18	1.15	....	.....	.....	.....
7	Passenger	16.72	.....	16.72	....	.....	.....	.....
8	Shop switching	16.71	.....	16.71	....	.....	.....	.....
9	Store Department	.67	.....	.67	....	.....	.....	.....
10	M. of W. Department	1.25	.....	1.25	....	.....	.....	.....
11	Weighing or ice house	17.93	.....	17.93	....	.....	.....	.....
12	Other service	.....	.....	.....	....	.....	.....	.....
	Meal-time, etc	15.67	15.67	.....	....	.....	.....	.....
	Total	276.78	15.85	260.93	....	.....	.....	.....

[fol. 742]

Northern Pacific Railway Company

Analysis of Engine Hours and Cost per Car in Connection with Switching Operations During Week June 3rd to 9th, 1934 at Everett, Wash.

		Gross engine hours	Non productive service hours	Net engine hours	Number of loaded cars handled	No. of loaded cars handled per net engine hour	Cost per net engine hour	Cost per loaded car (cents)
1A	Classification	17.50	.....	17.50	244	13.94	$9.86	70.73
1B	Classification	.....	.....	.....	....	.....	.....	.....
2A 2B	Transfer Interchange	14.92	.....	14.92	77	5.16	.....	191.09
3	Industry Log	17.92	.....	17.92	196	10.94	.....	90.13
	Industry Other	27.41	.....	27.41	139	5.07	.....	194.48
4	Freight house	5.08	.....	5.08	19	3.74	.....	263.64
5	Team Track	3.08	.....	3.08	17	5.52	.....	178.62
6	Co. coal docks and ash pits	.....	.....	.....	....	.....	.....	.....
7	Passenger	.....	.....	.....	....	.....	.....	.....
8	Shop switching	3.33	.....	3.33	....	.....	.....	.....
9	Store Department	.....	.....	.....	....	.....	.....	.....
10	M. of W. Department	.....	.....	.....	....	.....	.....	.....
11	Weighing or ice house	.50	.....	.50	....	.....	.....	.....
12	Other service	.....	.....	.....	....	.....	.....	.....
	Meal-time, etc.	9.08	9.08	.....	....	.....	.....	.....
	Total	98.82	9.08	89.74	....	.....	.....	.....

Analysis of Engine Hours and Cost per Car in Connection with Switching Operations During Week June 3rd to 9th, 1934 at Seattle, Wash.

		Gross engine hours	Non productive service hours	Net engine hours	Number of loaded cars handled	No. of loaded cars handled per net engine hour	Cost per net engine hour	Cost per loaded car (cents)
1	Classification—Middle Yard	161.72	.....	161.72	4246	26.26	$12.67	43.25
2	Classification—Interbay	36.75	.....	36.75	709	19.29	.....	65.68
3	Transfer—Middle Yd. Interbay	30.17	.....	30.17	372	12.33	.....	102.76
4	Transfer—Middle Piers	24.83	.....	24.83	351	14.14	.....	89.60
5	Transfer—Middle W. Seattle	13.13	.....	13.13	154	11.73	.....	108.01
6	Transfer—Middle 2nd Ave.	31.68	.....	31.68	620	19.57	.....	64.74
7	Transfer—Middle Argo	8.33	.....	8.33	127	15.25	.....	83.08
8	Transfer—Middle Harbor Island	11.25	.....	11.25	153	13.60	.....	93.16
9	Transfer—Interbay-Lake Union Dst.	8.17	.....	8.17	61	7.47	.....	169.61
10	Transfer—Interbay Ballard & Fremont	13.67	.....	13.67	113	8.27	.....	153.20
11	Interchange—Whatcom Ave.	19.87	.....	19.87	500	25.16	.....	50.36
12	Interchange—Pacific Coast Ry.	3.25	.....	3.25	29	8.92	.....	142.04
13	Interchange—G. N. Interbay	5.25	.....	5.25	113	21.52	.....	58.88
14	Interchange—G. N. Ballard Wye	2.17	.....	2.17	31	14.29	.....	88.66
15	Industry—W. Seattle Dist.	28.32	.....	28.32	160	5.65	.....	224.25
16	Industry—Harbor Island	47.72	.....	47.72	182	3.81	.....	332.55
17	Industry—Piere	66.08	.....	66.08	242	3.66	.....	346.17
18	Industry—Shore Line	19.42	.....	19.42	132	4.67	.....	271.31
19	Industry—Argo	8.83	.....	8.83				
20	Industry—Western Ave. Dist.	27.33	.....	27.33	128	4.68	.....	270.73
21	Industry—Mill Dist.	14.08	.....	14.08	62	4.40	.....	287.95
22	Industry—Stacey St.	.58	.....	.58	1	1.72	.....	736.63
23	Industry—2nd Ave.	19.00	.....	19.00	46	2.42	.....	523.55
24	Industry—Interbay Dist.	12.83	.....	12.83	57	4.44	.....	285.36
25	Industry—Fremont	21.50	.....	21.50	87	4.05	.....	312.84
26	Industry—Lake Union	16.08	.....	16.08	64	3.98	.....	318.34
27	Frt. Hse. & Team Track—King St.	66.83	.....	66.83	538	8.05	.....	157.39
28	Weighing cars	4.82	.....	4.82	63	13.07	.....	96.94
29	Repair track—Middle Yard	25.83	.....	25.83	....	.....	.....	.....
30	Co. coal docks & Ash Pits	10.77	4.11	6.66	....	.....	.....	.....
31	Meal time, etc.	114.91	114.91	.....	....	.....	.....	.....
	Total	875.17	119.02	756.15	....	.....	.....	.....

[fol. 744]

Northern Pacific Railway Company

Analysis of Engine Hours and Cost per Car in Connection with Switching Operations
During Week June 3rd to 9th, 1934 at Auburn, Wash.

		Gross engine hours	Non productive service hours	Net engine hours	Number of loaded cars handled	No. of loaded cars handled per net engine hour	Cost per net engine hour	Cost per loaded car (cents)
1A	Classification	218.17	.....	218.17	5078	23.28	$12.14	52.15
1B	Classification	.....	.....	.....	....	.....	.....	.....
2A	Transfer	.....	.....	.....	....	.....	.....	.....
2B	Interchange	.....	.....	.....	....	.....	.....	.....
3	Industry	21.83	.....	21.83	56	2.57	.....	472.37
4	Freight house	3.58	.....	3.58	7	1.96	.....	619.39
5	Team Track	1.58	.....	1.58	10	6.33	.....	191.79
6	Co. coal docks and ash pits	3.42	.68	2.74	....	.....	.....	.....
7	Passenger	4.75	.....	4.75	....	.....	.....	.....
8	Shop switching	36.58	.....	36.58	....	.....	.....	.....
9	Store Department	2.92	.....	2.92	....	.....	.....	.....
10	M. of W. Department	2.67	.....	2.67	....	.....	.....	.....
11	Weighing or ice house	30.92	.....	30.92	....	.....	.....	.....
12	Other service	.....	.....	.....	....	.....	.....	.....
	Meal-time, etc	26.92	26.92	.....	....	.....	.....	.....
	Total	353.34	27.60	325.74	.....	.....	.....	.....

[fol. 745]

Northern Pacific Railway Company

Analysis of Engine Hours and Cost per Car in Connection with Switching Operations
During Week June 3rd to 9th, 1934 at Tacoma, Wash.

		Gross engine hours	Non productive service hours	Net engine hours	Number of loaded cars handled	No. of loaded cars handled per net engine hour	Cost per net engine hour	Cost per loaded car (cents)
1A	Classification—Head of Bay	232.84	.....	232.84	3326	14.28	$11.93	83.54
1B	Classification—Half Moon	16.33	.....	16.33	321	19.66	.....	60.68
2A	Transfer	46.00	.....	46.00	508	11.04	.....	108.06
2B	Interchange	46.33	.....	46.33	250	5.40	.....	220.93
3	Industry	167.33	.....	167.33	1205	7.20	.....	165.69
4	Freight house	12.58	.....	12.58	168	13.35	.....	89.36
5	Team Track	5.08	.....	5.08	22	4.33	.....	275.52
6	Co. coal docks and ash pits	1.75	.40	1.35	....	.....	.....	.....
7	Passenger	38.17	.....	38.17	....	.....	.....	.....
8	Shop switching	10.08	.....	10.08	....	.....	.....	.....
9	Store Department	.67	.....	.67	....	.....	.....	.....
10	M. of W. Department	1.00	.....	1.00	....	.....	.....	.....
11	Weighing or ice house	11.17	.....	11.17	....	.....	.....	.....
12	Other service	.....	.....	.....	....	.....	.....	.....
	Helping road train	.58	.....	.58	....	.....	.....	.....
	Meal-time, etc.	60.00	60.00	.....	....	.....	.....	.....
	Total	649.91	60.40	589.51	....	.....	.....	.....

[fol. 746] Northern Pacific Railway Company

Analysis of Engine Hours and Cost per Car in Connection with Switching Operations During Week June 3rd to 9th, 1934 at Centralia, Wash.

		Gross engine hours	Non productive service hours	Net engine hours	Number of loaded cars handled	No. of loaded cars handled per net engine hour	Cost per net engine hour	Cost per loaded car (cents)
1A	Classification	53.08	.....	53.08	817	15.39	$13.13	85.32
1B	Classification	.....	.....	.....	....	.....	.....	.....
2A	Transfer	.....	.....	.....	....	.....	.....	.....
2B	Interchange	.....	.....	.....	....	.....	.....	.....
3	Industry	10.92	.....	10.92	21	1.92	.....	683.85
4	Freight house	8.83	.....	8.83	124	14.04	.....	93.52
5	Team Track	.....	.....	.....	....	.....	.....	.....
6	Co. coal docks and ash pits	.....	.....	.....	....	.....	.....	.....
7	Passenger	3.50	.....	3.50	....	.....	.....	.....
8	Shop switching	.....	.....	.....	....	.....	.....	.....
9	Store Department	.....	.....	.....	....	.....	.....	.....
10	M. of W. Department	3.92	.....	3.92	....	.....	.....	.....
11	Weighing or ice house	.33	.....	.33	....	.....	.....	.....
12	Other service	.....	.....	.....	....	.....	.....	.....
	Meal-time, etc	18.17	18.17	.....	....	.....	.....	.....
	Total	98.75	18.17	80.58	....	.....	.....	.....

[fol. 747]

Northern Pacific Railway Company

Analysis of Engine Hours and Cost per Car in Connection with Switching Operations During Week June 3rd to 9th, 1934 at Aberdeen, Wash.

		Gross engine hours	Non productive service hours	Net engine hours	Number of loaded cars handled	No. of loaded cars handled per net engine hour	Cost per net engine hour	Cost per loaded car (cents)
1A	Classification	.....	.....	.....	..	.....	.....	.....
1B	Classification	.....	.....	.....	....	.....	.....	.....
2A	Transfer	.....	.....	.....	....	.....	.....	.....
2B	Interchange	.....	.....	.....	....	.....	.....	.....
3	Industry	42.08	.....	42.08	104	2.47	$8.53	345.34
4	Freight house	2.83	.....	2.83	29	10.25	.....	83.22
5	Team Track	.17	.....	.17	....	.....	.....	.....
6	Co. coal docks and ash pits	.....	.....	.....	....	.....	.....	.....
7	Passenger	1.42	.....	1.42	....	.....	.....	.....
8	Shop switching	.....	.....	.....	....	.....	.....	.....
9	Store Department	.....	.....	.....	....	.....	.....	.....
10	M. of W. Department	1.83	.....	1.83	....	.....	.....	.....
11	Weighing or ice house	4.75	.....	4.75	....	.....	.....	.....
12	Other service	.....	.....	.....	....	.....	.....	.....
	Meal-time, etc	2.83	2.83	.....	....	.....	.....	.....
	Total	55.91	2.83	53.08	....	.....	.....	.....

[fol. 748]

Northern Pacific Railway Company

Analysis of Engine Hours and Cost per Car in Connection with Switching Operations During Week June 3rd to 9th, 1934 at Hoquiam, Wash.

		Gross engine hours	Non productive service hours	Net engine hours	Number of loaded cars handled	No. of loaded cars handled per net engine hour	Cost per net engine hour	Cost per loaded car (cents)
1A	Classification	8.08	.....	8.08	103	12.75	$11.07	86.82
1B	Classification	.....	.....	.....	....	.....	.....	.....
2A	Transfer	.....	.....	.....	....	.....	.....	.....
2B	Interchange	.....	.....	.....	....	.....	.....	.....
3	Industry	31.92	.....	31.92	46	1.44	.....	768.75
4	Freight house	2.75	.....	2.75	33	12.00	.....	92.25
5	Team Track	.....	.....	.....	....	.....	.....	.....
6	Co. coal docks and ash pits	.....	.....	.....	....	.....	.....	.....
7	Passenger	2.50	.....	2.50	....	.....	.....	.....
8	Shop switching	2.17	.....	2.17	....	.....	.....	.....
9	Store Department	.....	.....	.....	....	.....	.....	.....
10	M. of W. Department	.....	.....	.....	....	.....	.....	.....
11	Weighing or ice house	1.17	.....	1.17	....	.....	.....	.....
12	Other service	.....	.....	.....	....	.....	.....	.....
	Meal-time, etc	2.16	2.16	.....	....	.....	.....	.....
	Total	50.75	2.16	48.59	....	.....	.....	.....

[fol. 749] DEFENDANT'S EXHIBIT 13

Northern Pacific Railway Company

Cost of Switching for Cars Moving in Intrastate Traffic, State of Washington, (Log Traffic) During Period October 22 to 28, Inclusive, 1933, Based on Terminal Cost Study for Period Indicated.

Station See below From June 3, 1934 To June 9, 1934

	Elements of Switching Service Performed	Cost per car	No. of cars (see note)	Total Costs
Yakima	1–3	$1.8516	64	$118.50
Everett	1–3	1.6086	335	538.88
Tacoma	1A	.8354	5	4.18
	1A–3	2.4923	633	1,577.63
Centralia	1–1	1.7064	1	1.71
	1	.8532	1	.85
Hoquiam	1	.8682	42	36.46
Total			1,106	$2,278.21
Average per Car				2.06

Note: Total number of cars as shown includes certain cars which received no terminal handlings, and excludes duplications.

[fol. 750] Northern Pacific Railway Company

Cost of Switching for Cars Moving in Intrastate Traffic, State of Washington, (Except Logs) During Period October 22 to 28, Inclusive, 1933, Based on Terminal Cost Study for Period Indicated.

Station Summary From June 3, 1934 To June 9, 1934

Movement of Traffic From	To	Elements of Switching Service Performed	Cost per car	No. of cars (See Note)	Total Costs
Spokane			$2.60	146	$380.27
Pasco			1.68	256	429.98
Yakima			1.26	778	982.76
Everett			2.65	61	161.50
Seattle			3.79	530	2,006.09
Auburn			1.13	989	1,114.33
Tacoma			2.09	660	1,379.38
Centralia			1.85	78	144.64
Aberdeen			2.68	37	99.07
Hoquiam			5.35	24	128.46
Total				1,729	$6,826.48
Average per Car					3.95

Note: Duplications in number of cars eliminated in total.

[fol. 751] Northern Pacific Railway Company

Cost of Switching for Cars Moving in Intrastate Traffic, State of Washington, (Except Logs) During Period October 22 to 28, Inclusive, 1933, Based on Terminal Cost Study for Period Indicated.

Station Spokane, Wash. From June 3, 1934 To June 9, 1934

Movement of Traffic		Elements of Switching Service Performed	Cost per car	No. of cars	Total Costs
From	To				
Various	Spokane	1A–2B	$1.2590	3	$3.73
		1A–3	4.4384	5	22.19
		1B–3	4.1490	22	91.28
		1B–2B	.9696	18	17.45
Spokane	Various	1A–3	4.4384	10	44.38
		1A–2B	1.2590	5	6.30
		1B–3	4.1490	2	8.30
		1B–4	4.7064	3	14.12
		2A–1B	1.9924	3	5.98
		1A–2A	2.2818	1	2.28
		1B–2B	.9696	4	3.88
Various passing thru Less carload	Various Spokane traffic	1A	.8627	44	37.96
		1B–4	4.7064	26	122.37
Total				146	$380.27
Average per Car					2.60

[fol. 752] Northern Pacific Railway Company

Cost of Switching for Cars Moving in Intrastate Traffic, State of Washington, (Except Logs) During Period October 22 to 28, Inclusive, 1933, Based on Terminal Cost Study for Period Indicated.

Station Pasco, Wash. From June 3, 1934 To June 9, 1934

Movement of Traffic		Elements of Switching Service Performed	Cost per car	No. of cars	Total Costs
From	To				
Various	Pasco	1–3	$8.3368	13	$108.38
		1	.8398	5	4.20
Pasco	Various	1–3	8.3368	15	125.05
		1	.8398	2	1.68
Various passing thru Less carload	Various Pasco traffic	1	.8398	208	174.68
		1	.8398	7	5.88
		1–4	1.6842	6	10.11
Total				256	$429.98
Average per Car					1.68

[fol. 753] Northern Pacific Railway Company

Cost of Switching for Cars Moving in Intrastate Traffic, State of Washington, (Except Logs) During Period October 22 to 28, Inclusive, 1933, Based on Terminal Cost Study for Period Indicated.

Station Yakima, Wash. From June 3, 1934 To June 9, 1934

Movement of Traffic		Elements of Switching Service Performed	Cost per car	No. of cars	Total Costs
From	To				
Various	Yakima	1-3	$1.8516	136	$251.82
		1-2	1.9413	44	85.42
		1-4	1.4172	1	1.42
		1-5	2.2704	7	15.89
Yakima	Various	1-3	1.8516	22	40.74
		1-4	1.4172	1	1.42
		1-2	1.9413	140	271.78
Various passing thru	Various Yakima	1	.5652	287	162.21
		1-1	1.1304	120	135.65
Less carload traffic		1	.5652	14	7.91
		1-4	1.4172	6	8.50
Total				778	$982.76
Average per Car					1.26

[fol. 754] Northern Pacific Railway Company

Cost of Switching for Cars Moving in Intrastate Traffic, State of Washington, (Except Logs) During Period October 22 to 28, Inclusive, 1933, Based on Terminal Cost Study for Period Indicated.

Station Everett, Wash. From June 3, 1934 To June 9, 1934

Movement of Traffic		Elements of Switching Service Performed	Cost per car	No. of cars	Total Costs
From	To				
Various	Everett	1-3	$2.6521	30	$79.56
		1-5	2.4935	2	4.99
		1-2	2.6182	10	26.18
Everett	Various	1-2	2.6182	9	23.56
		1-3	2.6521	9	23.87
Less carload traffic		1-4	3.3437	1	3.34
Total				61	$161.50
Average per Car					2.65

[fol. 755] Northern Pacific Railway Company

Cost of Switching for Cars Moving in Intrastate Traffic, State of Washington, (Except Logs) During Period October 22 to 28, Inclusive, 1933, Based on Terminal Cost Study for Period Indicated.

Station Seattle, Wash. From June 3, 1934 To June 9, 1934.

Movement of Traffic		Elements of Switching Service Performed	Cost per car	No. of cars	Total Costs
From	To				
Various	Seattle	1-11	$.9861	38	$37.47
		1-4-20	4.0858	7	28.60
		1-6-27	2.7038	23	62.19
		1-3-2-9-26	7.0464	6	42.28
		1-12	1.9029	12	22.83
		1-3-2-9-25	6.9914	1	6.99
		1-1-11	1.4686	8	11.75
		1-1-12	2.3854	3	7.16
		1-11-12	2.4065	2	4.81
		1-5-15	3.8051	15	57.08
		1-4-17	4.8402	16	77.44
		1-3-2-24	5.0205	32	160.66
		1-21	3.3620	5	16.81
		1-7-18	4.0264	18	72.48
		1-3-2-10-14	4.5855	8	36.68
		1-3-2-10-25	6.8273	37	252.61
		1-3-2-13	2.7557	3	8.27
		2-10-14	3.0754	2	6.15
		2-10-25	5.3172	10	53.17
		1-8-16	4.7396	10	47.40
		1-7-19	4.0264	2	8.05
		1-6-23	6.3654	4	25.46
		1-6-27-6-1-4-17	8.1914	1	8.19
		1-6-27-6-1-4-20	7.4370	17	126.43
		1-1-21	3.8445	1	3.84
		1-1-7-18	4.5089	1	4.51
		2-9-26	5.5363	1	5.54
Seattle	Various	1-21	3.3620	20	67.24
		1-4-17	4.8402	30	145.21
		1-8-16	4.7396	28	132.71
		1-11	.9861	19	18.74
		1-3-2-10-25	6.8273	1	6.83
		1-3-2-13	2.7557	31	85.43
		1-3-2-24	5.0205	7	35.14
		2-10-14	3.0754	1	3.08
		1-12	1.9029	1	1.90
		1-6-27	2.7038	1	2.70
		1-7-18	4.0264	8	32.21
		1-5-15	3.8051	3	11.42
		1-1-11	1.4686	5	7.34
		2-13	1.2456	1	1.25
		1-23	5.7180	5	28.59
Various passing thru	Various Seattle	1-3-2	2.1669	2	4.33
Less carload traffic		1-6-27	2.7038	84	227.12
Total				530	$2,006.09
Average per Car					3.79

[fol. 756] Northern Pacific Railway Company

Cost of Switching for Cars Moving in Intrastate Traffic, State of Washington, (Except Logs) During Period October 22 to 28, Inclusive, 1933, Based on Terminal Cost Study for Period Indicated.

Station Auburn, Wash. From June 3, 1934 To June 9, 1934.

Movement of Traffic		Elements of Switching Service Performed	Cost per car	No. of cars	Total Costs
From	To				
Various	Auburn	1–3	$5.2452	9	$47.21
		1–5	2.4394	1	2.44
Auburn	Various	1–3	5.2452	3	15.74
Various passing thru	Various Auburn	1–1	1.0430	869	906.37
Less carload traffic		1–1	1.0430	102	106.39
		1–4	7.2369	5	36.18
Total				989	$1,114.33
Average per Car					1.13

[fol. 757] Northern Pacific Railway Company

Cost of Switching for Cars Moving in Intrastate Traffic, State of Washington, (Except Logs) During Period October 22 to 28, Inclusive, 1933, Based on Terminal Cost Study for Period Indicated.

Station Tacoma, Wash. From June 3, 1934 To June 9, 1934.

Movement of Traffic		Elements of Switching Service Performed	Cost per car	No. of cars	Total Costs
From	To				
Various	Tacoma	1A–2A–1B–3	$4.1797	90	$376.17
		1A–3	2.4923	67	166.98
		1A–2B	3.0447	49	149.19
		1A–2A–1B–2A–3	5.2603	16	84.16
		1A–5	3.5906	1	3.59
Tacoma	Various	1A–3	2.4923	22	54.83
		1A–2B	3.0447	8	24.36
		1A–1B–3	3.0991	5	15.50
		1A–1B–2A–3	4.1797	25	104.49
		1A–2A–3	3.5729	5	17.86
Various passing thru	Various Tacoma	1A	.8354	250	208.85
Less carload traffic		1A	.8354	42	35.09
		1A–4	1.7290	80	138.31
Total				660	$1,379.38
Average per Car					2.09

[fol. 758] Northern Pacific Railway Company

Cost of Switching for Cars Moving in Intrastate Traffic, State of Washington (Except Logs) During Period October 22 to 28, Inclusive, 1933, Based on Terminal Cost Study for Period Indicated.

Station Centralia, Wash. From June 3, 1934 To June 9, 1934.

Movement of Traffic		Elements of Switching Service Performed	Cost per car	No. of cars	Total Costs
From	To				
Various	Centralia	1–3	$7.6917	8	$61.53
Centralia	Various	1–4	1.7884	19	33.98
Various passing thru	Various Centralia	1	.8532	33	28.16
Less carload traffic		1	.8532	12	10.24
		1–4	1.7884	6	10.73
Total				78	$144.64
Average per Car					1.85

[fol. 759] Northern Pacific Railway Company

Cost of Switching for Cars Moving in Intrastate Traffic, State of Washington, (Except Logs) During Period October 22 to 28, Inclusive, 1933, Based on Terminal Cost Study for Period Indicated.

Station Aberdeen, Wash. From June 3, 1934 To June 9, 1934.

Movement of Traffic		Elements of Switching Service Performed	Cost per car	No. of cars	Total Costs
From	To				
Various	Aberdeen	5	.....	5	.....
		3	$3.4534	18	$62.16
Aberdeen	Various	3	3.4534	9	31.08
Less carload traffic		4	.8322	7	5.83
Total				37	$99.07
Average per Car					2.68

[fol. 760] Northern Pacific Railway Company

Cost of Switching for Cars Moving in Intrastate Traffic, State of Washington, (Except Logs) During Period October 22 to 28, Inclusive, 1933, Based on Terminal Cost Study for Period Indicated.

Station Hoquiam, Wash. From June 3, 1934 To June 9, 1934.

Movement of Traffic		Elements of Switching Service Performed	Cost per car	No. of cars	Total Costs
From	To				
Various	Hoquiam	1–3	$8.5557	10	$85.56
Hoquiam	Various	1–3	8.5557	4	34.22
Various passing thru	Various Hoquiam	1	.8682	6	5.21
Less carload traffic		1	.8682	4	3.47
Total				24	$128.46
Average per Car					5.35

[fols. 761-763] DEFENDANT'S EXHIBIT 46

Northern Pacific Railway Company
Washington
State Statistics

710. RAILWAY OPERATING REVENUES EARNED WITHIN THE STATE.

[FOR ROADS MAKING OPERATING REPORTS.]

State the railway operating revenues of the respondent for the year (classified in accordance with the Uniform System of Accounts for Steam Railway Corporations), and the comparison of such revenues with those of the preceding year (showing increases in black and decreases in red) for each of the several classes. The proportion of joint traffic receipts belonging to other carriers should not be included in column (b).

Line No.	Class of Railway Operating Revenues (a)	Total amount of revenue for the year. (b)	Comparison with total revenue of preceding year. (Increases in black, decreases in red.) (c)	Revenues Earned Within the State. On intrastate traffic. (d)	On interstate traffic. (e)	Total. (f)
		$ c.	$ c.	$ c.	$ c.	$ c.
1	(101) Freight,			7 761 841 22	6 895 206 33	14 657 047 55
2	(102) Passenger,			545 211 01	851 691 83	1 396 902 84
3	(103) Excess baggage,			4 886 63	7 633 56	12 520 19
4	(104) Sleeping car,			56 00	50 53	106 53
5	(105) Parlor and chair car,			5 528 08	8 635 60	14 163 68
6	(106) Mail,				393 600 28	393 600 28
7	(107) Express,				251 300 71	251 300 71
8	(108) Other passenger-train,			11 259 58	14 962 86	26 222 44
9	(109) Milk,			22 972 92	17 336 14	40 309 06
10	(110) Switching,			466 364 85		466 364 85
11	(111) Special service train,			1 572 05	5 539 98	7 112 03
12	(112) Other freight-train,			50 462 98		50 462 98
13	(113) Water transfers—Freight,			8 870 155 32	8 445 957 82	17 316 113 14
14	(114) Water transfers—Passenger,					
15	(115) Water transfers—Vehicles and live stock,					
16	(116) Water transfers—Other,					
17	Total rail-line transportation revenue,					
18	(121) Freight,					
19	(122) Passenger,					
20	(123) Excess baggage,		Data for columns (b) and (c) not required.			
21	(124) Other passenger service,					
22	(125) Mail,					
23	(126) Express,					
24	(127) Special service,					
25	(128) Other,					
26	Total water-line transportation revenue,					
27	(131) Dining and buffet,			39 376 04	61 510 57	100 886 61
28	(132) Hotel and restaurant,			129 963 04		129 963 04
29	(133) Station, train, and boat privileges,			4 649 24		4 649 24
30	(134) Parcel room,			6 514 30		6 514 30
31	(135) Storage—Freight,			3 221 31		3 221 31
32	(136) Storage—Baggage,			3 444 00		3 444 00
33	(137) Demurrage,			40 107 33		40 107 33
34	(138) Telegraph and telephone,				30 859 80	30 859 80
35	(139) Grain elevator,					
36	(140) Stockyard,					
37	(141) Power,					
38	(142) Rents of buildings and other property,			7 273 45		7 273 45
39	(143) Miscellaneous,			49 974 43	20 523 55	70 497 98
40	Total incidental operating revenue,			284 523 14	112 893 92	397 417 06
41	(151) Joint facility—Cr.,			2 309 99	48 444 37	50 754 36
42	(152) Joint facility—Dr.,			3 353 40	115 082 17	118 435 57
43	Total joint facility operating revenue,			Dr. 1 043 41	Dr. 66 637 80	Dr. 67 681 21
44	Total railway operating revenues,			9 153 635 05	8 492 213 94	17 645 848 99

50. State the rule or rules used by the respondent in assigning revenues from interstate traffic to the several States in which such traffic moves.

See note on page 707 regarding apportionment.

764-765

316

813

720. RAILWAY OPERATING EXPENSES—CLASS I COMPANIES—WITHIN THE STATE.

[FOR COMPANIES HAVING ANNUAL OPERATING REVENUES ABOVE $1,000,000.]

State the railway operating expenses on respondent's road for the year, classifying them in accordance with the Uniform System of Accounts for Steam Railway Corporations, and analyzing them in accordance with the Commission's Rules Governing the Separation of Operating Expenses, effective on January 1, 1920. The returns against "Yard" in accounts Nos. 202–226 should be those applying to tracks in yards where a separate switching service is maintained, as provided for by instructions pertaining to those accounts in the effective Rules.

Line No.	Name of Railway Operating Expense Account. (a)	Amount of operating expenses for the year. (b)	Expenses related solely to freight service. (c)	Expenses related solely to passenger and allied services. (d)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to freight service. (e)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to passenger and allied services. (f)	Expenses not related to either freight service or passenger and allied services. (g)
		$ . . c.	$ . . c.	$ . . c.	$ . . c.	$ . . c.	$ . . c.
1	I. Maintenance of Way and Structures.						
2	(201) Superintendence,	362 107 74	7 199 24		266 655 10	88 253 40	
3	(202) Roadway maintenance—Yard,	49 493 49	18 524 13	428 34	27 886 48	2 654 54	
4	Roadway maintenance—Other,	189 063 20			133 291 52	55 771 68	
5	(203) Roadway—Depreciation—Yard,						
6	Roadway—Depreciation—Other,						
7	(204) Underground power tubes—Yard,						
8	Underground power tubes—Other,						
9	(205) Underground power tubes—Depreciation—Yard,						
10	Underground power tubes—Depreciation—Other,						
11	(206) Tunnels and subways—Yard,	2 96		2 96			
12	Tunnels and subways—Other,	19 698 33			13 454 76	6 243 57	
13	(207) Tunnels and subways—Depreciation—Yard,						
14	Tunnels and subways—Depreciation—Other,						
15	(208) Bridges, trestles, and culverts—Yard,	85 445 61	70 312 91	Cr. 1 23	13 577 64	1 556 29	
16	Bridges, trestles, and culverts—Other,	229 514 55			164 377 79	65 136 76	
17	(209) Bridges, trestles, and culverts—Depreciation—Yard,						
18	Bridges, trestles, and culverts—Depreciation—Other,						
19	(210) Elevated structures—Yard,						
20	Elevated structures—Other,						
21	(211) Elevated structures—Depreciation—Yard,						
22	Elevated structures—Depreciation—Other,						
23	(212) Ties—Yard,	121 313 67	51 698 29	2 163 24	61 506 05	5 946 08	
24	Ties—Other,	392 415 15			281 269 30	111 145 85	
25	(213) Ties—Depreciation—Yard,						
26	Ties—Depreciation—Other,						
27	(214) Rails—Yard,	14 575 29	3 113 39	902 97	10 017 89	541 04	
28	Rails—Other,	61 921 25			41 665 74	20 255 51	
29	(215) Rails—Depreciation—Yard,						
30	Rails—Depreciation—Other,						
31	(216) Other track material—Yard,	47 548 60	17 411 19	3 748 56	24 535 79	1 853 06	
32	Other track material—Other,	103 830 89			74 759 18	29 071 71	
33	(217) Other track material—Depreciation—Yard,						
34	Other track material—Depreciation—Other,						
35	(218) Ballast—Yard,	6 759 41	333 91	396 16	5 720 63	308 71	
36	Ballast—Other,	Cr. 2 968 27			Cr. 1 972 24	Cr. 996 03	
37	(219) Ballast—Depreciation—Yard,						
38	Ballast—Depreciation—Other,						

39	(220) Track laying and surfacing—Yard,		108	344	50		43	786	25		3	650	61		53	527	88		5	379	76				
40	Track laying and surfacing—Other,		415	277	36										288	892	44		126	384	92				
41	(221) Right-of-way fences—Yard,			429	73			266	81							154	97			7	95				
42	Right-of-way fences—Other,		7	257	71										5	048	59		2	209	12				
43	(222) Right-of-way fences—Depreciation—Yard,																								
44	Right-of-way fences—Depreciation—Other,																								
45	(223) Snow and sand fences and snowsheds—Yard,																								
46	Snow and sand fences and snowsheds—Other,		1	018	58											714	42			304	16				
47	(224) Snow and sand fences and snowsheds—Depreciation—Yard,																								
48	Snow and sand fences and snowsheds—Depreciation—Other,																								
49	(225) Crossings and signs—Yard,		30	825	92		13	925	80			6	54		15	599	08		1	294	50				
50	Crossings and signs—Other,		28	193	08										18	593	10		9	599	98				
51	(226) Crossings and signs—Depreciation—Yard,																								
52	Crossings and signs—Depreciation—Other,																								
53	(227) Station and office buildings,		77	577	88		32	784	52		19	749	23		17	190	66		7	853	47				
54	(228) Station and office buildings—Depreciation,																								
55	(229) Roadway buildings,		8	551	54			217	62						6	337	97		1	995	95				
56	(230) Roadway buildings—Depreciation,																								
57	(231) Water stations,		38	403	91			484	20						27	635	57		10	284	14				
58	(232) Water stations—Depreciation,																								
59	(233) Fuel stations,		18	628	85			1	29						14	928	54		3	699	02				
60	(234) Fuel stations—Depreciation,																								
61	(235) Shops and enginehouses,		98	482	34			772	73						82	303	71		15	405	90				
62	(236) Shops and enginehouses—Depreciation,																								
63	(237) Grain elevators,																								
64	(238) Grain elevators—Depreciation,																								
65	(239) Storage warehouses,																								
66	(240) Storage warehouses—Depreciation,																								
67	(241) Wharves and docks,		2	468	81		2	468	81																
68	(242) Wharves and docks—Depreciation,																								
69	(243) Coal and ore wharves,			143	35			143	35																
70	(244) Coal and ore wharves—Depreciation,																								
71	(245) Gas producing plants,			231	57											202	69			28	88				
72	(246) Gas producing plants—Depreciation,																								
73	(247) Telegraph and telephone lines,		64	565	15			33	12						46	648	41		17	883	62				
74	(248) Telegraph and telephone lines—Depreciation,																								
75	(249) Signals and interlockers,		60	885	07			270	16			992	34		37	639	60		21	982	97				
76	(250) Signals and interlockers—Depreciation,																								
77	(251) Power plant dams, canals, and pipe lines,																								
78	(252) Power plant dams, canals, and pipe lines—Depreciation,																								
79	(253) Power plant buildings,		7	392	00										5	399	83		1	992	17				
80	(254) Power plant buildings—Depreciation.																								
81	(255) Power substation buildings,																								
82	(256) Power substation buildings—Depreciation,																								
83	(257) Power transmission systems,		2	035	19							305	04		1	504	27			225	88				
84	(258) Power transmission systems—Depreciation,																								
85	(259) Power distribution systems,	Cr.		206	84									Cr.		203	76	Cr.		3	08				
86	(260) Power distribution systems—Depreciation,																								
87	C forward,		2	651	227	57		265	747	72		32	344	76	1	738	863	61		614	271	48				

720. RAILWAY OPERATING EXPENSES—CLASS I COMPANIES—WITHIN THE STATE—Concluded.

Line No.	Name of Railway Operating Expense Account. (a)	Amount of operating expenses for the year. (b)	Expenses related solely to freight service. (c)	Expenses related solely to passenger and allied services. (d)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to freight service. (e)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to passenger and allied services. (f)	Expenses not related to either freight service or passenger and allied services. (g)
		$ c.	$ c.	$ c.	$ c.	$ c.	$ c.
88	Maintenance of Way and Structures—Brought forward,	2 651 227 57	265 747 72	32 344 76	1 738 863 61	614 271 48	
89	(261) Power line poles and fixtures	1 438 86	Cr. 01	4 05	1 178 17	256 65	
90	(262) Power line poles and fixtures—Depreciation,						
91	(263) Underground conduits,	1 607 00			1 406 61	200 39	
92	(264) Underground conduits—Depreciation,						
93	(265) Miscellaneous structures,						
94	(266) Miscellaneous structures—Depreciation,						
95	(267) Paving,	16 418 75	878 84		13 852 41	1 687 50	
96	(268) Paving—Depreciation,						
97	(269) Roadway machines,	22 269 25	1 342 55		15 497 97	5 428 73	
98	(270) Roadway machines—Depreciation,						
99	(271) Small tools and supplies,	34 347 45	1 947 95		24 584 57	7 814 93	
100	(272) Removing snow, ice, and sand,	20 862 94	37 64		14 427 65	6 397 65	
101	(273) Assessments for public improvements,	3 036 43			2 308 76	727 67	
102	(274) Injuries to persons,	24 332 59	215 00		18 051 10	6 066 49	
103	(275) Insurance,	4 478 35			3 904 23	574 12	
104	(276) Stationery and printing,	4 100 65	29 63	18 01	3 047 85	1 005 16	
105	(277) Other expenses,	85 12	4 91		53 51	26 70	
106	Total of accounts Nos. 201 to 277,	2 784 204 96	270 204 23	32 366 82	1 837 176 44	644 457 47	
107	(278) Maintaining joint tracks, yards, and other facilities—Dr.,	78 813 58	53 834 50	5 698 10	6 525 61	2 755 37	
108	(279) Maintaining joint tracks, yards, and other facilities—Cr.,	365 348 56	36 849 32	11 923 53	200 073 63	116 502 08	
109	(280) Equalization—Way and structures,						
110	Total—All depreciation accounts,						
111	Total—All other maintenance of way and structure accounts,						
112	Total maintenance of way and structures,	2 497 669 98	297 189 41	26 141 39	1 643 628 42	530 710 76	
113	II. Maintenance of Equipment.						
114	(301) Superintendence,	199 978 84	4 118 30	1 046 45	148 184 32	46 629 77	
115	(302) Shop machinery,	54 900 63	Cr. 53 94		40 553 44	14 401 13	
116	(303) Shop machinery—Depreciation,						
117	(304) Power plant machinery,	10 675 03	39 57		7 740 89	2 894 57	
118	(305) Power plant machinery—Depreciation,						
119	(306) Power substation apparatus,						
120	(307) Power substation apparatus—Depreciation,						
121	(308) Steam locomotives—Repairs,	994 115 22	665 614 31	308 868 53	17 758 47	1 873 91	
122	(309) Steam locomotives—Depreciation,	361 888 50			257 039 81	104 848 69	
123	(310) Steam locomotives—Retirements,	Cr. 2 389 18			Cr. 1 707 38	Cr. 681 80	
124	(311) Other locomotives—Repairs,						
125	(312) Other locomotives—Depreciation,						
126	(313) Other locomotives—Retirements,						
127	(314) Freight-train cars—Repairs,	754 400 80	754 400 80				
128	(315) Freight-train cars—Depreciation,	613 188 98	613 188 98				
129	(316) Freight-train cars—Retirements,	10 062 93	10 062 93				

130	(317) Passenger-train cars—Repairs,		275	780	58					275	780	58													
131	(318) Passenger-train cars—Depreciation,		100	307	47					100	307	47													
132	(319) Passenger-train cars—Retirements,	Cr.		51	66				Cr.		51	66													
133	(320) Motor equipment of cars—Repairs,																								
134	(321) Motor equipment of cars—Depreciation,																								
135	(322) Motor equipment of cars—Retirements,																								
136	(323) Floating equipment—Repairs,			472	23						472	23													
137	(324) Floating equipment—Depreciation,																								
138	(325) Floating equipment—Retirements,																								
139	(326) Work equipment—Repairs,		48	066	01			746	20					34	775	27		12	544	54					
140	(327) Work equipment—Depreciation,		34	402	35									25	817	91		8	584	44					
141	(328) Work equipment—Retirements,		2	803	81									2	094	98			708	85					
142	(329) Miscellaneous equipment—Repairs,			532	52			223	19			27	55		221	72			60	06					
143	(330) Miscellaneous equipment—Depreciation,			565	33										444	86			120	47					
144	(331) Miscellaneous equipment—Retirements,			165	04										129	87			35	17					
145	(332) Injuries to persons,		14	896	26		5	409	64			95	00	7	281	48		2	110	14					
146	(333) Insurance,		1	529	81			7	52					1	176	62			345	67					
147	(334) Stationery and printing,		3	454	09			19	85					2	639	87			794	37					
148	(335) Other expenses,			302	41			4	33			26	82		209	59			61	67					
149	Total of accounts Nos. 301 to 335,	3	480	048	00	2	053	781	68		686	572	97	544	361	72		195	331	63					
150	(336) Maintaining joint equipment—Dr.,		45	112	72		27	961	16		17	054	12		76	41			21	03					
151	(337) Maintaining joint equipment—Cr.,		62	449	54		23	964	93		35	788	10	1	972	01			724	50					
152	(338) Equalization—Equipment,																								
153	Total—All depreciation accounts,																								
154	Total—All other maintenance of equipment accounts,																								
155	Total maintenance of equipment,	3	462	711	18	2	057	777	91		667	838	99	542	466	12		194	628	16					
156	III. TRAFFIC.																								
157	(351) Superintendence,		157	962	47		76	524	01		39	605	18	18	709	87		23	123	41					
158	(352) Outside agencies,		302	711	88		114	400	17		112	332	78	33	985	77		41	993	16					
159	(353) Advertising,		126	423	86			82	30		125	564	94		347	31			429	31					
160	(354) Traffic associations,		13	529	76		10	341	25		3	188	51												
161	(355) Fast freight lines,		4	424	91		4	424	91																
162	(356) Industrial and immigration bureaus,		33	718	42									15	074	24		18	644	18					
163	(357) Insurance,			383	10			21	36			20	27		152	67			188	80					
164	(358) Stationery and printing,		36	183	97		24	939	76		5	838	32	2	418	14		2	987	75					
165	(359) Other expenses,		1	252	31			419	46			795	31		16	75			20	79					
166	Total of accounts Nos. 351 to 359,		676	590	68		231	153	22		287	345	31	70	704	75		87	387	40					
167	IV. TRANSPORTATION—RAIL LINE.																								
168	(371) Superintendence,		238	272	95		18	412	39		7	363	02	158	106	33		54	391	21					
169	(372) Dispatching trains,		253	789	51		3	598	12					122	204	58		127	986	81					
170	(373) Station employees,	1	196	685	71		523	770	77		202	729	02	341	598	97		128	586	95					
171	(374) Weighing, inspection, and demurrage bureaus,		25	024	35		25	024	35																
172	(375) Coal and ore wharves,			163	58			163	58																
173	(376) Station supplies and expenses,		86	655	68		28	913	75		52	664	33	18	313	48		6	764	12					
174	(377) Yardmasters and yard clerks,		377	003	80		351	384	90		25	618	90												
175	(378) Yard conductors and brakemen,		579	319	55		530	731	66		48	587	89												
176	Carried forward,																								

720. RAILWAY OPERATING EXPENSES—CLASS I COMPANIES—WITHIN THE STATE—Concluded.

Line No.	Name of Railway Operating Expense Account. (a)	Amount of operating expenses for the year. (b)	Expenses related solely to freight service. (c)	Expenses related solely to passenger and allied services. (d)	Expenses Related in Common to Both Freight Service and Passenger and Allied Services. Apportioned to freight service. (e)	Apportioned to passenger and allied services. (f)	Expenses not related to either freight service or passenger and allied services. (g)
177	TRANSPORTATION—RAIL LINE—Brought forward,	$ c.	$ c.	$ c.	$ c.	$ c.	$ c.
178	(379) Yard switch and signal tenders,	59 349 86	51 201 23	8 148 63			
179	(380) Yard enginemen,	379 616 98	347 924 15	31 692 83			
180	(381) Yard motormen,						
181	(382) Fuel for yard locomotives,	272 658 96	246 734 55	25 924 41			
182	(383) Yard switching power produced,						
183	(384) Yard switching power purchased,						
184	(385) Water for yard locomotives,	6 706 93	6 008 55	698 38			
185	(386) Lubricants for yard locomotives,	2 772 79	2 516 10	256 69			
186	(387) Other supplies for yard locomotives,	4 280 17	3 913 46	366 71			
187	(388) Enginehouse expenses—Yard,	93 608 68	85 904 72	7 703 96			
188	(389) Yard supplies and expenses,	15 773 25	14 806 10	967 15			
189	(392) Train enginemen,	830 048 42	543 594 98	258 767 36	25 738 15	1 947 93	
190	(393) Train motormen,	24 145 38		24 145 38			
191	(394) Fuel for train locomotives,	1 245 975 78	829 614 66	395 208 31	18 707 16	1 445 65	
192	(395) Train power produced,						
193	(396) Train power purchased,						
194	(397) Water for train locomotives,	33 040 08			22 453 91	10 586 17	
195	(398) Lubricants for train locomotives,	16 893 43	10 473 09	6 140 58	257 56	22 20	
196	(399) Other supplies for train locomotives,	12 210 31	7 253 66	4 754 28	185 89	16 48	
197	(400) Enginehouse expenses—Train,	269 268 58	185 391 56	78 369 14	5 118 82	389 06	
198	(401) Trainmen,	1 108 288 44	737 895 97	333 141 51	34 697 99	2 622 97	
199	(402) Train supplies and expenses,	251 555 64	115 265 88	136 285 76	3 76	24	
200	(403) Operating sleeping cars,						
201	(404) Signal and interlocker operation,	59 198 82	1 481 37	1 829 13	34 597 56	21 190 76	
202	(405) Crossing protection,	76 221 91	87 25		57 783 90	18 350 76	
203	(406) Drawbridge operation,	41 411 46	4 876 35		29 247 37	7 287 24	
204	(407) Telegraph and telephone operation,	44 544 56	78 94	119 63	31 985 43	12 356 56	
205	(408) Operating floating equipment,	2 843 97		2 843 97			
206	(409) Express service,						
207	(410) Stationery and printing,	26 776 92	10 832 68	2 903 11	9 588 55	3 452 64	
208	(411) Other expenses,	18 641 87	15 145 52	895 27	1 921 50	579 58	
209	(414) Insurance,	1 815 29	366 89	Cr. 6 20	1 074 57	380 03	
210	(415) Clearing wrecks,	7 418 15	6 351 92	415 80	506 42	144 01	
211	(416) Damage to property,	19 761 25	5 164 75	1 053 81	9 993 28	3 549 41	
212	(417) Damage to live stock on right of way,	19 333 22	3 156 75	4 141 22	8 741 97	3 293 28	
213	(418) Loss and damage—Freight,	82 108 13	82 108 13				
214	(419) Loss and damage—Baggage,	60 99		60 99			
215	(420) Injuries to persons,	73 110 22	49 503 87	8 890 64	10 877 57	3 838 34	
216	Total of accounts Nos. 371 to 393, 395 to 411, and 414 to 420,	7 856 355 57	4 849 652 54	1 653 681 61	943 739 02	409 282 40	

217	(390) Operating joint yards and terminals—Dr.,		48	942	00		40	794	99		3	611	47		3	378	07		1	157	47					
218	(391) Operating joint yards and terminals—Cr.,		208	368	18		141	655	55		59	353	00		5	242	37		2	117	26					
219	(412) Operating joint tracks and facilities—Dr.,		76	644	55		40	140	70		24	298	00		9	154	41		3	051	44					
220	(413) Operating joint tracks and facilities—Cr.,		217	174	56		32	067	52		60	652	70		82	914	65		41	539	69					
221	Total transportation—Rail line,	7	556	399	38	4	756	866	16	1	561	585	38		868	114	48		369	834	36					
222	V. TRANSPORTATION—WATER LINE.	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
223	(431) Operation of vessels,																									
224	(432) Operation of terminals,																									
225	(433) Incidental,																									
226	Total transportation—Water line,																									
227	VI. MISCELLANEOUS OPERATIONS.	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
228	(441) Dining and buffet service,		152	230	57						152	230	57													
229	(442) Hotels and restaurants,		137	850	75						52	196	11		31	245	88		54	408	76					
230	(443) Grain elevators,																									
231	(444) Stockyards,																									
232	(445) Producing power sold,																									
233	(446) Other miscellaneous operations,																									
234	Total miscellaneous operations,		290	081	32						204	426	68		31	245	88		54	408	76					
235	VII. GENERAL.	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
236	(451) Salaries and expenses of general officers,		109	261	99		10	238	32		1	510	20		70	456	53		27	056	94					
237	(452) Salaries and expenses of clerks and attendants,		395	302	65		145	842	15		27	940	14		160	157	51		61	362	85					
238	(453) General office supplies and expenses,		22	462	22		1	329	86			73	79		15	214	77		5	843	80					
239	(454) Law expenses,		63	232	61		4	696	20		1	018	51		41	592	30		15	925	60					
240	(455) Insurance,		1	441	99										1	045	76			396	23					
241	(456) Relief department expenses,																									
242	(457) Pensions,*		273	194	29										197	344	15		75	850	14					
243	(458) Stationery and printing,		21	490	20		3	322	54			516	92		12	752	87		4	897	87					
244	(459) Valuation expenses,		21	506	51										16	523	67		5	982	84					
245	(460) Other expenses,		19	559	92			395	94		1	024	04		13	130	34		5	009	60					
246	Total of accounts Nos. 451 to 460,		927	452	38		165	825	01		32	083	60		527	217	90		202	325	87					
247	(461) General joint facilities—Dr.,		7	743	87		7	010	66			707	47			16	78			8	96					
248	(462) General joint facilities—Cr.,		10	102	01			8	80			739	25		6	749	49		2	604	47					
249	Total general expenses,		925	094	24		172	826	87		32	051	82		520	485	19		199	730	36					
250	VIII. TRANSPORTATION FOR INVESTMENT—Cr.,		24	653	23		24	229	13			424	10													
251	GRAND TOTAL RAILWAY OPERATING EXPENSES,	15	[illegible]	893	55	7	491	583	44	2	778	965	47	3	676	644	84	1	436	699	80					

252 Operating ratio (ratio of operating expenses to operating revenues), 87.18 per cent.

State briefly the rule or rules in accordance with which expenses common to operations in two or more States are assigned to the State; if such rules are in print, file a copy thereof with this report or give reference to such copy previously filed.

NOTE:

The statements herein either of revenues or expenses attributed to Washington are misleading unless properly understood. They are necessarily based on arbitrary assumptions as follows:

Revenues contain (first) the revenues of business wholly local within the State and in addition a proportion of interstate revenues determined by the proportion of mileage which each interstate freight shipment or passenger is carried within the State.

Charges for expenses contain (first) those expenses incurred in each state that are considered wholly applicable to that state, and in addition some mileage proportion of expenses which can not be localized. Apportioning either such revenues or such expenses on a mileage basis is purely arbitrary and has been adopted for want of any other basis.

[fol. 833] IN SUPREME COURT OF WASHINGTON

Title of Action

No. 25684

STATE OF WASHINGTON, Appellant, Plaintiff,

vs.

NORTHERN PACIFIC RY. Co., Respondent, Defendant

Attorneys: G. W. Hamilton. R. G. Sharpe. L. B. da-Ponte. Robert S. Macfarlane.

Nature of Action: Thurston Co. #15415. Wright, J.

DOCKET ENTRIES

Date	Proceedings had
1935.	
Apr. 19.	Transcript.
May 10.	Statement of Facts.
10.	Exhibits—Package in pouch.
May 3.	Ent'd—Set May 28—En Banc.
24.	Appellant's Abstract of record (8 vol.) on shelf.
24.	25 Brief of Appellant (in #25683).
25.	25 Brief of Respondent.
27.	Acknowledgment of service (of brief).
June 5.	25 Respondent's sup. brief & letter re service.
7.	Acknowledgment of service of resp. suppl. brief.
12.	25 Reply brief (in #25683).
17.	Additional authority (in #25683) letter & (8).
Aug. 13.	Opinion—Reversed—En Banc.
Sept. 6.	Ent'd judgment 34-40 (in jacket).
13.	Petition for appeal.
13.	Assignment of Errors, etc.
13.	Cost & supersedeas bond.
13.	Order allowing appeal.
13.	Citation & service.
13.	Acknowledgment of service of petition, etc.
13.	Statement as to jurisdiction on appeal.
23.	Præcipe for record on appeal.
28.	Præcipe for record—additional.
30.	Appellee's præcipe for transcript on appeal (additional and includes others).

[fol. 834] SUPREME COURT OF THE UNITED STATES

[Title omitted]

APPELLEE'S PRÆCIPE FOR TRANSCRIPT ON APPEAL

To the Clerk of the Supreme Court of the State of Washington:

In preparing the transcript on the appeal of the above case to the Supreme Court of the United States, as provided by Rule 10 of the Supreme Court of the United States, please incorporate in said transcript the following additional portions of the record:

(1) Rule XVI of the "Rules of Pleading, Procedure and Practice" adopted by the Supreme Court of the State of Washington pursuant to Chapter 118, Laws of 1925, Extraordinary Session, and effective April 1, 1931;

(2) Rules VI and VII, and Rule VIII, subdivisions 1 and 2, of the Rules of the Supreme Court of the State of Washington, and also Amendment to Rule VI which became effective March 1, 1935;

(3) Appellant's Abstract of the Record;

(4) Brief of Appellant;

(5) All entries in Appearance Docket of Supreme Court of the State of Washington relating to Appeal No. 25684 therein;

(6) The following portions of Defendants's Exhibit "8": Title page, and pages 301, 302, 508, 509, 700, 702, 703, 704, 705, 706, and 707, 904, 905 and 915;

(7) The following portions of Defendant's Exhibit "9": Title page, and pages 301, 302, 508, 509, 700, 702, 703, 704, [fol. 835] 705, 706, 707, 904, 905 and 915;

(8) Defendant's Exhibits "11," "12," and "13";

(9) The following portions of Defendant's Exhibit "46:" first page, and pages 700, 702, 703, 704, 705, 706 and 707.

(10) Appellee's Prœcipe for Transcript on Appeal.

G. W. Hamilton, Attorney General. R. G. Sharpe, Assistant Attorney General.

[fol. 836] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 837-839] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed Oct. 30, 1935

Comes now appellant and adopts the assignment of errors as its statement of the points to be relied upon, and states that the whole of the record sent up from the Supreme Court of the State of Washington in accordance with the præcipe filed by appellant is necessary for consideration of the case.

Appellant attaches hereto copy of the præcipe filed by it with the Clerk of the Supreme Court of the State of Washington.

Lorenzo B. da Ponte, Robert S. Macfarlane, 909 Smith Tower, Seattle, Wash.; Dennis F. Lyons, Northern Pacific Bldg., St. Paul, Minnesota, Attorneys for Appellant.

[fol. 840] [File endorsement omitted.]

[fol. 841] IN SUPREME COURT OF THE UNITED STATES

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD TO BE PRINTED, AS PROVIDED BY PARAGRAPH 9, RULE 13.—Filed Nov. 4, 1935

Comes now the Appellee and designates in writing additional parts of the record which it thinks material, and which should be printed, in addition to those parts heretofore designated by Appellant, which additional parts are as follows:

Parts of Record to be Printed	Pages of Washington Supreme Court Clerk's Transcript
(1) Appellee's Præcipe for Transcript on Appeal (Item 10 of Appellee's Præcipe)	
(2) Rule XVI of the "Rules of Pleading, Procedure and Practice" adopted by the Supreme Court of the State of Washington pursuant to Chapter 118, Laws of 1925, Extraordinary Session, and effective April 1, 1931 (Item 1 of Appellee's Præcipe)	111
(3) Rules VI and VII, and Rule VIII, subdivisions 1 and 2, of the Rules of the Supreme Court of the State of Washington, and also Amendment to Rule VI which	

Parts of Record to be Printed	Pages of Washington Supreme Court Clerk's Transcript
became effective March 1, 1935 (Item 2, of Appellee's Præcipe)	107-110
(4) All of the following portions of Appellant's Abstract of the Record (Item 3 of Appellee's Præcipe): Pages 1 to 3 inclusive, pages 30 to 274, inclusive, and page 301	
(5) All of the following portions of Appellant's Brief, Volume one (Item 4 of Appellee's Præcipe): Pages 3 and 4, all of pages 12 to 21, inclusive; and the last four lines of page 190 and all of page 191	
(6) All entries in Appearance Docket of Supreme Court of the State of Washington relating to Appeal No. 25684 therein (Item 5 of Appellee's Præcipe)	
[fol. 842] (7) The following portions of Defendant's Exhibit "8": Title page, and pages 301, 302, 508, 509, 700, 702 to 706 inclusive, and 707, 904, 905 and 915 (Item 6, of Appellee's Præcipe)	
(8) The following portions of Defendant's Exhibit "9": Title page, and pages 301, 302, 508, 509, 700, 702 to 707 inclusive, and 904, 905 and 915 (Item 7, of Appellee's Præcipe)	
(9) Defendant's Exhibits "11," "12," and "13," (Item 8, of Appellee's Præcipe)	
(10) The following portions of Defendant's Exhibit "46:" first page, and pages 700, 702, 703, 704, 705, 706 and 707 (Item 9, of Appellee's Præcipe)	

Dated this 30th day of October, 1935.

G. W. Hamilton, Attorney General of State of Washington; R. G. Sharpe, Assistant Attorney General of State of Washington, Attorneys for Appellees.

[fol. 843] [File endorsement omitted.]

Endorsed on cover: File No. 40,083. Washington Supreme Court. Term No. 529. Northern Pacific Railway Company, appellant, vs. State of Washington. Filed October 19, 1935. Term No. 529, O. T., 1935.

[fol. 327] IN SUPREME COURT OF WASHINGTON

No. 25,683

STATE OF WASHINGTON, Plaintiff and Appellant,

v.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Respondent

No. 25,684

STATE OF WASHINGTON, Plaintiff and Appellant,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant and Appellant

Appeals from the Superior Court for Thurston County

Hon. D. F. Wright, Judge

ASSIGNMENTS OF ERROR IN BRIEF OF APPELLANT

Abbreviations:

For convenience and brevity, the defendant, Great Northern Railway Company, will be herein referred to as the [fols. 328 & 329] "G. N."; the defendant, Northern Pacific Railway Company, as the "N. P."; the Interstate Commerce Commission, as the "I. C. C."; and the Department of Public Works of the State of Washington, as the "D. P. W." Unless otherwise qualified, the word "intrastate" means the traffic or business of the particular defendant both beginning and ending in the State of Washington.

[fol. 330] ASSIGNMENTS OF ERROR

Northern Pacific Case:

(NP 1) The court erred in concluding that under the State statutes and constitution, the N. P. was not permitted to renounce its intrastate business without also withdrawing from its interstate business conducted therein. (Conclusion 3, NP Ab. 297.)

(NP 2) The court erred in finding that it is not possible for the N. P. to carry its intrastate and interstate freight and passengers in different trains or by means of different facilities and employes. (Finding XV, NP Ab. 292-3.)

(NP 3) The court erred in permitting the N. P.'s witness, Peterson, to testify over objection that the same was hearsay and that the underlying data was not produced, as to the relative ton miles, revenue and average miles of haul of Washington traffic in October, 1933, and during the week of October 22, 1933, as compared with the entire year, and in refusing to strike such testimony after received. (NP Ab. 46-8.)

[fol. 331] (NP 4) The court erred in receiving in evidence N. P.'s Exhibit "7" over objection that the same was hearsay, and that the data upon which based was taken from the N. P.'s records not introduced in evidence. (NP Ab. 60.)

(NP 5) The court erred in finding that the method used by the N. P. in assigning operating expenses to its Washington properties is the method prescribed by the D. P. W., and that the expenses incurred in Washington by the N. P. were correctly stated in Finding VI. (Finding VIII-b, NP Ab. 279.)

(NP 6) The court erred in finding that plaintiff contended that the N. P. should credit part of its mail and express revenue to local business, whereas no such contention was in fact made. (Finding XII, NP Ab. 288.)

(NP 7) The court erred in finding that $221,359 or any other sum should be added to the N. P.'s intrastate passenger revenue for 1933, for intrastate mail and express, such finding being wholly unsupported by the record. (Findings IX-h, IX-i and IX-j; NP Ab. 284-5.)

[fol. 332] (NP 8) The court erred in finding that the N. P.'s intrastate passenger revenue for 1933 was any sum greater than $429,635 as shown by plaintiff's Exhibit "25." (Finding IX-j, NP Ab. 216, 285.)

(NP 9) The court erred in finding that the correct method of apportioning the N. P.'s passenger service operating expenses as between intra and interstate passenger service is in the relation of relative revenue passenger miles, and not relative gross revenues. (Finding IX-i, NP Ab. 284-5.)

(NP 10) The court erred in finding that the N. P.'s expense of intrastate passenger business for 1933 was $1,500,000, or any other sum greater than $999,381 as shown by plaintiff's Exhibit "26." (Finding IX-j, NP Ab. 285.)

(NP 11) The court erred in finding that the mileage prorate division of revenues from interstate shipments is the method prescribed by the D. P. W. and the I. C. C., and is the correct method for apportioning such revenues to Washington. (Finding VIII-a, NP Ab. 278-9.)

[fol. 333] (NP 12) The court erred in finding that the 1933 ad valorem taxes on the N. P.'s Washington operating property should not be apportioned as between intrastate and interstate traffic on a relative use (car-mileage) basis, but instead on a relative revenue basis, with interstate freight revenues apportioned to Washington on a mileage prorate basis. (Finding XII, NP Ab. 287-8.)

(NP 13) The court erred in finding that in computing the ad valorem taxes properly apportionable to the N. P.'s intrastate traffic for 1933, credit should not be allowed such traffic for the taxes contributed by the N. P.'s tenant lines. (Finding XII, NP Ab. 287-8.)

(NP 14) The court erred in finding that the N. P.'s intrastate traffic for 1933 should be charged with ad valorem taxes paid in the sum of $876,083 or any greater sum than $678,662. (Finding XI-b, NP Ab. 220-1, 287.)

(NP 15) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "General Expenses," for the week of October 22, 1933, was [fol. 334] $5,945.44, or was any sum in excess of $4,407.89, which error was the result of the court including "pensions" as an item of operating expenses. (Finding IX-e, NP Ab. 231, 282.)

(NP 16) The court erred in finding that $530,637, or any other sum reported by the N. P. to the D. P. W. for 1933 as intrastate freight revenue was in fact interstate revenue. (Finding X, NP Ab. 286.)

(NP 17) The court erred in refusing to strike paragraph 7 of Peterson's affidavit (NP Ab. 266) to the effect that the amount of the N. P.'s interstate switching revenue for 1933 was $207,965 because not based on any record evidence before the court. (NP Ab. 270-1.)

(NP 18) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "Traffic Expenses" for the week of October 22, 1933, was $3,086.41, or was any sum in excess of $2,366.77, as shown by Exhibit "B" attached to the affidavit of State's witness, Manschreck. (Finding IX-e, NP Ab. 262, 282.)

[fol. 335] (NP 19) The court erred in finding that the N. P.'s operating expenses incident to maintenance of way and structures should be determined by taking the annual average for three years instead of for 1933 alone, or that the N. P. had any deferred maintenance in 1933. (Finding XIII, NP Ab. 288-9.)

(NP 20) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "Maintenance of Way and Structures," for the week of October 22, 1933, was $11,202.01, or was any sum in excess of $8,724.02 as shown by plaintiff's Exhibit "31." (Finding IX-e, NP Ab. 224, 282.)

(NP 21) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "Freight car repairs, depreciation and retirement," for the week of October 22, 1933, was $9,552.01, or was any sum in excess of $8,372.41, as shown by plaintiff's Exhibit "32." (Finding IX-e, NP Ab. 282, 225.)

(NP 22) The court erred in finding that only $582,774, or any other sum less than $1,355,064, of the net joint facility [fol. 336] rents received by the N. P. from its Washington operating properties should be assigned to the N. P.'s intrastate operations for 1933. (Finding XIV-b, NP Ab. 289-290.)

(NP 23) The court erred in finding that the N. P.'s total intrastate freight operating expenses for the week of October 22, 1933, was $75,078.42 or any sum in excess of $69,163.64 (Finding IX-e, NP Ab. 282); that the N. P.'s cost per revenue net ton mile was .98411¢ or any greater sum than $69,163.64 divided by 7,629,079 or .906579¢, or that the N. P.'s total intrastate freight operating expenses for 1933 were $3,291,785 or any other sum greater than 334,493,591 multiplied by .906579¢, or $3,032,448.64. (Finding IX-f, NP Ab. 282-3.)

(NP 24) The court erred in finding that the N. P.'s total intrastate operating expenses for 1933, other than taxes, were $4,796,440, or any other sum greater than $999,381 plus .6064 times the amount of the N. P.'s intrastate freight revenue for 1933. (Finding XII, NP Ab. 288.)

(NP 25) The court erred in finding that the N. P.'s total intrastate operating revenues for 1933 were only $5,271,-[fol. 337] 893, or $5,493,252, or any other sum less than $5,802,530, as reported under oath by the N. P. to the D. P. W. for that year, and as alleged in its answer. (Findings X and XII, NP Ab. 286, 288; Answer, NP Ab. 15-16.)

(NP 26) The court erred in finding that the N. P.'s net earnings from intrastate business for 1933 was a deficit of $228,632.22 or any other amount less than $817,443 if joint facility rents are not included, or $1,944,907 if joint facility rents are included. (Finding XII, NP Ab. 288.)

(NP 27) The court erred in refusing to strike paragraph 4 of Peterson's affidavit (NP Ab. 264-5) to the effect that the N. P.'s intrastate operating expenses for 1933 were $251,000 greater than as shown by N. P.'s Exhibit "7," on the ground that the same was not based on any record evidence before the court. (NP St. 578-580.)

(NP 28) The court erred in finding that the N. P.'s use of the test week of October 22, 1933, to determine its intrastate operating expenses resulted in an understatement of [fol. 338] such cost for 1933 of approximately $300,000, or any other sum. (Findings IX-b and IX-g, NP Ab. 280, 283.)

(NP 29) The court erred in refusing to strike paragraph 3 of Peterson's affidavit (NP. Ab. 264) to the effect that the N. P.'s operating ratio on shipments for export was lower than on its intrastate freight traffic. (NP Ab. 271.)

(NP 30) The court erred in finding that, in proportion to revenue, the cost of the N. P.'s intrastate business is greater than the cost of such company's interstate business. (Finding IX-a, NP Ab. 279-280.)

(NP 31) The court erred in finding that the tendency in 1934 was towards a substantial decrease in the N. P.'s net revenues, that increased cost of operation would be still

greater in 1935, and that there was nothing apparent at the time said findings were made to suggest an increase in the N. P.'s gross revenues, but that the facts known suggested a decreased net income for 1935. (Finding V, NP Ab. 277; Conclusion 7, NP Ab. 298.)

[fols. 339-341] (NP 32) The court erred in finding that the N. P. cannot so increase its local rates as to meet the occupational tax. (Finding XVIII, NP Ab. 295.)

(NP 33) The court erred in finding that the N. P.'s gross revenues from intrastate steam railway business for the last five months of 1933, and the amount of the occupational tax payable thereon were the several sums set forth in Finding of Fact No. 4 (NP Ab. 276), or were any less than the several sums set forth in the N. P.'s answers to interrogatories (See NP Ab. 35), showing a total taxable amount for said months of $2,674,704.85, and the total amount of taxes payable thereon to be 1½% of said amount, or $40,120.57.

(NP 34) The court erred in concluding that Chapter 191, Laws of 1933, is void as applied to the N. P. as violative of various provisions of the federal constitutions and statutes. (Conclusion 6, NP Ab. 298.)

(NP 35) The court erred in entering judgment in favor of the N. P. (NP Ab. 300.)

[fol. 342] We respectfully submit that, for the reasons set forth in the foregoing assignments, the judgment of the lower court in each of the above causes should be reversed, and the causes remanded with instructions that judgment [fol. 343] be entered in each case for the amount of taxes due as shown by the evidence.

G. W. Hamilton, Attorney General, R. G. Sharpe, Assistant Attorney General, Attorneys for Appellants.

FILE COPY

Office Supreme Court, U. S.
FILED
OCT 19 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 529

NORTHERN PACIFIC RAILWAY COMPANY,
A CORPORATION,
Appellant,

v.

STATE OF WASHINGTON,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION ON APPEAL.

D. F. LYONS,
L. B. DAPONTE,
ROBERT S. MACFARLANE,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction on appeal	1
Statutory provisions sustaining jurisdiction	1
Statute of the State the validity of which is involved	2
Date of judgment and date of application for appeal	5
Nature of case and rulings below	6
Cases believed to sustain the jurisdiction	9

Table of Cases Cited.

Bryant v. Zimmermann, 278 U. S. 63, 67	9
Great Northern Ry. Co. v. Minnesota, 278 U. S. 503, 506	2, 9
Gulf Refining Co. v. U. S., 269, U. S. 125	5
King Manufacturing Co. v. City Council of Augusta, 277 U. S. 100	9
Larson v. South Dakota, 278 U. S. 429, 432	2
Nashville, etc., Ry. v. White, 278 U. S. 456, 460	2
Pacific Telephone & Telegraph Co. v. City of Seattle, 291 U. S. 300	10
Puget Sound Power & Light Co. v. King County, 264 U. S. 22	5
Puget Sound Power & Light Co. v. City of Seattle, 291 U. S. 619	9
Sultan Ry. Co. v. Dept. of Labor, 277 U. S. 135	9
Weston v. City Council of Charleston, 27 U. S. 449	10

Statutes Cited.

Act of January 31, 1928, as amended by the Act of April 26, 1928; 45 Stat. 54; 45 Stat. 466 (28 U. S. Code, §§ 861 a, 861 b)	2
Chapter 191, Session Laws of Washington for 1933, Section 1	2, 3
Section 2	3
Section 3	4
Section 6	4
Constitution of United States, Article I, Section 8	7
14th Amendment	7
Emergency Railroad Transportation Act, 1933	6
Judicial Code, § 237 (a) (28 U. S. Code, § 344)	2, 5, 10
Supreme Court Opinion	8, 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 529

NORTHERN PACIFIC RAILWAY COMPANY,
A CORPORATION,
Appellant,

v.

STATE OF WASHINGTON,
Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdicton.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Judicial

Code, § 237 (a) (28 U. S. Code, § 344), reading, to the extent relevant here, as follows:

> "Section 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *."

The remedy by writ of error under the foregoing section, has been abolished and an appeal substituted.

Act of January 31, 1928, as amended by the Act of April 26, 1928; 45 Stat. 54; 45 Stat. 466 (28 U. S. Code, §§ 861a, 861b);

Nashville, etc., Ry. v. *White*, 278 U. S. 456, 460;

Great Northern Ry. Co. v. *Minnesota*, 278 U. S. 503, 506;

Larson v. *South Dakota*, 278 U. S. 429, 432.

B.

Statute of the State the Validity of Which is Involved.

The statute of the State of Washington, the validity of which has been sustained by the Supreme Court of the State of Washington, the highest court of said State, as not being violative of or repugnant to the provisions of the Constitution and Laws of the United States, is Chapter 191, Session Laws of 1933, State of Washington. The pertinent provisions thereof are:

> "Chapter 191.
>
> (S. H. B. 92.)
>
> Occupation Tax.
>
> An Act relating to taxation; imposing taxes upon the privilege of engaging in business activities and providing for the ascertainment, assessment, collection

and distribution thereof; providing for the administration and enforcement of this act; providing penalties, making appropriations; and declaring that this act shall take effect immediately.

Be it Enacted by the Legislature of the State of Washington:

Section 1. For the purposes of this act unless otherwise required by the context:

* * * * * * *

(6) The term 'gross income' means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without any deduction on account of losses; *Provided,* The term 'gross income' shall not include any payments received on accounts or notes outstanding at the time this act goes into effect.

* * * * * * *

Sec. 2 (2) From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows:

* * * * * * *

(e) Upon every person engaging or continuing within this state in the following businesses; as to such

persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business, as follows:

* * * * * * *

III. Steam railways: One and one-half per cent;

* * * * * * *

Sec. 3. If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function.

* * * * * * *

Sec. 6. The taxes imposed hereunder shall be due and payable in monthly installments on or before the fifteenth day of the month next succeeding the month in which the tax accrued. The taxpayer, on or before said fifteenth day of the month, shall make out a return, upon such forms and setting forth such information as the tax commission may require, showing his estimate of the amount of the tax for which he is liable for the preceding month, sign and transmit the same to the tax commission, together with a remittance for said amount in the form required by section 20 of this act. Whenever the total tax for which any person is liable under this act does not exceed the sum of ten dollars ($10.00) for any month, a quarter-yearly return and remittance in lieu of the monthly return may be made on or before the fifteenth day of the month next succeeding the end of the quarter-year for which the tax is due. Whenever the total tax for which any person

is liable under this act does not exceed the sum of ten dollars ($10.00) for any quarter-year an annual return and remittance in lieu of the quarterly return may be made as provided in section 7 of this act. The tax commission, for good cause shown, may extend the time for making and filing any monthly or quarterly return as required under this section, and may grant such reasonable additional time within which to make and file such return as it may deem proper; but the time for making and filing such return shall not be extended beyond the fifteenth day of the month next succeeding the regular date of the return."

C.

Date of Judgment and Date of Application for Appeal.

The date of the final judgment of the Supreme Court of the State of Washington sought to be reviewed is September 6, 1935.

The judgment of the Supreme Court of the State of Washington was a judgment reversing the judgment of the trial court holding the aforesaid Chapter 191 unconstitutional. The judgment of the Supreme Court of Washington directed the Superior Court to enter judgment in favor of appellee and against appellant for $36,116.22. This judgment of the Supreme Court of the State of Washington is a final judgment within the meaning of Judicial Code, § 237.

Gulf Refining Co. v. *U. S.*, 269 U. S. 125.

The time for taking the appeal began to run on the date of such final judgment, to-wit, September 6, 1935. (See *Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, where the time for appealing from the judgments of the Supreme Court of the State of Washington is considered.)

The date on which the application for appeal was presented and the appeal allowed is September 13, 1935.

D.

Nature of Case and Rulings Below.

The nature of the case and the rulings below which are deemed to bring the case within the jurisdictional provision relied on are as follows:

On February 28, 1934, appellee, State of Washington, brought suit against petitioner in the Superior Court for Thurston County, to recover $37,717.38 (and costs, interest and penalties), alleged to be the amount due as an occupation tax due plaintiff under the provisions of Chapter 191, Session Laws of Washington for 1933, for the period from August, 1933, to December, 1933, inclusive.

Appellant answered denying that any amount was due, and affirmatively alleging that its railroad within the State of Washington was constructed long prior to enactment of said Chapter 191 at a cost of more than one hundred million dollars to provide adequate facilities for both interstate business and intrastate business; that under the Constitution and laws of Washington it is compelled to do intrastate business, from which it cannot withdraw while continuing to carry on its interstate business; that the expense of doing intrastate business is in excess of the revenue received therefrom, and the intrastate business is necessarily conducted at a loss which must be borne by income from interstate business.

Appellant alleged that its interstate business and intrastate business is inseparably commingled and mutually dependent; that both classes of business are transported over the same lines of railroad in the same trains, operated by the same employes and with the same facilities; that it is not possible, practically and economically or at all, to carry intrastate business separately from interstate business by different instrumentalities or employes; that in a typical year (1933) income from appellant's intrastate business in

Washington totaled $5,802,530.12, and income from its interstate business in Washington totaled $6,262,424.20; that abandonment of intrastate business in order to escape the tax would result in annual loss on interstate business in Washington of $7,098,796.01 and destruction of an essential instrumentality of interstate commerce and of the value of appellant's property.

Appellant alleged that Chapter 191 as applied to it violates Article I, Section 8 and the due process clause of the 14th Amendment to the Constitution of the United States, and is null and void.

The Superior Court found the facts as alleged by appellant and concluded that Chapter 191, in its requirement of a license, making of reports and payment of a tax of 1½% of gross income from intrastate business for the privilege of engaging therein is, in practical operation and effect, to impose conditions and levy a tax upon the right to do both interstate business and local business and violates the commerce clause; and because the local business is conducted at a loss, the tax necessarily falls directly upon income from appellant's interstate and foreign business and income earned in other states, not subject to the tax, and therefore violates the due process clause of the 14th Amendment as well as the commerce clause. Judgment was accordingly entered dismissing the action with prejudice.

The Supreme Court of Washington on August 13, 1935, filed its opinion in which it overruled and denied all appellant's contentions predicated on the stated provisions of the federal constitution, reversed the judgment below and ordered judgment in favor of the state and against appellant in the sum of $36,116.22. The opinion and judgment which the Supreme Court rendered and entered are not and could not have been rendered or entered without denying to appellant all of the rights asserted by it under said constitutional provisions and said opinion and judgment are not

and cannot be rested upon any independent non-federal grounds.

The opinion of the Supreme Court of Washington, (83 Wash. Dec. —), is in part as follows:

"* * * * * * *

"The next and, as we view it, the important and difficult question is whether the tax may be collected, even though the railway company, the respondent, may not be able to retire from its intrastate business without also discontinuing its interstate. In this connection, it will be assumed (a) that the respondent cannot, as a matter of law, retire from its intrastate business; (b) that it is impractical, as a matter of fact, for it to retire from its intrastate business without also retiring from its interstate; and (c) that the intrastate or local business is conducted at a loss which is taken care of by the receipts from the interstate business. Giving effect to these assumptions, inquiry must be directed then to whether the tax is valid, even though the railway company may not be able to retire from its intrastate business without retiring from its interstate, and that the intrastate business is conducted at a loss.

* * * * * * *

"Even though the respondent in this case cannot retire from its intrastate business without also retiring from its interstate business, we think that the excise tax imposed upon the gross income from the intrastate business is not such a direct burden upon interstate commerce as to require that the tax be held void."

* * * * * * *

The dissenting opinion of Justice Steinert, concurred in by Justice Holcomb, contains the following:

"* * * * * * *

"The authorities cited in the prevailing opinion established beyond question, as I view it, that the state

may not impose a tax, no matter what its nature or variety may be, that has the effect of burdening or interfering with interstate commerce.

* * * * * * *

"* * * Under these cases, one of the essentials to the validity of a tax is that the one who is taxed could discontinue its intrastate business without also withdrawing from its interstate business.

* * * * * * *

"* * * That the action of the state will interfere with interstate commerce is, to me, very apparent.

* * * * * * *

"* * * It is, therefore, a burden upon, and interferes with, interstate commerce, and for that reason is invalid.

"I therefore dissent."

The final judgment of the Supreme Court of the State of Washington was entered on the 6th day of September, 1935.

E.

Cases Believed to Sustain the Jurisdiction.

The following cases are believed to sustain the jurisdiction of this court:

Great Northern Ry. Co. v. *State of Minnesota,* 278 U. S. 503;

King Manufacturing Co. v. *City Council of Augusta,* 277 U. S. 100;

Sultan Ry. Co. v. *Dept. of Labor,* 277 U. S. 135;

Bryant v. *Zimmermann,* 278 U. S. 63, 67;

Puget Sound Power & Light Co. v. *City of Seattle,* 291 U. S. 619;

Pacific Telephone & Telegraph Co. v. *City of Seattle*, 291 U. S. 300;

Weston v. *City Council of Charleston*, 27 U. S. 449, 2 Pet. 449.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237(a) of the Judicial Code.

Respectfully submitted,

D. F. LYONS,
L. B. DAPONTE,
R. S. MACFARLANE,
Attorneys for Appellant.

FILE COPY

FILED
DEC 24 1935
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1935

No. 529

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Appellant,

vs.

STATE OF WASHINGTON, Appellee.

Appeal From the Supreme Court of the State of Washington

Brief for Appellant

DENNIS F. LYONS,
LORENZO B. DAPONTE,
ROBERT S. MACFARLANE,
Attorneys for Appellant

December, 1935

SUBJECT INDEX

	Page
STATEMENT OF THE CASE	1
SPECIFICATION OF ERRORS RELIED UPON	13
SUMMARY OF ARGUMENT	15
ARGUMENT—	
I. Appellant cannot abandon its local business while continuing its interstate business	16
II. Intrastate business was done at a loss	33
III. Initiative Measure 64, 40-mill limit	41

CASES CITED

Aetna L. Ins. Co. v. Dunken, 266 U. S. 389	12
Allen v. Pullman, 191 U. S. 171	19, 36
Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203	40, 41
Baldwin v. Seelig, 79 L. Ed. 525	41
Barrett v. New York, 232 U. S. 14	22
Bowman v. Continental Oil Co., 256 U. S. 642	22
California v. C. P. R. Co., 127 U. S. 1	32
Chemical Bank v. City, 160 U. S. 646	13
C. M. & St. P. R. Co. v. Wisconsin, 238 U. S. 492	38
Colorado v. United States, 271 U. S. 153	26, 35
Cooney v. Mountain States T. & T. Co., 294 U. S. 384	18, 28, 29
Crutcher v. Kentucky, 141 U. S. 47	17, 18, 29
Cudahy Packing Co. v. Minnesota, 246 U. S. 450	33
Dawson v. Kentucky D. & W. Co., 255 U. S. 288	40
Denny v. Wooster, 175 Wash. 272	42
East Ohio Gas Co. v. Tax Commission, 283 U. S. 465	27
Fargo v. Hart, 193 U. S. 490	41
Fiske v. Kansas, 274 U. S. 380	12
Florida v. United States, 282 U. S. 194	38
Great Northern v. State, 147 Wash. 630	18
G. N. R. Co. v. Minnesota, 278 U. S. 503	33, 35
G. H. & S. A. R. Co. v. Texas, 210 U. S. 217	40
Interstate Buses v. Holyoke, 273 U. S. 45	23, 29
Kansas, etc., R. Co. v. Bodkin, 240 U. S. 227	33
Love v. King County, 44 Pac. (2) 175	42
Ludwig v. W. U. T. Co., 216 U. S. 146	23, 41

CASES CITED (Continued)

	Page
McCallam v. Massachusetts, 279 U. S. 620	40
Missouri ex rel S. W. Bell T. Co. v. P. S. Com., 262 U. S. 276	35
Minnesota v. Barber, 136 U. S. 324	27
North Bend Stage Lines v. Denney, 153 W. 439	37
Northern Express Co. v. State, 76 W. 636	18
N. P. R. Co. v. State, 84 Wash. 510	31
N. P. R. Co. v. Adams County, 1 Fed. Supp. 163	31, 42
N. P. R. Co. v. North Dakota, 236 U. S. 585	35
Ohio Tax Cases, 232 U. S. 576	33
Omaha v. Omaha Water Co., 218 U. S. 180	35
Pacific T. & T. Co. v. Kuykendall, 265 U. S. 196	37, 38
Page v. Arkansas Natural Gas Co., 286 U. S. 269	12
Pickard v. Pullman So. Car Co., 117 U. S. 34	19
Postal T. Co. v. Richmond, 249 U. S. 252	36
Postal T. Co. v. Fremont, 255 U. S. 124	37
Prentis v. Atlantic Coast Line, 211 U. S. 210	37
P. S. E. Ry. Co. v. R. R. Commission, 65 Wash. 75	37
Pullman Co. v. Adams, 189 U. S. 420	16, 18, 29, 36
R. R. Commission v. C. B. & Q. R. Co., 257 U. S. 563	25, 32, 35
Rowland v. Boyle, 244 U. S. 106	35
St. Louis, etc., R. Co. v. Arkansas, 235 U. S. 350	33
Shaffer v. Carter, 252 U. S. 37	41
Smiley v. Kansas, 196 U. S. 447	12
Smyth v. Ames, 169 U. S. 466	35
Southern R. Co. v. Kentucky, 274 U. S. 76	35
Sprout v. South Bend, 277 U. S. 163	27, 28, 30
State v. Yelle, 174 W. 402	4
State ex rel Tacoma Eastern R. Co. v. N. P. R. Co., 104 W. 405	37
Vance Lbr. Co. v. King Co., 84 Wash. Dec. 330	42
Wallace v. Hines, 253 U. S. 56	41
Western Trunk Class Rates, 204 I. C. C. 595	34
Western Union v. Kansas, 216 U. S. 1	21, 40, 41

Supreme Court of the United States

OCTOBER TERM, 1935

No. 529

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, **Appellant,**

vs.

STATE OF WASHINGTON, **Appellee.**

Appeal From the Supreme Court of the State of Washington

Brief for Appellant

STATEMENT OF THE CASE

This is an action by appellee to recover from appellant the tax of 1½% of gross *intrastate* revenue accrued August to December, 1933, inclusive, imposed by Chapter 191, Laws of 1933, for the privilege of doing *intrastate* railway business in that period.

Sec. 2 describes business subject to the tax, distributed into five principal classifications, viz.: extractive

function; manufacturing and producing function; wholesaling and jobbing; retail distribution; performing and rendering services.

Par. 2 (2) provides that from the first day of August, 1933, and until the 31st day of July, 1935, there is hereby levied "an annual tax or excise for the privilege of engaging in business activities * * * measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be * * *."

Sec. 2 imposes a tax of varying percentages of gross income for the several kinds of business. Sec. 2 (2) (e) is as follows:

"Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business, as follows:

III. Steam railways: one and one-half per cent."

Sec. 3 provides:

"If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

Sec. 6 requires payment of the tax in monthly installments and reports upon forms prescribed by the Tax Commission.

Sec. 7 requires an annual verified return for the entire year, accompanied by payment of the balance, if any, of the tax due for the year. Sec. 9, that the taxpayer shall keep a record of gross income for five years. Sec. 10, that if the taxpayer fails to make return the Commission shall make the assessment, adding a penalty of 10% and an additional penalty of 1% per month. Sec. 15, that if any tax or penalty be not paid within fifteen days after it is due, the Commission shall issue a warrant to the Sheriff commanding him to levy upon and sell real and personal property of the taxpayer sufficient to pay the amount, together with a penalty of 1% for each thirty days from date of the warrant. Sec. 16, that the tax and penalties shall be a debt due the State of Washington collectible by suit. Sec. 17, that any person may be enjoined from engaging or continuing in any business until the tax is paid. Sec. 23, that it shall be unlawful to fail or refuse to obtain the license, or fail or refuse to make a return, or to make any false return, etc. Any person violating any of the provisions of the section shall be guilty of a gross misdemeanor.

Appellant made no return, paid no tax, and received no license. Hence this suit.

There is no question as to the nature of the tax. It is strictly an excise for the privilege of doing intrastate business as distinguished from a property tax. *State v. Yelle*, 174 W. 402.

The trial court made findings of fact and concluded that the act, as applied to appellant, violates the commerce and due process clauses of the Constitution of the United States. Judgment of dismissal was entered. The State Supreme Court reversed on questions of law, holding that, on the facts found, the act violates neither of said clauses of the constitution.

The facts found may be summarized as follows:

Appellant's railroad extends from a point on Lake Superior, in Wisconsin, through the intervening states, to Puget Sound into and through twenty-three counties of Washington. It is a common carrier by railroad of both intrastate and interstate commerce subject to state and national regulatory laws. Appellant's intrastate business and interstate business are inseparably commingled and mutually dependent. For the year 1932 the gross freight revenue from business in Washington was $10,570,609, of which $5,497,482 was from intrastate business and $5,073,127 from interstate business. The local net ton miles in 1932

were 326,000,000 and the interstate were 427,000,000. For the week March 25 to 31, 1932, a representative period, the intrastate revenue net ton miles were 6,824,237 and interstate 7,601,845. Of the intrastate revenue net ton miles 3,022,719 were eastbound and 3,801,518 westbound; of the interstate revenue net ton miles, 5,175,941 were eastbound and 2,425,904 were westbound. Both intrastate business and interstate business, eastbound and westbound were carried over the same lines of railroad, in the same trains, by means of the same employes, and with the same facilities. It is not possible, practically and economically, or at all, to carry the interstate freight separately from the intrastate freight in different trains or by means of different facilities and employes. Finding XV, Rec. 47. Similar facts are found as to passenger traffic. Id. Rec. 48. If appellant should abandon its local freight business and continue to do interstate freight business, it would reduce its freight expenses approximately $1,471,623 per annum, but would lose its entire gross revenue from local freight business of $5,497,482. The same interstate passenger service would have to be rendered even if appellant did no intrastate passenger business. Therefore, the expense could not be reduced and the entire revenue of $379,715.00 from intrastate passenger business would be lost.

The result of abandoning local business while continuing interstate business is summarized in Finding XVI, Rec. 49, as follows:

Total Operating Expenses (1932)	$12,336,818
Reduction by abandoning intrastate freight business	1,471,623
Expense of interstate business if local freight business be abandoned	$10,865,195
Total interstate revenue	6,231,366
Loss on interstate business	$ 4,633,829
Ad valorem taxes	2,464,967
Loss including taxes	$ 7,098,796

Therefore, the Superior Court found that appellant's interstate business is dependent upon its intrastate business, and appellant could not, as a practical matter, abandon the local business and continue the interstate business. If it should do so the result would be insolvency within a short period and destruction of the instrumentality of interstate commerce and value of appellant's property. Other details are stated in Finding XVII, Rec. 49. The court finds that appellant's railroad is well located, economically managed, serves all but one of the principal cities and towns of Washington, and its continued operation in intrastate business is essential to the people of the state. (Finding XVIII, Rec. 50.)

The Superior Court held that appellant, a common carrier by railroad subject to the provisions of the

State Public Service Commission Law, Rem. Rev. St. Chap. 1, Title 72, and as well to the acts of congress regulating interstate commerce, could not, as a matter of law, retire from local business while continuing to transact interstate business. It therefore concluded, as matter of fact as well as of law, that the tax, ostensibly for the privilege of doing local business only, is, in reality, and in practical operation and effect, a tax for and condition of the right to do *both* interstate and intrastate business.

The Superior Court made detailed findings of revenue and expenses of doing intrastate business for the year 1933. Findings V to XIV, Rec. 34-45.

Finding XII, Rec. 43, summarizes the facts as follows:

"Operating Revenues (intrastate)	$5,271,893	
Credit account mail and express	221,359	
Total		$5,493,252.00
Operating Expenses	$4,796,440	
Taxes	889,319	
Total		5,685,759.00
Deficit		192,507.00
Occupation tax, Aug.-Dec., 1933 (if valid)		36,116.22
Total deficit		$ 228,623.22"

The occupation tax, it will be noted, is computed for only five months. The monthly average is $7,-

228.00. As the other figures are for a full year, the occupation tax for a full year should be used. At $7,228 per month the amount for the other seven months is $50,596, by which the loss of $228,623.22 should be increased, or $279,219.22 as the deficit from appellant's intrastate railway business in Washington for the year 1933. This computation does not include anything for return on value of the property. Finding XIV, Rec. 45, relates to capital expense, etc. Interest on appellant's funded debt applicable to operating property for 1933 was $7,448,337, of which 25.09%, or $1,868,788, is assignable to lines in Washington. The amount chargeable to the intrastate business is $786,531, which the court finds "is for hire of capital and is an expense of operation and must be taken into consideration in determining the expense of defendant's intrastate business in Washington." The assessed value of the operating property in Washington for 1933 was $100,450,000, of which $42,277,195 is assignable to intrastate business and interest at 6% is $2,536,632. By state statute the assessed value is market value. *N. P. v. State*, 84 W. 510. The cost of reproduction new less depreciation of appellant's operating property in Washington, as found by the Interstate Commerce Commission, in Volume 25 of its Valuation Reports, plus cost of net additions and betterments to December 31, 1933, is

$167,437,700, of which $70,470,844 is assignable to intrastate business and 6% interest is $4,228,251. In addition to funded debt appellant had outstanding capital stock of par value of $248,000,000 of which 25.09% or $62,223,200, would be assignable to Washington. Intrastate assignment on the same basis as bond interest is $26,188,376, of which 6% is $1,571,302. The court did not find what sum is chargeable as capital expense as not even other operating expense was, or was likely to be, earned.

The Superior Court found that years prior to 1932 are not representative of operations in 1932 and subsequent years, and that the probabilities were, at the time of the trial, that results in 1934 and 1935 would not be more favorable to the intrastate business than for the year 1933. Finding V, Rec. 34.

Finding XVII, Rec. 50, is that appellant cannot increase many of its local rates because of competition of other transportation agencies, and for economic reasons. Under the state law, it cannot do so without consent of the Department of Public Works. Appellant has heretofore applied for an increase of local rates but the application was denied by the Department by the order attached to the answer as Exhibit "C" and made a part of the finding. The court finds that appellant "has done all it can do to

increase its (local) revenue, but is unable to do so." Exhibit "C" is an order made by the Department in the matter of application for an extension of the increase in freight rates in connection with the order of the Interstate Commerce Commission extending the increases allowed in Ex Parte 103. The Department denied the increase upon findings, in substance, that to do so would result in discrimination, in violation of state law; and because "it is a matter of common knowledge that the present level of rail rates is too high to permit freedom of movement by rail." To extend the increase, said the Department, would be of no benefit from the standpoint of revenue because it would drive traffic to motor vehicles and other competing agencies, thus resulting in greater loss than gain. Ex. C, Rec. 14.

The final paragraph of Exhibit "C" is as follows:

"We find that a continuance of the effectiveness of the emergency freight rates and charges authorized by our order dated December 17, 1931, to expire March 31, 1933, is not necessary to prevent injury to the interests of the public or to the applicants under existing conditions."

The Supreme Court held that the tax applies only to income from intrastate business. Adopting the findings below, it states that "the interstate and intrastate business in this state is inextricably commingled, and the intrastate business is conducted at a loss, and

it is necessary to make up this loss from the income from interstate business." It states the question for decision as follows:

"The next and, as we view it, the important and difficult question is whether the tax may be collected, even though the railway company * * * may not be able to retire from its intrastate business without also discontinuing its interstate. In this connection, it will be assumed (a) that the respondent cannot, as a matter of law, retire from its intrastate business; (b) that it is impractical, as a matter of fact, for it to retire from its intrastate business without also retiring from its interstate; and (c) that the intrastate or local business is conducted at a loss which is taken care of by the receipts from the interstate business. Giving effect to these assumptions, inquiry must be directed then to whether the tax is valid, even though the railway company may not be able to retire from its intrastate business without retiring from its interstate, and that the intrastate business is conducted at a loss." Rec. 57.

The opinion concedes that a tax imposed as a license to do *both* kinds of business, or a tax levied *directly upon an instrumentality* used in both kinds of business, would be void. But it distinguishes the case at bar from the cases on which appellant relies on the ground that the tax is measured by *gross income* from intrastate business, and "the income from the interstate business may be segregated from the gross income from the intrastate business and (the tax) be valid." It denied the objection, based on unprofitableness of the intrastate business, on the ground

that appellant has "a remedy by application to the Department of Public Works (for an increase) with the right of review by the Superior Court and an appeal to this court." And while, said the court, it appears that such an application has been made and denied, "it does not appear that respondent has exhausted the relief granted by the statute, and until it does so, it cannot be said that even though the intrastate business is being conducted at a loss, it is such a burden upon interstate commerce as would justify holding the law unconstitutional." Presumably, the court means that appellant did not take a writ of review to the Superior Court to reverse the Department's order, Ex. C, supra, denying increase of intrastate rates.

Appellant has not brought the evidence to this court because it has assigned no error to the findings of fact, and this court does not review findings approved by both lower courts, except in circumstances not here present. *Fiske v. Kansas*, 274 U. S. 380; *Aetna L. Ins. Co. v. Dunken*, 266 U. S. 389; *Smiley v. Kansas*, 196 U. S. 447; *Page v. Arkansas Natural Gas Co.*, 286 U. S. 269. If an appellate court disposes of a case on findings of fact different from those of the trial court, it must recite the facts so found differently; otherwise it is conclusively presumed that it ac-

cepts those made below. *Chemical Bank v. City*, 160 U. S. 646.

Appellee has caused to be printed a voluminous record of the testimony and exhibits and appellant has paid the cost. This material has no place in the printed record. Appellant asks that the cost thereof be taxed to appellee irrespective of the outcome. Rule 13 (9).

SPECIFICATION OF ERRORS RELIED UPON

(1) The Supreme Court of the State of Washington having found that appellant is engaged in both intrastate commerce and interstate commerce, and having held that as a matter of *law* it cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(2) The Supreme Court of the State of Washington having found that appellant's interstate business and intrastate business in Washington are inextricably commingled, and that as a matter of *fact*, and as a practical matter, appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(3) The Supreme Court of the State of Washington having found that appellant's intrastate business is conducted at a loss which must be borne by the income from its interstate business, erred in deciding that the tax imposed by Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(4) The Supreme Court of the State of Washington having found that appellant's intrastate business is conducted at a loss which must be borne by income from its interstate business or income earned or received in other states, erred in refusing to hold that Chapter 191, Laws of 1933, violates the due process clause of the 14th Amendment to the Constitution of the United States.

(5) The Supreme Court of the State of Washington, having found that appellant's intrastate business is conducted at a loss which must be borne by income from its interstate business, erred in holding Chapter 191, Laws of 1933, and the tax imposed thereby, does not violate Article I, Section 8, of the Constitution of the United States, for the stated reason that appellant has not exhausted its remedy (by writ of review) to obtain intrastate rate increases, and because that circumstance is immaterial, not supported by, and is contrary to, the facts found in Finding 18.

(6) The Supreme Court of the State of Washington, for each of the reasons contained in the preceding assignments, erred in reversing the judgment of the Superior Court of Thurston County and in rendering judgment in favor of the State of Washington against appellant for the tax imposed by Chapter 191, Laws of 1933, in the sum of $36,116.22.

SUMMARY OF ARGUMENT

I. Chapter 191, Laws of 1933, violates Art. I, Sec. 8, Clause 3 of the Federal Constitution, because appellant cannot (as a matter of state law or of fact), abandon its intrastate business and continue its interstate. Therefore, the tax, while ostensibly for the privilege of doing intrastate business only, is, in practical operation and effect, a tax for the privilege of doing both kinds of business.

II. As appellant's intrastate business is done at a loss, which must be made up from the net proceeds of its interstate business or business done in other states, the tax for the privilege of doing intrastate business, from which appellant cannot withdraw while continuing to do interstate business, violates the commerce clause and due process clause of the 14th Amendment.

III. The tax is not saved because appellant did not seek a court review of the order of the Department of Public Works denying increase of intrastate rates.

ARGUMENT

I. *Appellant cannot abandon its local business while continuing its interstate business.*

While a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction, in order to be valid under the commerce clause, must be solely on account of the intrastate business done and the party taxed must be free, in *law* and *fact*, to withdraw from the intrastate business without withdrawing also from the interstate.

In *Pullman Co. v. Adams*, 189 U. S. 420, a Mississippi statute imposed "on each sleeping and palace car company carrying passengers from one point to another within the state $100, and 25c per mile for each mile of railroad track over which the company runs its cars * * * in this state." (p. 421.)

Evidence offered to prove that intrastate business was done at a loss, while the corporation was obliged to engage in such business by the state constitution, was rejected. The court said:

"If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the

states analogous to that which was held bad in Crutcher v. Kentucky, 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by Osborne v. Florida, 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." (p. 422.)

The act held bad in *Crutcher v. Kentucky*, 141 U. S. 47, required the agent of every express company to pay a small fee and obtain a license to transact *any* business for the company, and file a statement showing that the company had capital of a prescribed amount. The statute, as construed, applied to both interstate and intrastate business. The court said:

"We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it." (p. 58.)

Nor, said the court, is the difficulty at all obviated because the express company,

"as incidental to its main business, (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the state of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company." (p. 59.)

Certainly, no one will say that Chapter 191 would be valid if, *in terms*, it prescribed conditions for the

privilege of doing *both* intrastate and interstate business, as in *Crutcher v. Kentucky*. Compare *Cooney v. Mountain States T. Co.*, 294 U. S. 384. (In the *Crutcher* case there was no claim that intrastate business was done at a loss.)

The Supreme Court of Washington, in the instant case, departed from a well established rule which it had previously followed. In *Northern Express Co. v. State*, 76 Wash. 636, it held that an occupation tax of a percentage of gross revenue from intrastate business for the privilege of doing that business, violates the commerce clause, because of the condition that the express company is not free, under state law, to withdraw from the intrastate business while continuing the interstate. Though the case was reversed on rehearing, 80 Wash. 308, that decision is based upon the point that the express company *is* free to withdraw from its intrastate business, following *Pullman Co. v. Adams*, *supra*, and like cases. Again, in *Great Northern v. State*, 147 Wash. 630, a license fee or tax measured by a percentage of authorized capital stock, imposed for the privilege of doing intrastate business, is declared void on the ground that the railway company, a common carrier under the laws of the state, cannot renounce its intrastate business while continuing to transact its interstate, distinguishing the second decision in the

Express case, and following the rule of the Crutcher and Pullman cases. The decision in the case at bar is contrary to the three prior decisions of the state court, in that it is now held that such a tax does not burden interstate commerce even though appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business.

Allen v. Pullman, 191 U. S. 171, considers two acts of the State of Tennessee, one imposing a tax of $500 per car on sleeping car companies doing business in the state, making no distinction between cars used in intrastate commerce and interstate commerce, and the other imposing a flat tax of $3000 on sleeping car companies which carry one or more local passengers in the state. Following *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, the first statute was held invalid because it applied to the privilege of operating the cars in both intrastate and interstate commerce. It was argued by the Pullman Company that the tax of $3000 per annum imposed for carrying one or more local passengers is assessed upon such small proportion of the entire business within the state as to be but a thinly disguised attempt to tax the privilege of engaging in interstate commerce. The court said:

"If the payment of this tax was compulsory upon the company before it could do a carrying business

within the state, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection. Upon this proposition we are unable to distinguish this case from *Pullman Co. v. Adams*, 189 U. S. 420, decided at the last term, wherein it was held that the privilege tax imposed by the state of Mississippi, upon each car carrying passengers from one point in the state to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of passengers named did not equal the expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit. It was urged, that, under the Constitution of Mississippi, the Pullman Company was a common carrier, required to carry passengers, and therefore could not be taxed for the privilege of doing that which it was compelled to do; but in view of the decision of the Supreme Court of Mississippi, sustaining the tax, it was assumed that no such objection existed under the state constitution." (pp. 181, 182.)

The court states that there is additional reason for holding that the company may transact its interstate business without paying the privilege tax in view of a statute repealing the rule of the common law giving a right of action to any person excluded from any hotel or public means of transportation.

"It follows," said the court, "that a tax imposed upon domestic business, under the circumstances shown, cannot be a burden upon interstate commerce in such sense as will invalidate it." (p. 183.)

Other cases consider inability to withdraw from intrastate business as a practical matter. Thus, in

Western Union v. Kansas, 216 U. S. 1, where a tax of a percentage of the entire capital stock of the Telegraph Company for the privilege of doing intrastate business was held invalid under both the commerce and due process clauses, it was contended that, as the Telegraph Company might withdraw from its local business, it could not complain of the tax. The court observed that the Telegraph Company lawfully entered Kansas long before and was legally there when the act was passed. The state conceded its right to remain if it paid the tax; and only because of its refusal sought the aid of the court to oust the company from its local business.

"The State," said the court, "knows that the telegraph company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of telegraphic business. Yet it seeks to enforce a regulation requiring the company by paying the 'fee' in question to assent to its interstate business being burdened and its property outside of Kansas being taxed in order that it may continue to conduct a business concededly beneficial to the public —a right lawfully acquired from the United States when Kansas was a territory, and exercised consistently with the statutes of the state for many years after Kansas was admitted as a state of the Union." * * * (p. 33.)

Justice White, concurring, said:

"The telegraph company has expended in the state large sums of money, adequate for the purpose of enabling it to do both local and interstate business. The investment is there, and its magnitude, it is fair

to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired; that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in the state. It has been invested therein for the very purpose of doing local as well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place." (p. 50.)

Findings XVI, XVII and XVIII, (Rec. 49-51), disclose facts to which the language quoted applies with full force.

Barrett v. New York, 232 U. S. 14, holds invalid an ordinance requiring the express company to pay a license fee and give bond for each vehicle, conditioned for safe delivery of packages, on the ground that intrastate packages are handled by the same vehicles and employees that handle interstate packages.

Bowman v. Continental Oil Co., 256 U. S. 642, is a suit by the Oil Company to restrain enforcement of a New Mexico statute imposing a gallonage tax upon sale of gasoline in the state, and a tax of $50 for

each station or place of business at which gasoline was handled and sold in both intrastate and interstate commerce. The gallonage tax was upheld, but the license fee of $50 was held invalid. The court said:

"No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce * * * But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence, it cannot be enforced at all." (p. 648.)

So here, appellant necessarily transports both kinds of business by means of the same instrumentalities and employees and cannot do otherwise. Therefore, a tax of a percentage of income from intrastate business, or a tax, however measured, for the privilege of doing intrastate business is, in reality, a tax for and condition of the right to do *both* kinds of business. To deny is to contradict the obvious. Compare *Ludwig v. W. U. T. Co.*, 216 U. S. 146.

Interstate Buses v. Holyoke, 273 U. S. 45, was much relied on by appellant, but not noticed by the State Supreme Court. It is a suit by the bus company to restrain enforcement of a statute prohibiting

intrastate operation of buses on the highways without first obtaining a license and certificate of public convenience and necessity. It is emphasized that the conditions were imposed directly upon and made conditions precedent to the *right to operate* as distinguished from an imposition upon the *instrumentality.* The stipulated facts are that the street railway carries passengers in Massachusetts through Holyoke and other towns. The buses transport passengers between Hartford, Connecticut, and Greenfield, Massachusetts, paralleling the route of the street railway in Massachusetts. They carry both local and interstate passengers. The street railway had caused repeated arrests of the bus company's employees for failure to obtain the certificate required for doing local business. The State Supreme Court sustained the statute and its judgment is affirmed by this court. Upon the point here presented, the court used the following language:

"The burden is upon appellant to show that enforcement of the act operates to prejudice the interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying intrastate passengers without license over that part of its route which is parallel to the street railway. Its right to use the highways between Springfield and Hartford is not in controversy. While it appears that in Massachusetts both classes of passengers are carried in the same vehicles, it is not shown what part of the total number are intrastate or interstate. The record contains no

information as to the number of persons, if any, traveling in interstate commerce on appellant's buses over the part of the route competing with the street railway. It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried *efficiently* and *economically* in buses used exclusively for that purpose, or that appellant's interstate business is *dependent* in any degree upon the local business in question. Appellant may not evade the act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employees." (p. 51.)

The Massachusetts act is like Chapter 191 in applying only to local business. The case is in point, even though the statute was upheld, because the decision rests upon failure to prove the facts here found by both courts below. (Finding XV, Rec. 47.) If appellant be correct in saying that the decision in the Holyoke case would have been against the statute had the missing facts been proved, it is controlling here.

Inseparability and mutual dependence of the two kinds of business, as conducted by rail carriers, are, doubtless, matters of common and judicial knowledge. In *R. R. Commission v. C. B. & Q. R. Co.*, 257 U. S. 563, the court said:

"Intrastate rates and the income from them must play a most important part in maintaining an ade-

quate national railway system. Twenty per cent of the gross freight receipts of the railroads of the country are from intrastate traffic, and 50 per cent of the passenger receipts. * * * If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. * * * (pp. 585, 586.)

"Effective control of the one must embrace some control over the other, in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them" * * * (p. 588.)

Again, in *Colorado v. United States*, 271 U. S. 153, 164, the court said:

"This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole."

Obviously, the courts below could not have found the facts otherwise than as they did. The system was provided to handle both kinds of business. Income from intrastate business is essential to its existence as a carrier of interstate commerce. Therefore, to require making of reports, taking out of license and payment of a tax, for the privilege of doing intrastate business from which appellant cannot withdraw, is, in effect, to impose those conditions upon the right to do interstate business. And, as the amount of the

tax is left to the discretion of the state, an essential instrumentality of interstate commerce may be destroyed by the state, if Chapter 191 be valid. Compare *Minnesota v. Barber*, 136 U. S. 313, 324.

Sprout v. South Bend, 277 U. S. 163, invalidates an ordinance prohibiting operation on the city streets of a motor bus unless it be licensed and payment made of a graduated fee based upon seating capacity. Sprout operated between South Bend, Indiana, and Niles, Michigan. He was prosecuted and convicted for violation of the ordinance. Considering whether the ordinance could be sustained as imposing an occupation tax, the court said:

"A state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. * * * But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; *and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.*" Citing Barrett v. New York, supra; Bowman v. Continental Oil Co., supra, and other cases. (pp. 170, 171.)

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, sustains an Ohio statute imposing an occupation tax of a percentage of gross intrastate revenue for the privilege of doing intrastate business. It is like

Chapter 191. Although the court quotes the language quoted above from *Sprout v. South Bend*, the opinion of the Supreme Court of Washington in the instant case says of the Ohio case that this court did not invalidate the tax, although

"the facts * * * make it plain that, if the Gas Company had withdrawn from its intrastate business, it would have completely destroyed its interstate business." (Rec. 60.)

The Company brought gas into the state in pipe lines where it was received at pressure reducing stations, thence passed into local distributing systems for delivery to consumers. This court held that interstate transportation ended at the local distributing system. Thereafter the Gas Company did only intrastate business for which the occupation tax was imposed. The interstate and intrastate business was done *consecutively* with *different* facilities; not, as here, *simultaneously* with the *same* facilities. The inseparability of the two kinds of business and dependency of the interstate upon the intrastate was not established in the Ohio case, as here. Nor was there an obligation by state law to do intrastate business as a condition of doing interstate. The Ohio case is not authority for sustaining Chapter 191. It is authority for saying the tax is void.

Cooney v. Mountain States T. & T. Co., 294 U. S. 384, condemns an occupation tax measured by num-

ber of telephone instruments. The act, as construed, imposes the tax for the privilege of doing both local and interstate business, and therefore is invalid. The court repeats the above quotation from *Sprout v. South Bend* and used in the Ohio case, and cites those cases. The Supreme Court of Washington, in the instant case, says of the *Cooney* case that it was there distinctly pointed out that the tax was not laid on revenue derived from monthly rates as distinguished from toll charges, nor imposed with respect either to the nature of the revenue, character of the service, or manner in which the charges are fixed. "From what is there said," said the State Court, "it would appear to be a reasonable inference that, if the tax were of the character described in the quotation just made from the opinion, the result might be different." The language quoted was used by this court in answering an argument made by defendants. It is not authority for saying that the tax would have been sustained had it been measured by gross revenue, even though imposed for the privilege of doing local business from which the telephone company could not withdraw. That point, though decided below, was not considered here. If the State Court is right in its understanding of the *Cooney* case, *Crutcher v. Kentucky*, *Pullman v. Adams*, *Interstate Buses v. Holyoke*, and many like cases were overruled. Certainly, the *Cooney* case would be con-

trary to those and many other cases if the State Court is right. The language quoted by the State Court is immediately followed by the statement that the evidence shows that the same telephones, signaling apparatus, wires, etc., are used in common for both services. It was in this view, said this court, that the District Court held it not feasible to provide separate statewide systems. But, said this court, "apart from that question," the telephone instruments are the means by which customers command service, whether intrastate or interstate. And, so far as the use of the instruments in interstate commerce is not excepted, the tax is laid indiscriminately regardless of their use. This court then said that while the state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce, it cannot tax interstate commerce nor the business which constitutes such commerce nor the privilege of engaging in it. And the fact that a portion of the business is intrastate, and therefore taxable, does not justify a tax either upon the interstate business or upon the whole business without discrimination. "There are," said this court, "sufficient modes in which the local business may be taxed without the imposition of a tax which covers the entire operation." (p. 393.) Then follows the quoted language from *Sprout v. South Bend, supra.*

Certainly, there is nothing in the preceding language of the opinion to justify the statement that a tax which violates any of the four conditions precedent to validity stated in the *Sprout* case, repeated in the Ohio case and again in the *Cooney* case, (as does Chapter 191), will be sustained. The statement that there are "sufficient (other) modes of taxing the intrastate business," reminds us to say that the Railroad Revenue Act of Washington, Chapter 130, Laws of 1925, provides for taxing railroad property at its value as a *going concern*, including all franchises, rights and privileges, and all property whatsoever, tangible and intangible, used in operating the railroad. Rem. Rev. St. Sec. 11157 (4). This statute has been so construed in *N. P. Ry. Co. v. State*, 84 Wash. 510, and by the District Court for the Eastern District of Washington in *N. P. R. Co. v. Adams County*, 1 Fed. Supp. 163. F. No. V. (Rec. 34), shows that appellant's *system* net income for 1932 was $1,990,389.21 and for 1933 was $5,975,973.63. F. No. II shows that cost of the property in this state was in excess of $100,000,000, and cost of reproduction less depreciation was $167,000,000. F. XIV (C) Rec. 47. Ad valorem taxes in Washington for 1932 were $2,464,967 and for 1933 $2,005,015. F. VI, Rec. 35. This suggests that ad valorem taxation, to say the least, is ample. The value on which those taxes are calcu-

lated includes the franchise and all intangibles, *including the privilege of doing business*, the very same privilege for which appellant is taxed by Chapter 191. Were it otherwise, the railroad would be taxed on the lesser aggregate value of the separate parcels of real and articles of personal property of which it is made up, not as a going concern. Compare *N. P. R. Co. v. State, supra.* This is a "sufficient mode in which the local business may be taxed," and marks the limit of the state's power to tax the business of the interstate transportation system. If this be not so these systems are at the mercy of the several states. If a tax of 1½% of gross revenue may be levied why not 5% or 10%. And if Washington has the power claimed so have the other states. Even before expiration of the period prescribed for Chapter 191 it was superseded by Chapter 180, Laws of 1935, Rem. Rev. St. 8370-36, raising the rate to 3%. *To uphold Chapter 191 will give to the states power of life and death over the interstate transportation system of the United States.* The dissenting opinion below perceives the menace also adverted to by this court in *California v. C. P. R. Co.*, 127 U. S. 1. We submit that state power to tax is *not* power to destroy, as applied to the interstate transportation system. Compare *R. R. Commission v. C. B. & Q. R. Co.*, 257 U. S. 563. No such limitless

power pertains to state ad valorem taxation. *G. N. v. Minnesota*, 278 U. S. 503. Why, then, should it be permitted in favor of the far more dangerous and insidious occupation or franchise tax?

Appellee relied below on *Ohio Tax Cases*, 232 U. S. 576. This case is not noticed by the State Supreme Court. There the tax was for the privilege of exercising the corporate franchise granted by the state to a domestic corporation. *Kansas etc. R. Co. v. Bodkin*, 240 U. S. 227, is a similar case. *St. Louis etc. R. Co. v. Arkansas*, 235 U. S. 350, also relied on, sustains a *property* tax measured by percentage of the outstanding capital stock, as is recognized in *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450. Therefore, those cases, and others in the same category, are not in point. Besides, the facts here present were not present in those cases. This court has never sustained a statute like Chapter 191 under the circumstances shown by this record.

II. *Intrastate business was done at a loss.*

The answer alleges, and both courts below have found, that the intrastate business was conducted at a loss which must be made up from net income from interstate business and business done in other states. Findings XII, XVII, Rec. 44, 49, Opinion below, Rec. 57.

Finding XVIII, Rec. 50, is that appellant's railroad is economically managed and its operation in intrastate business is essential to the people of the state. Appellant cannot increase many intrastate rates because of competition of other kinds of transportation, and for economic reasons, nor can it do so under the laws of the state without consent of the Department of Public Service. Appellant has applied for an increase of intrastate rates, but the application was denied for the reasons stated in the Department's findings attached to the answer as Exhibit "C". Appellant, as a practical matter, has been unable to increase its revenue from intrastate business, and the Superior Court finds that it has done all it can but without success. The application for increased rates, denied by the Department's order, was made in connection with the application to the Interstate Commerce Commission in Ex Parte 103, 191 I. C. C. 361, for an extension of the period during which increases were allowed. The application was denied April 7, 1933. Chapter 191 was effective from August 1, 1933, to July 31, 1935, Sec. 2 (2). Necessity for reducing local short haul rates to meet truck competition is common knowledge. *Western Trunk Line Class Rates*, 204 I. C. C. 595, 645, 647. The deficit from intrastate business, exclusive of return on value, including the occupation tax in question, was $279,-

219.22 for 1933. The carrying charge on the investment is no less an operating expense than the cost of labor and materials. *Missouri ex rel. S. W. Bell T. Co. v. P. S. Commission*, 262 U. S. 276; *Rowland v. Boyle*, 244 U. S. 106; *N. P. R. Co. v. North Dakota*, 236 U. S. 585. The obligation of intrastate business under Transportation Act, 1920, to contribute a just proportion of operating expense, including return on value of property, is declared in *R. R. Commission v. C. B. & Q. R. Co.*, 257 U. S. 563. Whether the burden on interstate commerce be due to inadequate intrastate rates, excessive taxation, excessive expenditures in the local interest, or otherwise, is without legal significance. Compare *Colorado v. United States*, 271 U. S. 153; *Smyth v. Ames*, 169 U. S. 466. Even ad valorem taxation, (measured by a percentage of gross revenue), is subject to restraint of the commerce clause. *G. N. R. Co. v. Minnesota*, 278 U. S. 503. Why, then, not an occupation tax? In *Southern R. Co. v. Kentucky*, 274 U. S. 76, considering a franchise tax, the court said that "no intangible element of substantial amount over and above the value of its physical parts inheres in a railroad that cannot earn a reasonable rate of return on its bare-bones—as the mere tangible elements properly may be called. *Omaha v. Omaha Water Co.*, 218 U. S. 180." Certainly, no value inheres in the so-called privilege of being com-

pelled to do intrastate business at a loss. And even so, the property is otherwise taxed as a going concern. We have cited *Allen v. Pullman Co.*, 191 U. S. 171 and *Pullman Co. v. Adams*, 189 U. S. 420, to the point that if payment of the privilege tax be compulsory and the burden rests upon receipts from interstate traffic, the tax is void. *Postal T. Co. v. Richmond*, 249 U. S. 252, decides the same point. The court said:

"This requirement that the appellant shall engage in intrastate business, construed with the ordinance imposing the license tax, results, it is argued, in imposing a burden upon its interstate business, for the reason that the net receipts from its intrastate business are insufficient to pay the tax, and therefore, payment, if compelled, must be made from interstate receipts. If the facts were as thus asserted, it well might be that this tax would be invalid. Pullman v. Adams, 189 U. S. 420; Williams v. Talledega, 226 U. S. 404." (p. 258.)

The state court distinguished the Richmond case on the ground that the legislature has provided a remedy by application to the Department for increased rates, "with right of review by the Superior Court and appeal to this court." Rec. 62. From the findings, said the court, it appears that an application has been made and denied and that another is pending, but it does not appear "that the respondent has exhausted the relief granted by the statute, and until it does so, it cannot be said that, even though the intrastate business is being conducted at a loss, it is such a

burden upon interstate commerce as would justify holding the law unconstitutional." Rec. 62. *Postal T. Co., v. Fremont*, 255 U. S. 124, is cited. The Fremont case is so different in its facts as to lack authority here, even had no application for increased intrastate rates been made and denied. The state court must mean that appellant did not seek review and reversal of the Department's order. Review, of course, would have been unavailing unless the order would have been reversed. Therefore, the state court assumed that it was erroneous, contrary to the well settled rule in this state. *P. S. E. Ry. Co. v. R. R. Commission*, 65 Wash. 75; *State ex rel Tacoma Eastern Ry. Co. v. N. P. R. Co.*, 104 Wash. 405; *North Bend Stage Lines v. Denney*, 153 Wash. 439. The court review is not, as in *Prentis v. Atlantic Coast Line*, 211 U. S. 210, a part of the administrative machinery. The state superior and supreme courts, on writ of review, exercise a purely judicial function. Therefore, after the Department had finally denied the increase of rates applied for, appellant had exhausted its administrative remedy to avoid the uncompensatory rates under which it was compelled to render intrastate service. See *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196, where the nature of the remedy by writ of review of the Department's order is determined. Appellant had a right to rely upon the presumption of

validity of the Department's order. It was no more required to establish its invalidity under the state constitution than if a statute were in question. Appellant lost no rights by acting upon the presumption of validity of the Department's order. *Pacific T. & T. Co. v. Kuykendall, supra.* But even so, what would it avail appellant if the loss from diversion of traffic would be greater than the gain from increased intrastate rates? *Florida v. United States*, 282 U. S. 194, holds that an order of the Interstate Commerce Commission under Sec. 13 (4) is void for lack of a finding that increased intrastate rates would, in fact, produce additional income, for, said the court, "the raising of rates does not necessarily increase revenue. It may, in particular localities, reduce revenue instead of increasing it by discouraging patronage." *C. M. & St. P. v. Wisconsin*, 238 U. S. 492, holds invalid under the due process clause a Wisconsin statute prohibiting letting down of an unengaged upper berth in a sleeping car when the lower berth in the same section is occupied. The Wisconsin Supreme Court said that "if compliance with this command imposes extra burdens, they are not of such an unusual nature as to be oppressive; and if it involves additional costs in the conduct of the business, then the defendant can readily be secured against such loss by having the rate adjusted to meet this burden." This court said:

"But if the statute is not a reasonable exercise of the police power and yet operates to take property, such taking cannot be justified on the ground that the company may be able to secure an increase in rates. For, without considering any other question involved, it is sufficient to say that the taking and a fixed right to compensation must coincide, though in some cases the time for payment may be delayed. Sweet v. Rechel, 159 U. S. 380." (p. 500.)

As the tax falls on income earned outside the state, there is a violation of the due process clause. Cases cited *post* page 41. Not only is there no fixed right of compensation payable at the time of taking, but compensation will never be received because increased rates, if obtained, will not apply retroactively. Even though the state court's position were otherwise well taken it is untenable under the Wisconsin case. We know of no precedent for sustaining an otherwise unconstitutional tax on the theory that other presumptively valid state action is in truth, unconstitutional, and will be set aside by a state court at the end of protracted and expensive litigation, even if indemnity for past loss would then be received. More especially, where it affirmatively appears that greater loss than gain will result from nominal success.

The state court is on untenable ground in sustaining Chapter 191 for the reason that the tax is measured by a percentage of gross intrastate reve-

nue. The tax is no less a burden on interstate commerce and condition of appellant's right to engage therein because it is measured by a percentage of revenue than if measured by the number of cars, number of miles of track, or number of farm crossings. The states, realizing that a tax of a percentage of both intrastate and interstate revenue for the privilege of doing intrastate business is invalid, resort to the device of measuring the tax by a percentage of revenue from intrastate business only. This measure does not reduce the tax, since the rate per cent is correspondingly increased. The exaction is called a tax for the privilege of doing local business, though it is known to all, and judicially known, that railroads have no option. *W. U. T. Co. v. Kansas, supra.* They cannot retire, as a practical matter, without ruin. In Washington they cannot do so even as a matter of law. The state thus burdens interstate commerce and taxes property beyond its limits by the simple device of calling the exaction a tax for the privilege of doing intrastate business. But this court has often said that a tax will be judged by its practical operation and effect, not by the name or form. *McCallam v. Massachusetts*, 279 U. S. 620; *Dawson v. Kentucky D. & W. Co.*, 255 U. S. 288; *G. H. & S. A. R. Co. v. Texas*, 210 U. S. 217; *W. U. T. Co. v. Kansas*, 216 U. S. 1; *Alpha Port-*

land Cement Co. v. Massachusetts, 268 U. S. 203; *Shaffer v. Carter*, 252 U. S. 37. In the instant case the *reality* is that if appellant withdraws from its intrastate business its interstate business will be destroyed, its property confiscated, and it will be made insolvent. The alternative is to pay a tax for the privilege of rendering service which, as found below, is essential to the people of the state while being given at a loss. Under the facts found, the real nature of the exaction cannot be concealed by calling it a tax for the privilege of doing intrastate business. Compare *Baldwin v. Seelig*, 294 U. S. 511.

As Chapter 191 so clearly violates the commerce clause it is, perhaps, unnecessary to add that, as the tax falls on income of a non-resident not earned in the state, it also violates the 14th Amendment. *W. U. T. Co. v. Kansas, supra; Ludwig v. W. U. T. Co.*, 216 U. S. 146; *Fargo v. Hart*, 193 U. S. 490; *Wallace v. Hines*, 253 U. S. 56; *Alpha Portland Cement Co. v. Massachusetts, supra; Shaffer v. Carter*, 252 U. S. 37.

III. The State Court mentions Chapter 4, Laws of 1933, Initiative Measure 64, limiting the aggregate of ad valorem taxes on real and personal property to 40 mills on the assessed value. It is said that by this law ad valorem taxes have been reduced approxi-

mately one-half. Rec. p. 61. We need not stop to show that the court greatly overestimates the reduction of appellant's ad valorem taxes. *N. P. R. Co. v. Adams County*, 1 Fed. Supp. 163, did more. Why the 40 mill act is mentioned is not apparent. It is something new to intimate that an unconstitutional tax should be sustained because the state has not imposed a constitutional tax for as much as it might. Initiative 64 is a general law applying to all real and personal property from which appellant received no special benefit. *Denny v. Wooster*, 175 Wash. 272. It was strengthened, the limit still further reduced, and re-enacted as Initiative 94, Chapter 2, Laws of 1935, Rem. Rev. St. Sec. 11238-1a. *Love v. King County*, 44 Pac. (2) 175. That the people of Washington, menaced by ever mounting delinquencies of ad valorem taxes which they could not pay, took the law into their own hands, may be inferred from enactment of these measures and from acts offering a premium for payment of delinquent taxes. Chapter 53, Laws 1933; Chapter 166, Laws 1935; *Vance Lbr. Co. v. King County*, 84 Wash. Dec. 330, Nov. 13, 1935. But the railroads were not specially benefited by the 40 mill limit. Bearing in mind that railroads are subject to ad valorem taxation at their value as an entity and going concern (including the franchise to do business) whereas other busi-

nesses, except telegraph, are not so valued, the 40 mill limit laws cannot reasonably be invoked as a reason why an otherwise unconstitutional tax for the privilege of doing intrastate railway business should be sustained.

Appellant submits that the judgment of the Supreme Court of the State of Washington is erroneous and prays for reversal.

DENNIS F. LYONS,
LORENZO B. DAPONTE,
ROBERT S. MACFARLANE,
Attorneys for Appellant.

Address—
DENNIS F. LYONS,
N. P. Bldg., St. Paul, Minn.
LORENZO B. DAPONTE,
ROBERT S. MACFARLANE,
Smith Tower, Seattle, Wash.

FILE COPY

FILED
JAN 6 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, *Appellant*, vs. STATE OF WASHINGTON, *Appellee.*	No. 529
GREAT NORTHERN RAILWAY COMPANY, a Corporation, *Appellant*, vs. STATE OF WASHINGTON, *Appellee*,	No. 573
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, *Appellant*, vs. THE TAX COMMISSION OF THE STATE OF WASHINGTON and T. S. HEDGES and T. M. JENNER, as Members of the Tax Commission of the State of Washington, *Appellees.*	No. 544

APPEALS FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,

Attorneys for Appellees.

STATE PRINTING PLANT

SUBJECT INDEX

	Page
Abbreviations	2
Statement	2–5
1933 Occupational Tax Act	5–6
State and U. S. District Court decisions sustaining	6–7
Decisions sustaining similar excises as to interstate public service companies—	
Washington decisions	7
United States Supreme Court decisions	7–19
Decisions relating to domestic corporations, pertinent to foreign corporations	19
Interstate commerce not unlawfully burdened, where Appellants' total tax, property and excise, not greater than might be lawfully imposed on an ad valorem basis	19–21
Determination of method of distributing tax burden, left to States	21–22
State revenue laws must be examined collectively to discover whether Appellants' interstate business is unlawfully burdened by offending tax	22–28
State's New Tax Plan	28–30
Evidence shows that Appellant Railroads' aggregate tax burden substantially reduced by State's New Tax Plan	30–35
Appellant Railroads' criticisms answered	33–35
Effect of New Tax Plan on Appellant Telephone Company	35–37
P. T. has not sought rate increase to meet tax, though tax may be passed on to patrons	35–37
Appellants' objections to Occupational Tax Act enumerated	37–38
Trial Court's Findings in Railroad actions not adopted by State supreme court	38–41
Proper disposition of appeals, if State court's assumptions invalidate tax	41–42
Trial Court's Findings in Railroad actions not adopted by State supreme court	38–41
If findings found material, Court should either review evidence, or remand causes for review of evidence by State supreme court	42–43
Evidence fails to show that either appellant railroad conducted intrastate business at loss in 1933	44–45, 93–178

Page

Answer to contention that Appellant Railroads did intrastate business at loss in 1933 46–51

Answer to Appellants' contention that tax violative of commerce clause if appellants restrained by law from renouncing intrastate while continuing interstate operations 51–56

State supreme court has not so construed State statutes and constitution 56–63

Tax Act itself permits such withdrawal 57–59

Since Federal regulations control, no longer in State's power to deny Appellant Railroads right to discontinue intrastate operations 63–64

But Federal regulation does not prevent State taxation 64–68

State likewise without power to prevent Appellant Telephone Company from renouncing its intrastate operations 68–69

State cannot lawfully condition Public Service Company's right to do interstate business, on its continuing to do local business 69–74

Appellants may withdraw from local business if not making a fair return thereon 74–78

Public utility company subject to privilege tax though franchise requires continuation of service 78–81

Answer to contention that tax invalid as to Appellants because their intra and interstate instrumentalities and operations inseparable 81–87

Answer to contention that Appellants would be required to retain present equipment for interstate operations alone 81, 181–7

If contention sound, no state tax or regulatory measure sustainable 82

Similar taxes uniformly sustained where instrumentalities and operations no less commingled 83–87

Cases relied on by Appellants distinguished 87–92

Evidence failed to show that Appellant Railroads' 1933 intrastate business conducted at a loss—

Character of proof offered 93–97

Operating ratio (freight)—comparison of interstate and intrastate 146–7

1934 revenues and expenses—comparison with 1932 and 1933 148–151

No attempt to increase rates to cover occupational tax ... 47–51

Mileage prorate not adequate apportionment to Washington of interstate freight revenue 111–118

Page

N. P. CASE—Inadmissibility of evidence received 98–111, 131–3, 143–5

Court's error in finding that N. P.'s method of apportioning expenses to intrastate traffic correct 102–5

Mail and express revenue should all be credited to interstate 105–7

Passenger service expense, how properly apportionable to intrastate 108–111

Taxes, proper amount of, and how properly apportionable to intrastate operations 119–124

"Pensions" not properly chargeable as operating expense 125–7

Court's error in finding intrastate freight revenue other than as reported to D. P. W. 127–131

"Traffic expense"—how properly apportionable to intrastate operations 133–4

Propriety of using 3-year average of maintenance of way and car repairs expense 135–6

Joint facility rent income—if used, how apportionable to intrastate 136–7

N. P.'s duplication of operating expenses 138–140

N. P.'s intrastate income for 1933, if properly computed 140–1

N. P.'s evidence showed substantial profit on 1933 local freight business, but loss on local passenger business 141–3

Inadmissibility of evidence that special study understated N. P.'s intrastate expense 143–5

G. N. CASE—Error of court in finding that accuracy of reports as to intrastate revenue not heretofore matter of importance 152–4

Inadmissibility of evidence, and court's error in finding that intrastate revenue was other than as reported to D. P. W. 154–162

Joint facility rents paid—not properly chargeable as operating expense 165–171

G. N.'s duplication of operating expenses 171–2

Taxes—amount of, apportionable to intrastate 172

Joint facility rents paid—how apportionable to intrastate, if proper expense item 173–4

G. N.'s intrastate income, if properly computed 174–6

G. N.'s evidence showed substantial profit on 1933 local freight business, but loss on local passenger business 176–8

TABLE OF CASES

Page

Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211..... 68
Alabama v. U. S., 283 U. S. 776..... 63
Allen v. Pullman Co., 191 U. S. 171.....9, 66, 85
American Expr. Co. v. Michigan, 177 U. S. 404.....36, 50
Atlantic Coast Line v. Daughton, 262 U. S. 413.....24, 167–170
Baker v. Druesedow, 263 U. S. 137.....22, 32
Barrett v. New York, 232 U. S. 14.....84, 90
Behre v. Anchor Ins. Co., 297 Fed. 986..... 130
Binderup v. Pathe Exchange, 263 U. S. 291..... 68
Boston & Maine R. Co. v. Armburg, 285 U. S. 234..... 83
Bowman v. Continental Oil Co., 256 U. S. 642.....53, 86, 90
Buck Stove and Range Co. v. Vickers, 226 U. S. 205..... 69
Buck v. Kuykendall, 267 U. S. 307..... 70
Cascade Tel. Co. v. State Tax Commission, 176 Wash. 616... 6
Case Threshing Machine Co. v. Wiley, 89 Wash. 301..... 160
Cascade Telephone Co. v. State Tax Commission, 176 Wash. 616 36
Central Pacific R. R. v. California, 162 U. S. 91..... 67
Chassanoil v. Greenwood, 166 Miss. 848, 148 So. 781..... 66
Chicago, M., St. P. & P. R. Co. v. Hedges, 5 Fed. Supp. 752 .....6–7, 19, 31, 50, 73
Clark v. Williard, 292 U. S. 113..... 41
Cleveland v. Cleveland City Ry. Co., 194 U. S. 517..... 79
Colorado v. U. S., 271 U. S. 153.....63, 74
Columbus Ry. & Power Co. v. Columbus, 249 U. S. 399..... 78
Cooney v. Mountain States Tel. & Tel. Co., — U. S. —, 79 L. ed. 498, '55 Sup. Crt. 477.....12, 52, 54, 91
Crutcher v. Kentucky, 141 U. S. 47.....54, 70, 72
Cudahy Packing Co. v. Minnesota, 246 U. S. 450..... 24
Culliton v. Chase, 174 Wash. 393.....29, 32
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282..... 70
Day v. T. R. & R. Co., 80 Wash. 161..... 56
Deficit Status of U. S. & Canada R. R., 76 I. C. C. 455..... 117
Eastern Air Transport v. Tax Commission, 285 U. S. 147.... 27
East Ohio Gas Co. v. Tax Commission, 283 U. S. 465..... 54
Edelman v. Boeing Air Transport, 289 U. S. 249..... 27
Erie Railroad Co. v. Pennsylvania, 21 Wall. 492..... 79

Page

Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17 65
Flint v. Stone Tracy Co., 220 U. S. 107 67
Galveston, Harrisburg, etc. Ry. Co. v. Texas, 210 U. S. 217 16, 19, 51, 83
Georgia Public Service Com. v. U. S., 283 U. S. 765 68
Georgia Ry. v. R. R. Com., 262 U. S. 625 51
Gibbs v. Baltimore Gas Co., 130 U. S. 396 79
Grand Trunk Western Ry. Co. v. South Bend, 227 U. S. 544 78
Greene v. Louisville & L. R. Co., 244 U. S. 499 32
Gregg Dyeing Co. v. Query, 286 U. S. 472 23, 32
Great Northern Ry. Co. v. State, 147 Wash. 630 60–2
Helsen v. Kentucky, 279 U. S. 245 26, 27
Henderson Water Co. v. Corporation Com., 269 U. S. 278 79
Hoptowit v. Brown, 115 Wash. 661 160
Interstate Busses v. Holyoke Street Ry., 273 U. S. 45 87
I. C. C. v. Oregon-Wash. R. Co., 288 U. S. 14 77
International Textbook Co. v. Pigg, 217 U. S. 91 70
Investigation of Advances in Rates on Grain, 21 I. C. C. 22 116
Johnson v. Wells, Fargo & Co., 239 U. S. 234 25
Kansas etc. R. Co. v. Bodkin, 240 U. S. 227 18
Kehrer v. Stewart, 197 U. S. 60 66
Kennedy v. Canadian Pac. R. Co., 87 Wash. 134 160
Lake Shore & M. S. Ry. Co. v. Felton, 103 Fed. 227 130
Lawrence v. State Tax Commission, 286 U. S. 276 21
Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192 15, 53, 85
LeLoup v. Port of Mobile, 127 U. S. 640 7, 20, 53, 89
Louisville v. Cumberland Tel. Co., 224 U. S. 649 78
Louisville & N. R. R. Coal and Coke Rates, 26 I. C. C. 20 117
Memphis Gas Light Co. v. Shelby County, 109 U. S. 398 79
Michigan Commission v. Duke, 266 U. S. 570 70
Minnesota Rate Cases, 230 U. S. 352 25, 44, 121, 144
Munn v. Illinois, 94 U. S. 113 60
Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249 27
New Jersey Bell Tel. Co. v. State Board, 280 U. S. 338 12
Northern Ohio Traction & Light Co. v. Ohio, 245 U. S. 574 78
Northern Pacific Ry. Co. v. Gifford, 27 Ida. 667, 151 Pac. 909 58
Northern Pacific Ry. Co. v. Gifford, 25 Ida. 196, 136 Pac. 1131 58
Ohio River & W. R. Co. v. Dittey, 232 U. S. 576 17, 18, 19, 74, 85
Ohio Tax Cases, 232 U. S. 576 17, 18, 19, 74, 85
Old Colony Trust Co. v. Omaha, 230 U. S. 100 78

Page

Opelika v. Opelika Sewer Co., 265 U. S. 215 79
Osborne v. Florida, 164 U. S. 650 .....8, 9, 33, 65, 72, 84
Osborne v. Mobile, 16 Wall. 479 7
Owensboro v. Cumberland Telephone Co., 230 U. S. 58 78
Pacific Express Co. v. Seibert, 142 U. S. 339 ..... 7, 84
Pacific Tel. & Tel. Co. v. Seattle, 172 Wash. 649 (aff.: 291 U. S. 300) 7
Pacific Tel. & Tel. Co. v. State Tax Commission, 83 Wash. Dec. 67, 48 Pac. (2d) 938 41
People ex rel. Cornell Steamboat Co. v. Sohmer, 235 U. S. 549..17, 86
Philippine Sugar etc. Co. v. Philippine Islands, 247 U. S. 385 43
Pine-Coffin v. Erie R. Co., 69 N. Y. S. 333 130
Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692..11, 53, 85
Postal Tel.-Cable Co. v. Fremont, 255 U. S. 124....9, 36, 50, 55, 85
Postal Tel.-Cable Co. v. Richmond, 249 U. S. 252..10, 36, 50, 85, 90
Puget Sound P. & L. Co. v. Seattle, 172 Wash. 668 (aff.: 291 U. S. 619) 7
Puget Sound P. & L. Co. v. Seattle, 291 U. S. 619 79
Pullman Co. v. Adams, 78 Miss. 814, 30 So. 757 (aff.: 189 U. S. 420) 75, 71
Pullman Co. v. Adams, 189 U. S. 420 .....9, 52, 59, 60, 71, 85
Pullman Co. v. Richardson, 261 U. S. 330 .....23, 24
Railroad Commission v. C. B. & Q. R. Co., 257 U. S. 563 63
Railroad Commission v. Eastern Texas R. R., 264 U. S. 79.45, 76, 77
Railroad Retirement Board v. Alton R. Co., — U. S. —, 55 Sup. Ct. 758 126
Railway Co. v. Philadelphia, 101 U. S. 528 79
Ratterman v. Western Union Telegraph Co., 127 U. S. 411 .....11, 16, 53, 85
Reading R. Co. v. Pennsylvania, 15 Wall. 232 14
Reading R. Co. v. Pennsylvania, 15 Wall. 284 .....15, 83
Russell v. Sebastina, 233 U. S. 195 79
St. Cloud Public Service Co. v. St. Cloud, 265 U. S. 352 79
St. Louis v. United Railways Co., 210 U. S. 266 79
St. Louis Southwestern Ry. Co. v. Arkansas ex rel. Norwood, 235 U. S. 350 .....16, 85
Seid Chee v. Sanitary Fish Co, 103 Wash. 345 160
Shaffer v. Carter, 252 U. S. 37 24
Southern Ry. Co. v. Greene, 216 U. S. 400 19
Southern Ry. Co. v. Watts, 260 U. S. 519 28
Spokane International R. Co. v. State, 162 Wash. 395 7

Page

Sprout v. South Bend, 277 U. S. 163 ..... 51, 54
Stafford v. Wallace, 258 U. S. 495 ..... 63, 68
State ex rel. Stiner v. Yelle, 174 Wash. 402 ..... 6, 35, 49
State of Maine v. Grand Trunk Ry. Co., 142 U. S. 217 ..... 15, 83
State v. G. N. Ry. Co., 83 Wash. Dec. 66, 48 Pac. (2d) 938 .. 40
State v. Northern Express Co., 80 Wash. 309 .... 7, 33, 59, 60, 73, 76
State v. N. P. Ry. Co., 83 Wash. Dec. 52, 48 Pac (2d) 931 ..... 6, 19, 39, 40, 46, 51, 63
Superior Oil Co. v. Mississippi, 280 U. S. 390 66
Supply Laundry Co. v. Jenner, 178 Wash. 72 6
Swift & Co. v. U. S., 196 U. S. 375 68
Tacoma v. State Tax Commission, 177 Wash. 604 ..... 6, 34, 36, 80
Telegraph Company v. Texas, 105 U. S. 460 ..... 11, 85
Terral v. Burke Const. Co., 257 U. S. 9 70
Texas v. U. S., 292 U. S. 522 64
Thomas v. Railroad Co., 101 U. S. 71 79
Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 24
Union Tank Line Co. v. Wright, 249 U. S. 275 24
U. S. Express Co. v. Minnesota, 223 U. S. 335 24
U. S. v. Louisiana, 290 U. S. 70 63
United States Glue Co. v. Oak Creek, 247 U. S. 321 24
Wells, Fargo & Co. v. Nevada, 248 U. S. 165 24
Western Union Telegraph Co. v. Alabama, 132 U. S. 472 .. 10, 53, 85
Western Union Tel. Co. v. Kansas, 216 U. S. 1 ..... 20, 53, 90
Western Union Tel. Co. v. Texas, 105 U. S. 460 65
Williams v. Mayor, 289 U. S. 36 77
Williams v. Talladega, 26 U. S. 404 ..... 12, 50, 54
Wiloil Corporation v. Pennsylvania, — U. S. —, 79 L. Ed. 382 27

TABLE OF CONSTITUTIONAL PROVISIONS AND STATUTES CITED

	Page
Constitution of Idaho:	
Art. 11, Sec. 5	57
Constitution of Mississippi:	
Art. 7, Sec. 195	71
Constitution of Washington:	
Art. IV, Sec. 2	40
Art. VII	34
Art. XII, Sec. 13	56, 57, 81
Secs. 14 and 15	56
Sec. 19	56, 57, 81
Mississippi Statutes:	
Code 1892, Sec. 3378	71
Washington Statutes:	
Laws 1911, ch. 117	56
Laws 1933, ch. 4, p. 47	20
Ch. 5, Sec. 1	29
Ch. 191, Sec. 2(2)(e) XI	48
Sec. 3	57, 75
Sec. 16	76
Sec. 17	57
Laws 1935, ch. 180	35
United States Statutes:	
Transportation Act of 1920	63
USCA, Title 47, ch. 5, Sec. 221(b)	69

TEXT BOOKS CITED

	Page
12 Corpus Juris, 13, 50	83
22 Corpus Juris, 1017	160
32 Corpus Juris, 354, 357	130
51 Corpus Juris, 25	51

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, *Appellant*, vs. STATE OF WASHINGTON, *Appellee.*	No. 529
GREAT NORTHERN RAILWAY COMPANY, a Corporation, *Appellant*, vs. STATE OF WASHINGTON, *Appellee*,	No. 573
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, *Appellant*, vs. THE TAX COMMISSION OF THE STATE OF WASHINGTON and T. S. HEDGES and T. M. JENNER, as Members of the Tax Commission of the State of Washington, *Appellees.*	No. 544

APPEALS FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,

Attorneys for Appellees.

STATEMENT

These appeals having been assigned for argument on the same day, and substantially all of the legal questions involved being common to all, the appellees, to avoid needless repetition, have interposed but one brief in the three appeals.

Abbreviations:

For convenience and brevity, the appellant, Northern Pacific Railway Company, will be herein referred to as the "N. P.;" the appellant, Great Northern Railway Company, as the "G. N.;" the appellant, Pacific Telephone & Telegraph Company, as the "P. T.;" the tax commission of the state of Washington, as the "tax commission;" the state of Washington, as the "State;" the Interstate Commerce Commission, as the "I. C. C.;" and the Department of Public Works of the State of Washington, as the "D. P. W."

Unless otherwise qualified, the word "intrastate" means the traffic or business of the particular appellant, both beginning and ending in the state of Washington.

The N. P. and G. N. Cases:

These are appeals from judgments of the State supreme court reversing judgments for defendant in separate actions brought by the State in the superior court for Thurston county, Washington, against these companies to recover the occupational tax measured by 1½% of the intrastate gross income imposed on steam railroads by Chapter 191, Laws of Washington of 1933, for the last five months of 1933. The N. P. is a Wisconsin corpora-

tion, and the G. N., a Minnesota corporation, each owning and operating lines of steam railway in Washington and other states.

The complaint in each case alleges non-payment of the tax, and prays judgment for the amount. (NP Rec. 1-6; GN Rec. 1-6.)

The answers while admitting the amount of the disputed tax to be substantially as alleged by the State, and that the same is unpaid, deny liability therefor on the grounds:

(1) That under the State laws and constitution the defendant is not allowed to withdraw from its local business while continuing to carry on its interstate business;

(2) That it conducted its intrastate business at a loss in 1932 and 1933; and

(3) That its intra and interstate traffic is hauled over the same rails, in the same trains, and by the same employes, and is inseparably commingled and mutually dependent, and that abandonment of its local business, even if possible, would result in the loss of its local revenues with no considerable reduction in its expenses, and would require an increase in interstate tariffs higher than the traffic would bear. (NP Rec. 7-13; GN Rec. 7-20.)

The State replied, denying the material allegations of the railroads' answers, and alleging affirmatively (1) that defendant had never applied to the D. P. W. for permission to increase its tariffs by reason of the occupational tax; and (2) that as a result of the adoption in 1932 and 1933 by the people and state legislature of the

New Tax Plan including the 40-mill limit act and occupational tax act, the tax burden of defendants and other railroads had been greatly reduced as compared with the *ad valorem* taxes which would have been collectible from said companies under the old tax plan. (NP Rec. 17-32; GN Rec. 29-44.)

The cases were tried by the court without a jury resulting in each case in a judgment for defendant (NP Rec. 54; GN Rec. 77-8), from which judgments, appeals were taken to the State supreme court (NP Rec. 252; GN Rec. 253), where, in each case, the judgment was reversed with directions to the lower court to enter judgment for the State for the amount of the tax. (NP Rec. 67; GN Rec. 97.) Each company has appealed to this court.

The P. T. Case:

This is an appeal from the judgment of the state supreme court reversing a decree in an injunction suit instituted by the P. T., a California corporation, in the superior court for Thurston county, Washington, permanently enjoining the defendant, tax commissioners, from enforcing as against the P. T. the provisions of said chapter 191, Laws of 1933, in so far as it imposes an occupational tax on the P. T., an interstate telephone and telegraph company, equal to 3% of its intrastate gross receipts. (Ab. 4, 13.)

In its amended complaint, the P. T. assails the tax on substantially the same grounds urged by the railroad companies, save that it does not allege that it is losing money on its intrastate business, but alleges, on the contrary, that it is earning a return of at least 1.75%

on the fair value of its operating property. (PT Rec. 4.)

The defendant, tax commissioners, answered putting in issue the material allegations of the amended complaint, and setting up as an affirmative defense that the P. T. had never applied either to the D. P. W. or to any other state department for permission either to renounce its intrastate business, or to increase its tariffs because of the offending occupational tax. (PT Rec. 13.) These defenses stand admitted since no reply was interposed thereto. (Rem. Comp. Stat., Sec. 297.)

The trial resulted in a decree permanently enjoining the defendant tax commissioners from enforcing the provisions of said Occupational Tax Act of 1933 as against the P. T. (PT Rec. 15-17.) From such decree, such commissioners appealed to the state supreme court, which reversed the decree of the lower court with instructions to dismiss the suit. The P. T. has appealed to this Court.

THE 1933 STATE OCCUPATIONAL TAX ACT:

By the law here assailed, an occupational tax is imposed for the two-year period ending July 31, 1935, upon those engaged in various business activities in the state, measured by the gross proceeds derived from mining, manufacturing, wholesaling or jobbing, retail distributing, and performing of services. The rates imposed vary with the different activities. Thus, on the gross income of stock brokers, the rate is 2%; on steam railways and highway transportation companies, 1½%; and on light and power companies, water companies and telephone and telegraph companies, 3%. (Laws 1933, Ch. 191, Sec. 2, pp. 870-5.)

The tax is imposed on municipal corporations operating utilities and conducting businesses, the same as upon private enterprises (Sec. 2-e), and has been sustained as such. See *Tacoma v. State Tax Commission*, 177 Wash. 604.

Other states imposing similar excises are shown in the footnote.*

It is conceded, as above noted, that as to interstate public service companies the tax commission construes the Act as not applying to the gross income from interstate business, but to the gross income from intrastate business only.

The tax has been repeatedly sustained by the State supreme court as against attacks made on its constitutionality by various classes of taxpayers. See *State ex rel. Stiner v. Yelle*, 174 Wash. 402; *Cascade Tel. Co. v. State Tax Commission*, 176 Wash. 616; *Tacoma v. State Tax Commission*, 177 Wash. 604; *Supply Laundry Co. v. Jenner*, 178 Wash. 72; *State v. N. P. Ry. Co.*, 83 Wash. Dec. 52, 48 Pac. (2d) 931, NP Rec. 54.

Indeed, the tax was sustained by a three-judge federal district court, in an attack on its constitutionality by five interstate railroads including the two railroad appellants here, made upon the same grounds as urged on these appeals. See *Chicago, M., St. P. & P.*

---

*Arizona: ch. 77, Laws 1935; Indiana: ch. 50, Acts, 1933; Kentucky: ch. 25, Laws 1934; Mississippi: ch. 119, Laws 1934; New Mexico: ch. 78, Laws 1935; New York City: Local Law No. 21, 1934, amended by Local Law No. 2, 1935; North Dakota: ch. 276, Laws 1935; Oklahoma: Laws 1935, p. 131, ch. 88, art. 6; Ohio: Laws 1933-4, Pt. 2, p. 821; West Virginia: ch. 38, p. 219, Ex. Sess. 1933.

R. Co. v. Hedges, 5 Fed. Supp. 752, to which we will later refer.

The State supreme court has heretofore sustained excise taxes similar to the 1933 Occupational Tax Act as applied to interstate public service companies. *State v. Northern Express Co.,* 80 Wash. 309; *Pacific Tel. & Tel. Co. v. Seattle,* 172 Wash. 649 (affirmed: 291 U. S. 300); *Puget Sound P. & L. Co. v. Seattle,* 172 Wash. 668 (affirmed: 291 U. S. 619). And see: *Spokane International R. Co. v. State,* 162 Wash. 395.

UNITED STATES SUPREME COURT DECISIONS SUSTAINING EXCISE TAXES EXACTED OF INTERSTATE PUBLIC SERVICE COMPANIES.

Express Companies:

In *Osborne v. Mobile,* 16 Wall. 479, the court upheld a city ordinance fixing the annual license fees for express companies doing business within its limits as follows: if doing an interstate business, $500; if doing intrastate business only, $100; and if doing intra-city business only, $50. The attack was made by a corporation doing an interstate business.

This case, however, was later disapproved in *Leloup v. Port of Mobile,* 127 U. S. 640, 645, as not in harmony with the court's later decisions.

In *Pacific Express Co. v. Seibert,* 142 U. S. 339, a state statute imposing a privilege tax of 2% of the company's intrastate gross receipts in addition to the *ad valorem* tax paid on the company's tangible property, and providing for a penalty of $100 a day for delinquency in making its report and paying the tax, and prohibiting the company from carrying on intrastate business while such tax was delinquent, was upheld as not violative of the commerce clause.

Osborne v. Florida, 164 U. S. 650, involved the validity of an occupation or license tax imposed by cities upon those pursuing divers occupations and professions, in so far as it affected express companies who were required to pay a tax of from $10 to $200 a year depending on the size of the city. As to express companies the state court had construed the act as applying only to intrastate and not to interstate business. As so construed, the supreme court held the act not violative of the federal constitution. In so holding, the court said:

"It has never been held, however, that when the business of the company which is wholly within the State, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute. * * * The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the state whatever unless upon the payment of the fee or tax. It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State." (P. 655.)

Sleeping Car Companies;

By the Mississippi Code of 1892, a tax was imposed "on each sleeping and palace car company carrying

passengers from one point to another within the state, one hundred dollars, and twenty-five cents per mile for each mile of railroad track (in the state) over which the company runs its cars." The state constitution declared sleeping car companies to be common carriers. In *Pullman Co. v. Adams,* 189 U. S. 420, the supreme court, following its former decision of *Osborne v. Florida, supra,* held the tax valid.

Again, in *Allen v. Pullman Co.,* 191 U. S. 171, it was held that a tax law of Tennessee requiring sleeping car companies to pay a tax of $3,000 per annum in lieu of all other except *ad valorem* taxes for one or more passengers taken up at one point within the state and delivered at another and transported wholly within the state and which did not refer to or affect the interstate business of the companies, would not be regarded as disguised attempt to tax the privilege of engaging in interstate commerce, where under the laws of the taxing state, it was not compulsory for a corporation engaged in interstate commerce to carry on that part of its business which was wholly within the state, and was therefore not repugnant to the commerce clause of the federal constitution. In so holding the court followed its former rulings in *Osborne v. Florida, supra,* and *Pullman Co. v. Adams, supra.*

Telegraph Companies:

In *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124, it was held that a license tax of $60 a year imposed by a city on a telegraph company for the privilege of doing intrastate business, could not be declared an unconstitutional burden on its interstate business merely because the local business was unprofitable, where the tax ordi-

nance was in force when the company entered the place and the tax was paid without objection for a series of years, the circumstances thus repelling any intent to invade interstate commerce in levying it, and where the state law afforded means to prevent the tax from burdening the interstate business through an application to increase intrastate rates, of which the company had not sought to avail itself.

And in *Postal Tel.-Cable Co. v. Richmond*, 249 U. S. 252, a license tax imposed on intrastate business was upheld as against the objection that it imposed a burden on the company's interstate business because the net receipts from its intrastate business were insufficient to pay the tax, and the payment would therefore have to be made from interstate receipts.

In *Western Union Tel. Co. v. Alabama*, 132 U. S. 472, it appeared that a statute of Alabama imposed a tax "on the gross amount of the receipts by any and every telegraph company derived from the business done by it in this state." The company reported to the board of assessors only its gross receipts received from business wholly transacted within the state. The board required a further return by the company of gross receipts from messages carried partly within and partly without the state. The company made such further return, and the tax was imposed on the gross receipts as shown by the two returns. In holding that the tax imposed on the messages comprised in the second return was unconstitutional, the court said:

"The principle is, in regard to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866 (Rev. Stat. Sec. 5263 to Sec. 5268), that they shall not be taxed by the authorities of a state

for any messages, or receipts arising from messages, from points within the state to points without, or from points without the state to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this principle is that messages of the former class are elements of commerce between the states and not subject to legislative control of the states, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the state, and, therefore, subject to its taxing power." (p. 473.)

In *Telegraph Company v. Texas*, 105 U. S. 460, it was held that state laws, so far as they impose upon telegraph companies a specific tax on each message transmitted beyond the state, are unconstitutional; but it was said that "any tax which the state may put on messages by private parties, and not by agents of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States."

In *Postal Tel.-Cable Co. v. Charleston*, 153 U. S. 692, it was held that a city ordinance imposing a license tax of $500 upon a telegraph company upon business done exclusively within the city was a valid exercise of the police power and was not an interference with interstate commerce.

In *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, the court, after an exhaustive review of its earlier decisions, held that a single tax of 5% of the gross receipts assessed under an Ohio law upon receipts of a telegraph company derived partly from interstate, and partly from intrastate commerce, but which were capable of separation, was invalid in proportion to the extent such receipts were derived from interstate commerce, but was otherwise valid.

In *Williams v. Talladega,* 226 U. S. 404, it was held that a municipal license tax on an interstate telegraph company's right to do local business within the state could not be deemed an unconstitutional burden on interstate business because a test for eleven months showed that the company did its intrastate business at that point at a net loss of 86 cents. The tax measure, however, was adjudged invalid because of not excepting from its application messages transmitted for the federal government.

Telephone Companies:

New Jersey Bell Tel. Co. v. State Board, 280 U. S. 338, involved the validity of an occupational tax measured by the state's proportion of the company's entire gross receipts, both intra and interstate. *The company paid without protest the tax based on local receipts.* The court condemned the tax in so far as measured by interstate receipts, Justices Holmes and Brandeis, however, dissenting.

The supreme court's most recent expression on the right of a state to impose an occupational or business tax on public service companies doing both an intra and interstate business, is found in *Cooney v. Mountain States Tel. & Tel. Co.,* —— U. S. ——, 79 L. ed. 498, 55 Sup. Crt. 477, where the court refused to sustain an excise tax imposed on an interstate telephone company and measured by a certain imposition on each telephone instrument used in its business, varying from 20 cents to $2 per year, depending on the number of phones and the rates charged. The offending state law provided that every corporation "engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana * * * shall pay

* * * a license tax * * * for each telephone instrument used, controlled and operated by it in the conduct of such business." The court held that by this language the tax was clearly intended to be imposed on telephone instruments used not only in intrastate but in interstate business and was therefore void.

In considering the following excerpt from the opinion (79 L. ed. 502), the Court will bear in mind that there the tax was on an instrumentality used by the company in carrying on both its intra and interstate activities, while here the tax is measured by intrastate gross income only:

"The business is the maintaining of telephone lines and the furnishing of telephone service in the state. No distinction is made between interstate and intrastate service. The tax is then stated to be 'for each telephone instrument used, controlled and operated.' Again, there is no limitation as to use, control or operation in intrastate business. The tax is 'based upon the number of telephone instruments owned, controlled and operated' during all or any part of the calendar year. A 'telephone instrument' is defined in section two of the act as 'a transmitter and receiver capable of use in the transmitting and receiving of telephone communications.' The tax is thus laid simply by reason of the fact that the company is furnishing telephone service and is based upon the number of telephone instruments used in that service without regard to its character whether intrastate or interstate. * * * All the telephone instruments, not excepted, whether they are used in intrastate or interstate commerce and however the service is paid for, are left subject to the tax. * * * But the tax is not laid on revenues. It is not laid on revenue derived from monthly rates as distinguished from toll charges. It is not imposed with respect either to the nature of the revenue, or to the character of the service from which the revenue is derived, or to the manner in which the charges for the service are fixed.

"The evidence supports the finding that these tele-

phone instruments are available for interstate and foreign communications. * * * It appears that in the operation of this unified system, the telephone instruments are the means by which the customers command at their pleasure the service they desire whether intrastate or interstate. And, so far as the instruments are not excepted, the tax is laid indiscriminately with respect to each of these facilities, regardless of the nature of their use.

"There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce." (Italics ours.)

In a footnote the court here cites a large number of authorities including all those heretofore reviewed, and then continues:

"But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 S. Ct. 1380, 2 Inters. Com. Rep. 134. *There are 'sufficient modes' in which the local business may be taxed without the imposition of a tax 'which covers the entire operations.'* Id., p. 647. See *Williams v. Talladega*, 226 U. S. 404, 419, 57 L. ed. 275, 281, 33 S. Ct. 116." (Italics ours.)

In using the last expression quoted, the court unquestionably had in mind the imposition of a tax measured by intrastate revenues—excises which, as heretofore shown, it had so often theretofore sustained.

Railroad Companies:

Reading R. Co. v. Pennsylvania, 15 Wall. 232, involved the validity of a Pennsylvania statute imposing a tax of two to five cents on every ton of freight transported by any railroad or canal in that state. The tax was held valid as to commerce wholly within the state, but void as to freight hauled in interstate commerce. As

to the tax imposed on intrastate freight, the court said (p. 282):

"But while holding this, we recognize fully the power of each state to tax at its discretion its own internal commerce, and the franchises, property or business of its own corporations, so that interstate intercourse, trade, or commerce, be not embarrassed or restricted. That must remain free."

But in *Reading R. Co. v. Pennsylvania*, 15 Wall. 284, a state statute imposing an excise tax of three fourths of 1% on both the intra and interstate gross receipts of domestic railroad corporations, was upheld as not violative of the commerce clause of the constitution, three justices dissenting.

And in *State of Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, the court sustained as to a foreign corporation, and as not violative of the commerce clause, a state statute requiring every railroad corporation operating in the state to pay "an annual excise tax for the privilege of exercising its franchise," the amount of the tax being determined according to a sliding scale proportioned to the average gross earnings per mile within the state for the preceding year. Four justices dissented.

In *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, it was held that a state gross receipts tax of 8/10ths of 1% against a domestic railroad corporation on account of transportation between points in the same state, but passing, during transportation, without the state, was not a tax upon interstate commerce, and did not infringe the provisions of the federal constitution. The court said:

"Taxation is undoubtedly one of the forms of regulation, but the power of each state to tax its own internal commerce, and the franchise, property or business of its

own corporations engaged in such commerce, has always been recognized, and the particular mode of taxation in this instance is conceded to be in itself not open to objection. And while interstate commerce cannot be regulated by a state by the laying of taxes thereon, in any form, yet when the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect that arising upon commerce solely within its own territory. *Ratterman v. West. Union Tel. Co.*, 127 U. S. 411, 424."

But in the later case of *Galveston, Harrisburg, etc. Ry. Co. v. Texas*, 210 U. S. 217, the court held, in a five-to-four decision that a Texas statute imposing a tax upon domestic railroad companies equal to 1% of their gross receipts was, as to those companies whose revenue included receipts from interstate business, a burden on interstate commerce and, as such, violative of the commerce clause of the federal constitution, thus, to the extent that interstate receipts were taxed, reversing by a bare majority, its earlier decisions in this regard.

Never, however, has this court in even a minority opinion questioned the right of the states to impose an excise tax on the intrastate gross receipts of either domestic or foreign public service corporations, doing both intra and interstate business, whatever the character of the service rendered.

In *St. Louis Southwestern Ry. Co. v. Arkansas ex rel. Norwood*, 235 U. S. 350, it was held that the annual franchise tax imposed by an Arkansas statute upon a railroad corporation "for the privilege of exercising its franchise in this state" of a specified percentage of the corporation's outstanding capital stock represented by

property owned and used in business transacted in the state was not repugnant to the commerce clause of the federal constitution, as applied to a foreign railway company doing both interstate and intrastate business, where, as construed by the state court, such tax was upon the right to exercise the privilege to transact intrastate business in corporate form, the amount of the tax being fixed solely by reference to the property of the corporation that was within the state and used in business transacted within the state, excluding any imposition upon, or interference with, interstate commerce.

In *People ex rel. Cornell Steamboat Co. v. Sahmer*, 235 U. S. 549, the court held a state excise tax or license fee equal to 5/10th of 1% upon intrastate gross earnings imposed on transportation and transmission corporations and associations for the privilege of doing business in the state in corporate form not to be an invalid regulation of commerce as applied to a navigation company engaged in the business of towing upon the Hudson river.

We come now to the outstanding case of *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576,—the *"Ohio Tax Cases."* By an act of 1911, the Ohio legislature prescribed various taxes, some upon property and others upon franchises and privileges with sundry provisions, penal and otherwise, for their collection. The tax there in question was limited in its operation to certain public utilities, including railroads. Each railroad doing business in the state was required to pay an excise tax of 4% of its entire gross earnings from business done

within the state except business done for the federal government.

In sustaining such tax as to railroads, the court held among other things:

That the tax was not void as confiscatory or violative of the due process clause because the complaining roads were not earning a fair return from their local business on the value of their operating property, devoted thereto, and one of which roads was operating at a loss;

That such roads were not arbitrarily discriminated against, contrary to the equal protections clause, because the tax was not exacted of all public utilities, or because the public utilities included, were not all taxed at the same rate; and

That the tax was not void for lack of uniformity because imposed in addition to an ad valorem tax, as being double taxation.

Counsel for the various appellants waive aside the *Ohio Tax Cases, supra,* with the statement that there "the tax was for the privilege of exercising the corporate franchise granted by the state to a domestic corporation," and liken it to *Kansas etc. R. Co. v. Bodkin,* 240 U. S. 227. (NP Brief, p. 33.)

True, in the *Bodkin* case the tax sustained was "on the primary corporate franchise granted by the State" (240 U. S. 232), but this was not true of the *Ohio Tax Cases.* In the latter case the imposition was stated in the statute to be "in the nature of an excise tax, for the privilege of carrying on its intrastate business," and *was imposed equally and alike on corporations, part-*

nerships, and individuals. (232 U. S. 580.) Indeed, appellants' counsel there conceded that the offending tax was not "upon corporate franchises or privileges, as such." (232 U. S. 581.) And in its opinion the court speaks of the tax as one "with respect to the privilege or *occupation.*" (232 U. S. 594.)

The fact that in the *Ohio Tax Cases, supra,* the objecting taxpayers were domestic corporations does not detract from the controlling force of the decision. *Galveston, etc. Ry. Co. v. Texas,* 210 U. S. 217, 228; *Southern Ry. Co. v. Greene,* 216 U. S. 400, 417-8; *Chicago, M., St. P. & P. R. Co. v. Hedges,* 5 Fed. Supp. 752, 760.

In the case last cited Judge Cushman, after reviewing the *Ohio Tax Cases,* said with respect to counsel's attempted distinction:

"There is no reason for contending that the interstate commerce carriage by a domestic corporation can be burdened as the result of a state law, and that carried by foreign corporations cannot. Northern Securities Co. v. United States, 193 U. S. 197."

INTERSTATE COMMERCE NOT UNLAWFULLY BURDENED, WHERE APPELLANTS' TOTAL TAX, PROPERTY AND EXCISE, NOT GREATER THAN MIGHT BE LAWFULLY IMPOSED ON AN AD VALOREM BASIS ALONE.

In this connection, we quote the following from the decision of the state supreme court (*State v. N. P. Ry. Co.,* 83 Wash. Dec. 52, 59-61, 48 Pac. (2d) 931, 935; NP Rec. 61-2):

"It must be remembered that chapter 191 of the Laws of 1933 applies to every person engaging or continuing in business within this state, with a comparatively few exceptions. The law may be said to be a general one and applies to all businesses within the state. In this respect, it is somewhat analgous to a property tax which all persons, with comparatively few exceptions provided for in the statute, are required to pay upon

the property owned by them. The state has the authority to tax property which is used in interstate commerce and which is regularly and permanently located within its limits, where the ascertainment of the amount assessed is dependent upon the value of the property within the state, as the property of other citizens is taxed. *Leloup v. Port of Mobile*, 127 U. S. 640, 8 S. Ct. 1380; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 S. Ct. 190.

"Even though the respondent in this case cannot retire from its intrastate business without also retiring from its interstate business, we think that the excise tax imposed upon the gross income from the intrastate business is not such a direct burden upon interstate commerce as to require that the tax be held void.

"Attention at this point should be called to chapter 4 of the Laws of 1933, p. 47, Rem. 1933 Sup. § 11238-1 [P. C. § 6882-77a], which was initiative measure 64, and generally referred to as the '40-mill tax limit for taxation' law. In that act, it was provided that the aggregate of all taxes upon real and personal property in the state should not exceed in any one year forty mills on the dollar of assessment valuation, which should be based upon fifty per cent of the true and fair value of the property in money, with some exceptions which are not here material. The respondent, by reason of this law, has been relieved from paying a very large sum of money as taxes upon the property which it owns in this state and which was subject to taxation, even though devoted to interstate commerce. It is a matter of common knowledge that, under the 40-mill tax limit law, property is now paying about half of what it paid for general taxes prior to the passage of that law; in other words, that, by reason of the law limiting the amount to forty mills, the tax burden upon both real and personal property of the state has been reduced approximately one-half. Having thus provided for a reduction of taxes upon real and personal property, it was necessary for the legislature to find other sources of revenue, and chapter 191 was undoubtedly passed for this reason.

"So far as we are informed, the Federal supreme court has at no time distinctly held that an excise tax, such as that of this state, which is imposed upon all businesses, is such a direct burden upon interstate com-

merce as to render the act of the legislature unconstitutional."

In amplification of what was said by the State supreme court in this connection, may we here set forth the appellees' position in the court below. It was contended: (1) that the State's revenue laws must be considered collectively to determine whether the tax complained of unlawfully burdens appellants' interstate business; (2) that were appellants' physical properties and franchises taxed as in 1932 and prior years to cover the entire cost of state government, such tax could not be deemed an unlawful burden on appellants' interstate business; and (3) that the undisputed evidence shows that under the present state revenue laws, each appellant railroad's entire tax burden is materially less than its *ad valorem* taxes alone would have been, were the State's necessary revenues raised by property taxation alone.

DETERMINATION OF METHOD OF DISTRIBUTING TAX BURDEN IS LEFT TO THE STATES.

This was thus recognized in *Lawrence v. State Tax Commission*, 286 U. S. 276, 279-280, where Your Honors said in sustaining, as not violative of the due process clause, a Mississippi law imposing a tax on the net income of its residents derived wholly from activities carried on by them outside of the state:

"The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its law, are inseparable from the responsibility for sharing the costs of government. See *Fidelity & Columbia Trust*

Co. v. Louisville, 245 U. S. 54, 58; *Maguire v. Trefry,* 253 U. S. 12, 14, 17; *Kirtland v. Hotchkiss,* 100 U. S. 491, 498; *Shaffer v. Carter,* 252 U. S. 37, 50. The Federal Constitution imposes on the states no particular modes of taxation, and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment. * * *

"It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship."

STATE REVENUE LAWS MUST BE EXAMINED COLLECTIVELY TO DISCOVER WHETHER APPELLANTS' INTERSTATE BUSINESS IS UNLAWFULLY BURDENED BY TAXES IMPOSED.

In *Baker v. Druesedow,* 263 U. S. 137, 142, the court said:

"Where illegal discrimination was practiced, it is immaterial whether it was effected by a single assessing board or through the action of two independent boards. *Greene v. Louisville & Interurban R. R. Co.,* 244 U. S. 499, 513; *Southern Ry. Co. v. Watts,* 260 U. S. 519, 526."

The converse, we submit, must be true. If the operation of the state's revenue statutes as an entirety do not result in an invasion of any of appellants' constitu-

tional rights or burden their interstate commerce, appellants cannot be heard to complain.

The principle is thus clearly announced in *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 479-80:

"The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the state imposing a tax upon the sale and use of gasoline within the state. The state court said that the act in question 'taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred acts all users are taxed.' But appellants question the right to invoke other statutes to support the validity of the act assailed. To stand the test of constitutionality, they say, the act must be constitutional 'within its four corners,' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power. When the Supreme Court of the state has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves. *Hebert v. Louisiana*, 272 U. S. 312, 317. See *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 73."

True, a State can neither tax the act of engaging in interstate commerce nor lay a tax on the gross receipts therefrom. (*Pullman Co. v. Richardson*, 261 U. S. 330, 338.)

But on the other hand, it has been held by this Court many times that an apportionment of the cost of State government to an interstate utility company according to the relative value of the property of such company

permanently located or commonly used by it within the state in such interstate commerce is not violative of the commerce clause. (*Cudahy Packing Co. v. Minnesota,* 246 U. S. 450, 453; *Wells, Fargo & Co. v. Nevada,* 248 U. S. 165, 167; *Union Tank Line Co. v. Wright,* 249 U. S. 275, 282; *Pullman Co. v. Richardson,* 261 U. S. 330, 338.)

It has also been frequently held that an apportionment of the expense of state government to an interstate utility company according to its net income including that earned in its interstate activities does not violate the commerce clause. (*United States Glue Co. v. Oak Creek,* 247 U. S. 321; *Shaffer v. Carter,* 252 U. S. 37, 57; *Underwood Typewriter Co. v. Chamberlain,* 254 U. S. 113; *Atlantic Coast Line v. Daughton,* 262 U. S. 413, 416.)

And the rule is likewise established by this court that a tax measured by an interstate utility company's gross income including a mileage proportion of that earned in interstate commerce imposed in lieu of property taxes, will be sustained as not violative of the commerce clause, if such exaction does not exceed that which could lawfully have been imposed on an *ad valorem* property tax basis. *U. S. Express Co. v. Minnesota,* 223 U. S. 335; *Cudahy Packing Co. v. Minnesota,* 246 U. S. 450; *Pullman Co. v. Richardson,* 261 U. S. 330.

In *U. S. Express Co. v. Minnesota,* 223 U. S. 335, 344-5, it was said:

"The right of the State to tax property, although it is used in interstate commerce, is thoroughly well settled. *Postal Telegraph Co. v. Adams,* 155 U. S. 688; *Pullman's Palace Car Co. v. Pennsylvania,* 141 U. S. 18; *Ficklen v. Shelby County,* 145 U. S. 1, 22. • • •

" 'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon prop-

erty or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution.' *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 697."

These lieu taxes of Minnesota and other states, it must be remembered, were not sustained or sustainable on the theory that gross receipts is a proper criterion of property values. Such a holding would have been entirely out of harmony with *Johnson v. Wells Fargo & Co.*, 239 U. S. 234, holding invalid the valuation of the property of an interstate utility company by giving controlling effect to the gross income derived therefrom, and with the Minnesota Rate Cases, 230 U. S. 352, 458, condemning the apportionment of the value of the property of an interstate railroad used in its intrastate and interstate operations according to the gross income received from the two activities.

Such lieu taxes were sustainable, therefore, only on the theory that the tax imposed on gross income was no greater than that which would have been imposed, had the expense of state government been apportioned to these interstate utilities on an *ad valorem* tax basis.

By its New Tax Plan, the State of Washington has seen fit to distribute a part of the governmental costs to appellants and all other property owners on an *ad valorem* property tax basis, and to apportion the remainder of such costs of government according to the gross income received from practically all business activities, including the intrastate receipts of interstate utility companies.

And we respectfully submit that in determining whether appellants' interstate commerce has been unlawfully burdened by Washington's New Tax Plan, the

same test should be applied as in the cases sustaining a tax on interstate companies measured by gross income in lieu of a property tax, and that in the absence of a showing that the total tax burden thus imposed, property and excise, is not greater than that which would have been imposed had the State chosen to apportion the entire cost of government according to the relative value of the taxpayers' properties, it cannot be said that the excise thus exacted in lieu of taxes which might otherwise have been lawfully imposed as an added burden on property, is violative of the commerce clause.

It is of course apparent that a tax levied on an interstate carrier's tangible property and franchises is no less a burden on its interstate business than is a privilege tax measured by its intrastate gross income.

In this connection, may we note the language of Mr. Justice Stone, with Justices Holmes and Brandeis concurring, in *Helson v. Kentucky*, 279 U. S. 245, 252, wherein the majority held a tax on gasoline used in an interstate ferry to be void as violative of the commerce clause:

"I cannot yield assent to the reasoning by which the present forbidden tax on the use of property in interstate commerce is distinguished from a permissible tax on property, measured by its use or use value in interstate commerce. * * * (citing authorities) * * * Nor can I find any practical justification for this distinction or for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, which is neither aimed at nor discriminates against interstate commerce. 'It affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in

no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed.' *Deleware Railroad Tax,* 18 Wall. 206, 232."

That this view is not out of harmony with that now taken by this court is evidenced by the later cases of *Eastern Air Transport v. Tax Commission,* 285 U. S. 147, *Nashville, C. & St. L. Ry. v. Wallace,* 288 U. S. 249, and *Edelman v. Boeing Air Transport,* 289 U. S. 249, holding that a state non-discriminatory use tax may constitutionally be imposed on gasoline imported and stored by an interstate carrier for use in generating motive power for instrumentalities of interstate transportation.

Distinguishing *Helson v. Kentucky,* 279 U. S. 245, Your Honors said in the *Wallace* case:

"But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged." (288 U. S. 267.)

That no distinction is to be made between property taxes and excises with respect to the taxation of the subjects, as distinguished from the instrumentalities, of interstate commerce, was held in *Wiloil Corporation v. Pennsylvania,* — U. S. —, 79 L. Ed. 382, where a non-discriminatory sales or use tax on liquid fuels was sustained as to gasoline sold within, but delivered from without, the taxing state.

"It is not material," said Your Honors there, "whether the tax is upon the sale and delivery or upon the property." (79 L. ed. 384.)

It must follow that if, as a result of the State's present scheme of taxation, "taken in its totality," the interstate carrier's total tax burden is not increased,

but *actually lightened* as compared with the tax burden which might legitimately be imposed by the taxing state, such interstate carrier cannot be heard to complain that its interstate business is unduly burdened.

In *Southern Ry. Co. v. Watts,* 260 U. S. 519, 530, the court said:

"It is argued that this franchise tax is an additional property tax which is not imposed on others, and that, consequently, it violates the uniformity clause of the state constitution and the equal protection clause of the Federal Constitution. It is true that the franchise tax is measured by the value of property already subjected to the *ad valorem* tax. But a privilege tax is not converted into a property tax because it is measured by the value of property (compare *Clark v. Titusville,* 184 U. S. 329, 333, 334); nor by the fact that in this measure is included property not used in the transportation service. Railroads differ in so many respects from other properties that they may, as a class, be taxed differently or additionally, if that is not inconsistent with the constitution of the state.

"Nor is there any basis for the claim that the franchise tax act violates the commerce clause. The tax appears to be upon the privilege of doing an intrastate business. Compare *Armour Packing Co. v. Lacy,* 200 U. S. 226. It is not of the character which is held a burden upon interstate commerce. *St. Louis Southwestern Ry. Co. v. Arkansas,* 235 U. S. 350; *Underwood Typewriter Co. v. Chamberlain,* 254 U .S. 113, 119, 120; *St. Louis-San Francisco Ry. Co. v. Middlekamp,* 256 U. S. 226. Payment of the tax is not made a condition precedent to granting a railroad permission to do interstate business. Compare *Leloup v. Mobile,* 127 U. S. 640. *Underwood Typewriter Co. v. Chamberlain,* 254 U. S. 113, 119. *And there is no basis for the contention that the aggregate burden imposed by the property tax, the franchise tax, and the income tax, operates to obstruct interstate commerce.*" (Italics ours.)

STATE'S NEW TAX PLAN:

Prior to 1932 practically the entire cost of government, state, county and municipal, was raised by *ad*

valorem taxes imposed on real and personal property including that of interstate carriers. By measures adopted by the people themselves at the general election of November, 1932, and by the people's representatives at the legislative session of 1933, this scheme of taxation was changed by shifting a substantial part of this burden of governmental expense from property to various kinds of businesses and occupations. Thus, by an initiative measure (Chap. 4, Laws of 1933) it was provided that thereafter (except when authorized by special elections) no more than 40 mills should be thereafter levied on the assessed valuation (50% of the actual value) of real and personal property, such millage being limited to 5 mills for the state, 10 mills for counties, 10 mills for school districts and 15 mills for cities or towns.

At the same election, the people, by direct vote, enacted a state income tax law (Chap. 5, Laws 1933) providing for a tax of certain percentages of all net incomes of individuals and corporations in excess of certain stated amounts. Although this income tax measure was later adjudged unconstitutional (see *Culliton v. Chase,* 174 Wash. 363), the court may nevertheless refer to its recitals to discover the people's purpose in adopting both the 40-mill and income tax measures. To quote:

"Existing methods of taxation, primarily based on property holdings, are inadequate, inequitable and economically unsound. Present conditions point the need of a new subject matter for taxation, which should be based on the ability to pay. Earnings for a given period are a fair measure of such ability.

"The people of the State of Washington, therefore, exercising herein their supreme power and fundamental right, declare their purpose hereby to tax all annual incomes within the state as such, and not as property." (Laws 1933, ch. 5, sec. 1.)

These two acts were initiative measures. At the following legislative session Chapter 28, Laws of 1933, was enacted, Section 4 of which limits the levy for the current school fund (a state fund theretofore unlimited) to five mills. The same session enacted Chapter 191, Laws of 1933 (the law here assailed), imposing an occupational tax on those engaged in various business activities, thereby largely shifting the expense of government from tangible property to such businesses and occupations.

REDUCTION IN RAILROADS' TAXES BY STATE'S NEW TAX PLAN:

At the trial of the railroad cases, appellee introduced exhibits for the purpose of comparing the total taxes, *ad valorem* and occupational, payable by the four large interstate railroads of the state for each of the years 1933 and 1934 (assuming such occupational tax to have been collectible for all of 1933, instead of only for the last five months), with the taxes which would have been payable by such railroads for such years under the revenue laws in effect prior to November, 1932. (Plff's Exs. "43" and "44," NP Rec. 224-226; Plff's Exs. "32" and "33," GN Rec. 241-244), which exhibits are explained by State's witness, Manschreck. (NP Rec. 194-6; GN Rec. 208-211.)

These exhibits are, we believe, self-explanatory, and show that as a result of the New Tax Plan the total taxes payable by the four roads (including the occupational tax) were $597,770 less in 1933 and $549,034 less in 1934 than they would have been under the old tax plan (see lines "A" to "H"), and that such companies' state taxes alone, plus the occupational tax, were $738,248 less in 1933, and $826,343 less in 1934 than such state taxes

alone would have been for those years under the old tax plan. (See lines "I" to "M.")

Had the 40-mill tax limit act been combined with the occupational tax measure it is clear that in determining whether such single tax measure imposed an undue and unlawful burden on appellents' interstate operations, the Court's first inquiry would necessarily have been as to the net results of the operation of such law in increasing or reducing such carriers' aggregate tax burden.

Suppose that, instead of the 40-mill act, the people or their legislature had adopted a measure freeing property from ALL *ad valorem* taxes, shifting the entire burden to businesses and occupations, and thereby substantially reducing the total taxes payable by the appellant railroads. Could these carriers then, while accepting such exemption features, be heard to urge that they should likewise escape the occupational tax and thus avoid any contribution whatever to the support of government? We submit not.

Our position is supported by *Chicago, M. St. P. & P. R. Co. v. Hedges*, 5 Fed. Supp. 752, 756, *et seq.*, where Judge Neterer said:

"To change its taxing system, the electors of the state, by initiation, adopted chapters 4 and 5, pp. 47, 49, Laws of Washington 1933 (40-mill levy limit on real estate and the income tax measure), and the Legislature, the act in issue, an 'emergency measure,' as a new taxing system. The preamble to chapter 5, p. 49, Laws of 1933, exposes the state of mind as follows:

" 'Existing methods of taxation, primarily based on property holdings, are inadequate, inequitable and economically unsound. Present conditions point the need of a new subject matter for taxation, which should be

based on the ability to pay. Earnings for a given period are a fair measure of such ability.

"'The people of the State of Washington, therefore, exercising herein their supreme power and fundamental right, declare their purpose hereby to tax all annual incomes within the state as such, and not as property.' Laws 1933, ch. 5, p. 49, Sec. 1.

"The Supreme Court of the state held this Income Tax Law unconstitutional [(*Culliton v. Chase, McKale's Inc. v. Chase*), 25 P. (2d) 81], and thus deprived the state of a portion of its revised system, and further disorganized the revenue situation. The 40-mill limit tax on real property authorized by chapter 4, p. 47, Laws of 1933, is grossly inadequate and the need of the 'emergency measure', and the act in issue, chapter 191, p. 869, Laws of 1933, effective from August 1, 1933, to July 31, 1935, became vital; and, in considering this issue, chapter 166, p. 613, Laws of 1933, should be noted. • • •

"Consideration of the new system to supersede the old, and the status of the litigants under the old system, and the traffic rates approved by the rate-making body, the Interstate Commerce Commission, which must be presumed as sufficient for interstate commerce, is enlightening. May it be said that any burden has been placed on interstate commerce by the challenged act, when, as later particularized, the new system, including the excise law (term used merely for designation) in issue, commerce, intra and inter state, has been relieved of $737,825 taxes?

"The principle that these laws must be considered together is approved in *Baker v. Druesedow*, 263 U. S. 137, 44 S. Ct. 40, 68 L. Ed. 212, and cited cases; *Greene v. Louisville & I. R. Co.*, 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280; *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 52 S. Ct. 631, 76 L. Ed. 1232, 84 A. L. R. 831. If the state has not by all of its taxation legislation, burdened interstate commerce, it may not be criticized. *Hebert v. Louisiana*, 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270, 48 A. L. R. 1102; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160. • • •

"The plaintiffs are receiving all of the revenue they received prior to the act in issue, with no added burden on interstate commerce, or at all. No burden could be

placed upon interstate commerce by the changed taxing system, if the tax has been lessened and no reduction of tariff rates made, as in this case.

* * * * * * * * *

"* * * Obviously complainants 'suffer no harm from the provisions of the statute.' *Osborne v. Florida*, 164 U. S. 650, 17 S. Ct. 214, 216, 41 L. Ed. 586. The net saving to the complainants, under the new system, including the excise tax, is $737,825. The excise tax is in no event a direct charge against interstate commerce, and, if it indirectly affects it, it is not forbidden. *Oliver Iron Co. v. Lord*, 262 U. S. 172, 43 S. Ct. 526, 67 L. Ed. 929; *State v. Express Co.*, 80 Wash. 309, 141 Pac. 757.

"This does not take cognizance of benefits to the complainants of the Motor Truck Act (chapter 166, p. 613, Laws 1933), curtailing truck competition and increasing the traffic revenues for the complainants' roads. Instead of taking from other states and contributing to the state of Washington, as contended by complainant in argument, there is actually taken from the taxpayer and patrons of the complainants' roads in the state of Washington $737,825 to apply in other states. Assuredly, complainants may not invoke the Fourteenth Amendment. *Gant v. Oklahoma City*, 289 U. S. 98, 53 S. Ct. 530, 77 L. Ed. 1058. * * *."

"But," appellants argue, "we are required to pay the same *ad valorem* taxes as are imposed on all other property, and on top of that, an excise not exacted of other tax payers."

But this argument, we submit, is patently fallacious. Let us consider, for instance, the total revenue received by the State under its New Tax Plan from the valuable business properties in its larger cities. It receives, first, the *ad valorem* tax exacted of the owner, and in addition, the business or occupational tax exacted of every business enterprise conducted on such business property. From such properties as public stages, trucks, ferries, etc. it first exacts an *ad valorem* tax on the vehicles themselves and on the owners' franchises, and in addi-

tion, an occupational tax measured by the intrastate gross receipts from such activities.

And in this connection we would call particular attention to the fact that although the property of municipal corporations is expressly exempted from *ad valorem* taxation by Article VII of the State constitution, the offending occupational tax is imposed on municipalities operating public utilities and conducting businesses, the same as upon private enterprises (Laws 1933, ch. 191, Sec. 2-e), which provisions have been sustained by the State court. See *Tacoma v. State Tax Commission,* 177 Wash. 604. Needless to say, no small part of the burden of taxation is thus shifted from appellants' property to municipally owned street railways, and water, light and power plants not otherwise taxable.

That the total burden of taxation thus imposed has, as a necessary result of the State's New Tax Plan, been shifted from the appellant companies to these municipalities and to the business carried on in connection with the other general taxable property of the State, is, we submit, conclusively demonstrated by the fact that such appellants' entire tax burden, *ad valorem* and excise, is now materially less than it would have been under the former method of requiring taxable property to bear the entire load.

Counsel profess concern that if the 1933 tax be sustained, the state legislature may raise the rate to 10, 25 or even 50%.

The answer is three-fold: (a) it cannot be presumed that the State will attempt to tax these roads out of existence; (b) appellants' patrons who must ultimately pay the tax would not tolerate an unreasonable

exaction; and (c) should counsel's fears be realized, the courts will on application, promptly declare such an unreasonable and discriminatory imposition invalid as violative of the constitutional provisions which appellants now seek to invoke.

Since the 1933 measure was adopted, the sorely pressed State legislature has twice convened, but has not raised the rate as to railroads beyond that originally imposed on several other utilities including telephone companies, but instead, has exacted of the State's citizens a 2% retail sales tax to meet the emergency. (Laws 1935, Ch. 180.)

EFFECT OF NEW TAX PLAN ON APPELLANT, TELEPHONE COMPANY:

This company has received all the benefits of a tax reduction on its property, without necessarily suffering from the imposition of the occupational tax. It concedes that it is making at least some net returns on the fair value of its property used in its intrastate operations. (PT Rec. 4.) There are no competitive companies in the field which it occupies. (PT Rec. 68.) It neither alleged nor proved that its rates could not be so increased as to cover the excise exacted without loss of patronage. Yet it also concedes that it has made no application to any regulatory body, state or federal, for an increase of its rates for the purpose of meeting the tax. (PT Rec. 100.)

There is nothing in the Occupational Tax Act which prevents it from passing the tax on to its patrons.

Not only does the State court in effect so hold in the cases before us, but in *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 410, it was said:

"Moreover, the farmer cannot pass the tax to the

ultimate consumer, while all those later dealing with his products, like all others engaged in commercial pursuits, may and probably will very largely do so."

And in *Cascade Telephone Co. v. State Tax Commission,* 176 Wash. 616, the court, if it did not squarely so hold, at least strongly implied that the fact that the Governor vetoed the section of the Act *requiring* the taxpayer to pass the tax along to the ultimate consumer, did not prevent the taxpayer from doing so if he chose. A similar suggestion is found in *Tacoma v. State Tax Com.,* 177 Wash. 604, 611.

Indeed, none of the appellants even suggest that there is anything in the Act even impliedly forbidding that the tax be passed along to appellants' customers.

"To add by implication" said Your Honors in *American Express Co. v. Michigan,* 177 U. S. 404, 412, "such a provision to a tax law would be contrary to its intent, and be in conflict with the general object which a law levying taxes is naturally presumed to effectuate."

If on application to the proper authority, the P. T. is allowed (and we have no reason to doubt but that such permission would be granted) to increase its rates to the extent of the tax exacted, obviously that company would be in the position, not of a taxpayer, but of a mere tax collector, and neither its intrastate nor interstate operations would be burdened thereby.

For the reasons so clearly set forth in *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124, 217-8, and *Postal Tel.-Cable Co. v. Richmond,* 249 U. S. 252, 258, we submit that so far as the P. T. is concerned, the tax is an invasion of neither the due process nor the commerce clause of the federal constitution.

In *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124,

it was contended, as here, that the complaining company was required by State law not only to continue to engage in intrastate business, but at designated rates, but the court said:

"The company, as we have seen, cites Sec. 7408 as a compulsion upon it to engage in intrastate business and at designated rates. From the rigor of the requirement Sec. 7409 provides a mode of relief, and until it is denied the company cannot complain under the circumstances presented by this record. In other words, if Sec. 7408 is imperative upon the company to continue intrastate business, Sec. 7409 affords a means of obtaining relief from burdensome obedience. The sections are counterparts. If submission to Sec. 7408 results in insufficient revenue and a burden upon interstate commerce, it is made the duty of the Railway Commission by Sec. 7409 upon complaint of the Postal Company to raise the intrastate rate 'fixed' in Sec. 7408. No attempt to secure relief under Sec. 7409 appears to have been made."

DISCUSSION OF APPELLANTS' SPECIFIC OBJECTIONS TO 1933 OCCUPATIONAL TAX ACT:

The N. P.'s and G. N.'s assignments of error are substantially identical and are to the following effect:

(1) That having held as a matter of law that appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, the State court erred in holding said tax not to be violative of the commerce clause;

(2) That having held that as a practical matter appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, said court erred in holding said tax not to be violative of the commerce clause;

(3) That having found that the appellant's intrastate business is conducted at a loss which must be borne by its income from interstate business, said court erred

in holding said tax not to be violative of the commerce clause and due process clause.

(4) That having found that the appellant's intrastate business is conducted at a loss which must be borne by its income from interstate business, said court erred in holding that the tax was not violative of the commerce clause for the stated reason that the appellant had not exhauted its remedy (by writ of review) to obtain intrastate rate increases, for the reason that such circumstance is immaterial, and not supported by, but contrary to the facts found by the trial court.

The P. T.'s assignments of error are the same as the first two above set forth, to which it has added the following:

(5) That having found that the P. T. cannot, as a matter of law, retire from its intrastate business while continuing its interstate business, the court erred in holding the tax not to be violative of the due process clause.

THE TRIAL COURT'S FINDINGS IN THE N. P. AND G. N. CASES WERE NOT ADOPTED BY STATE SUPREME COURT:

At the outset it is important to note that appellants' various assignments of error are based upon wholly erroneous assumptions. The state supreme court did not hold as to any of the appellants, that it could not, as a matter of law, retire from its intrastate business without also retiring from its interstate business. Neither did it find from the evidence as to any of the appellants that, as a practical matter, such appellant could not retire from its intrastate business without also retiring from its interstate business, or that either railroad com-

pany was conducting its intrastate business at a loss. On the contrary, without passing upon the merits of any of these contentions, the court, for the purpose of argument, merely *assumed* them to be well-taken, and then proceeded to hold each and all of them immaterial and to sustain the tax. This is obvious from the following language of the court:

"The next and, as we view it, the important and difficult question is whether the tax may be collected, even though the railway company, the respondent, may not be able to retire from its intrastate business without also discontinuing its interstate. In this connection, *it will be assumed* (a) that the respondent cannot, as a matter of law, retire from its intrastate business; (b) that it is impractical, as a matter of fact, for it to retire from its intrastate business without also retiring from its interstate; and (c) that the intrastate or local business is conducted at a loss which is taken care of by the receipts from the interstate business. Giving effect to these *assumptions,* inquiry must be directed then to whether the tax is valid, even though the railway company may not be able to retire from its intrastate business without retiring from its interstate, and that the intrastate business is conducted at a loss." (Italics ours.) *State v. N. P. Ry. Co.,* 83 Wash. Dec. 52, 55, 48 Pac. (2d) 931, NP Rec. 57.

But counsel for appellant railroads would have Your Honors believe that the State supreme court adopted the findings of the trial court as its own, such contention being based, apparently, upon the court's following statement in its opinion in the N. P. case:

"As found by the trial court, the interstate and intrastate business in this state is inextricably commingled, and the intrastate business is conducted at a loss, and it is necessary to make up this loss from the income

from interstate business." *State v. N. P. Ry. Co.*, 83 Wash. Dec. 52, 53, 48 Pac. (2d) 931, NP Rec. 55.

But it is perfectly apparent that in using this language the court was merely reciting what the trial court had found. Surely, where the State supreme court reached the conclusion that the offending tax was valid without regard to the trial court's findings, this court cannot assume that, by the above recitals, the State supreme court intended to adopt the trial court findings on these hotly contested issues. It must be remembered that the State had assigned numerous errors based on the trial court's findings on these issues and on the admissibility of the evidence upon which they were seemingly based. (Post, pp. 93-180.) The State court could not, we submit, have intended to overrule all of these numerous assignments without making any reference to them whatever.

Section 2, Article IV, of the State Constitution provides:

"In the determination of causes, all decisions of the court shall be given in writing, and the grounds of the decision shall be stated."

Surely, it should require the most positive and unequivocal language, to persuade Your Honors that the State supreme court had so grievously violated its plain constitutional duty.

Again, we find no such recital in the court's opinion in the G. N. case. See *State v. G. N. Ry. Co.*, 83 Wash. Dec. 66, 48 Pac. (2d) 938, GN Rec. 84.

Moreover, in the P. T. case, an equity cause, in which the lower court made no findings, and in which the complaint expressly alleged that the P. T. was making

a net profit on its intrastate business (PT Rec. 4), we find the State supreme court basing its decision upon its opinion in the N. P. case (*Pac. Tel. & Tel. Co. v. State Tax Commission,* 83 Wash. Dec. 67, 48 Pac. (2d) 938, PT Rec. 151), with no reference whatever to the trial court's findings.

In view of fact, then, that in reaching its conclusions on the law, the State supreme court merely *assumed* that it was impractical for the N. P. to withdraw from its intrastate business, and that it was conducting such intrastate business at a loss, the court's opinion, must, we submit, be construed as a mere recital, but without endorsement, of the trial court's findings. Nothing more.

Disposition of appeals if assumptions found material.

What disposition, then, should be made of these appeals should Your Honors conclude that the tax would be invalid on the basis of an assumption that the appellants cannot, as a matter of law, retire from their intrastate business without also retiring from their interstate business?

The correctness of this assumption necessarily involves purely a construction of the local constitution and statutes, as to which the State supreme court's decision is controlling. Consequently, if the correctness of this assumption is found to be material, it would seem that Your Honors should not attempt to decide this question of local law, but should make such disposition of the appeals as to permit the State supreme court to exercise its undoubted prerogative in this regard. *Clark v. Williard,* 292 U. S. 113, 128-9.

But if, as we contend, the Washington constitution and statutes would themselves be violative of the com-

merce clause if given the assumed construction, then obviously this assumption of the State court should be wholly disregarded, since it would be wholly useless and ineffectual for the State court to reach a conclusion which would in and of itself, wholly vitiate such state statutes and constitutional provisions.

APPELLEE'S OBJECTIONS TO TRIAL COURT'S FINDINGS AND RULINGS ON ADMISSIBILITY OF EVIDENCE IN N. P. AND G. N. CASES.

In its appeals to the State supreme court in each of these cases, the appellee here, as appellant there, assigned numerous errors both as to the propriety of the trial court's findings, and as to the admission of evidence received in support of the same. May we note that in its designation of additional portions of the record to be printed in the N. P. and G. N. cases (NP Rec. 325-6; GN Rec. 293-4), the appellee requested that the clerk print those portions of its State court briefs setting forth its assignments of error. While these assignments are printed in the G. N. transcript (GN Rec. 79-83), we fail to find them in the N. P. transcript, but since they appear in the unprinted record and are set forth herein, we assume that this court will notice them.

Under the Washington practice, the complaining party may base error upon adverse findings without the necessity of taking exceptions thereto in the trial court. (NP Rec. 77; GN Rec. 108) But in the appellant's brief, each error relied upon must be clearly pointed out and separately discussed. (NP Rec. 76; GN Rec. 108)

Appellee's purpose in requesting that such assignments be certified to this Court was to show that it had assigned error in the State supreme court based on these various adverse findings and rulings of the trial court,

which assignments the court had failed to consider for the reason that, to sustain the offending tax, it was found unnecessary to do so. This appellee believed necessary not only to advise Your Honors that appellee had not acquiesced in the trial court's findings and rulings, but to show that if such findings were deemed material, appellee was entitled to have the same reveiwed either by this Court, or to have the causes remanded for that purpose to the State supreme court.

Of course, should Your Honors follow any other course, it would mean that the State would be wholly deprived of its unquestioned right to have these adverse findings and rulings of the trial court reviewed either by this or the State supreme court.

Upon an appeal from a decree of the Supreme Court of the Philippine Islands erroneously reversing the trial court solely on a question of law, this Court held in *Philippine Sugar &c. Co. v. Philippine Islands,* 247 U. S. 385, that, in order to dispose finally of the case, Your Honors might review the facts, when all the evidence proffered was admitted, and was in the record, and where the appellant in the court below sought to review the trial court's findings.

The Court will find the evidence on the question of whether or not the appellant railroads are in fact losing money on their local business, and the trial court's adverse rulings on the admissibility of evidence relating thereto, reviewed at length in Appendix "A" (Post, pp. 93-151) as to the N. P., and in Appendix "B," (Post, pp. 152-180) as to the G. N.

EVIDENCE AS TO N. P. AND G. N. NET EARNINGS IN INTRASTATE BUSINESS IN 1933.

The Northern Pacific:

The undisputed evidence showed that instead of losing $413,866 as claimed, had the N. P. computed its passenger operating expense on the same basis as the G. N., its net earnings would have been $87,710; and having made this correction, had it apportioned taxes on a relative use basis as required by the *Minnesota Rate Cases*, 230 U. S. 352, instead of on a relative gross revenue basis, its net earnings would have been $285,131; and having made these corrections, had it correctly apportioned traffic expenses, and not charged pensions as an operating expense, its net earnings would have been $457,160. Having made these corrections, had the N. P., in its calculations, used the intrastate revenues reported to the D. P. W., its net earnings would have been $583,154. (Post, pp. 140-1.)

The Great Norhern:

The undisputed evidence showed that by its own calculations, by using the intrastate revenues reported to the D. P. W., its net earnings were $202,458, and not deducting car and joint facility rentals as an operating expense, its net earnings were $491,544. (GN Ex. "11," p. 1, GN Rec. 258.)

But making the full deductions from its reported revenue as claimed, and not deducting car and joint facility rents as an operating expense, its net earnings were $114,152. (GN Ex. "11," p. "A," item 5, GN Rec. 254.) And even making such deductions from revenue and deducting such car and joint facility rents as an operating expense, but correctly apportioning taxes and joint facility rents, eliminating pensions as an oper-

ating expense, and eliminating duplications of expense, its net earnings were $132,256. (Post, pp. 175-6.)

G. N. AND N. P. CONCEDED A SUBSTANTIAL PROFIT FROM THEIR INTRASTATE FREIGHT BUSINESS.

The N. P. admittedly made a profit of $729,940 on its intrastate freight business, but claimed to have absorbed such profits in its claimed net loss of $1,143,806 on its passenger business with a resulting claimed net loss on the two activities combined of $413,866. (Post, pp. 141-3.)

The G. N., on its most extreme calculations, admittedly made a profit of $430,234 on its intrastate freight business, but claimed to have absorbed such profits in its claimed net loss of $529,503 on its passenger business with a resulting claimed net loss on the two activities combined of $99,269. (Post, pp. 176-8.)

Surely it cannot be seriously contended that any valid statute or constitutional provision, either state or federal, can compel an intrastate carrier to continue its intrastate passenger business, every dollar of revenue from which costs the carrier $1.95 (as the G. N.), and $3.66 (as to the N. P.). See *Railroad Commission v. Eastern Texas R. R.*, 264 U. S. 79.

And if such carrier elects to continue such losing local passenger business, why, we ask, charge the loss to its local freight profits, rather than to its system passenger business to which its local passenger business is at best, merely incidental?

For the purpose of this inquiry, should not these carriers' passenger and freight operations, we ask, under the circumstances here revealed, be treated as separate and distinct business activities for the purpose of determining the validity of the offending tax?

RAILROAD APPELLANTS' CONTENTION THAT OCCUPATIONAL TAX ACT INVALID AS TO THEM, IF THEIR INTRASTATE BUSINESS IS CONDUCTED AT A LOSS.

We submit that under the facts revealed by the record the State supreme court was absolutely correct in not condemning the tax on the ground urged. To quote the language of the court:

"But it is said that the intrastate business is being conducted at a loss, and this loss must be borne by the interstate business and therefore is a burden upon interstate commerce. There is an expression in the case of *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 39 S. Ct. 265, that would appear to support this contention, even though the question was not necessarily involved in that case; and further, in that case there was not involved an excise tax based upon gross income, as here.

"In this state, if the respondent's intrastate business is conducted at a loss, the legislature has provided a remedy, first, by application to the department of public service, with the right of review by the superior court and an appeal to this court. From the findings, it appears that an application has been made and denied by the department, and that another application is pending. It does not appear, however, that the respondent has exhausted the relief granted by the statute, and until it does so, it cannot be said that, even though the intrastate business is being conducted at a loss, it is such a burden upon interstate commerce as would justify holding the law unconstitutional.

"The facts in the case of *Postal Telegraph-Cable Co. v. Fremont*, 255 U. S. 124, 41 S. Ct. 279, presented a similar question, and it was there held that, where the state law affords a means to prevent the tax from burdening interstate commerce, through an application to increase intrastate rates, the tax will not be held void, in the absence of a showing that the company had exhausted the remedy afforded by an increase of the rates on intrastate business. We see no just or legal reason why the respondent should not comply with chapter 191, as all other businesses in this state are required to do." *State v. N. P. Ry. Co.*, 83 Wash. Dec. 52, 61-2, 48 Pac. (2d) 931; NP Rec. 54, 62.

The court recites, it will be noted, that "from the findings, it appears that an application" (for an increase in local tariffs) "has been made and denied by the department, and that another application is pending."

But it definitely appears from counsel's own admissions that neither the N. P. nor G. N. has ever sought an increase of rates from either the D. P. W. or the I. C. C. *by reason of the imposition of the occupational tax.* Thus, speaking of the showing made by the N. P. and G. N. in certain rate investigations pending before each of those bodies, counsel for the N. P. said:

"There was no occupational tax included, because none had ever been levied against the railroad, much less collected, and we don't think any will ever be collected, either. So it certainly was not in the showing." (NP Rec. 154; GN Rec. 200.)

And in the rate proceeding instituted by these roads before the D. P. W. in September, 1934, the railroads did not make any claim based on the occupational tax. (NP Rec. 155; GN Rec. 200.)

Thus the records reveal that far from petitioning these regulatory bodies for an increase of rates to meet the occupational tax, they have always taken the position that such tax is void as to them.

True, each of these carriers alleged in its answer (NP Rec. 13; GN Rec. 19), and secured a finding of the trial court (NP Rec. 50; GN Rec. 73) to the effect that most of its local rates cannot be raised, because of competitition from other kinds of transportation. But there is, we submit, not a syllable of evidence in the record to justify any such finding.

The "competition" referred to, is no doubt highway

transportation companies, but the same tax imposed on railroads is likewise exacted of truck lines. (Laws of Wash. 1933, Ch. 191, Sec. 2(2)(e)XI.) May it not therefore be fairly assumed in the absence of evidence to the contrary, that these competitors have met with the same problem as these appellants as to the necessity of a rate increase to meet the tax. Indeed, the problem of the trucks is all the more pronounced in that their total tax burden is very materially increased by the New Tax Plan whereas that of the railroads, as we have shown, is materially lightened.

The only evidence offered by these roads in support of their allegations of inability to raise *many* of their local rates, was an order of the D. P. W. dated April 27, 1933, denying the carriers' application made January 13, 1933, for an order extending to September 30, 1933, a 15% local rate increase then in effect, to September 30, 1933 (NP Rec. 14-16; GN Rec. 21-23), which order recited that it was a matter of common knowledge that "the present level of rail rates is too high to permit freedom of movement by rail."

But it is apparent that the rates to which the commission referred were the rates which had been in effect up to March 30, 1933, but a few days before such order was entered. It would have had no occasion to speak of any other rates.

Moreover, the effect of the order was to deny a 15% increase. To meet the occupational tax, only a 1½% increase would have been necessary. There is nothing in the order to indicate that the D. P. W. had any occasion to consider the effect of the occupational tax. Nor could it have had, since the order was made in April, 1933, and

the Tax Act did not take effect until August 1, 1933,

It must follow that any statements made in this order relative to the existing rates being as high as the traffic would bear, could not have been made in the light of the imposition of the occupational tax, which would fall as heavily, if not more heavily on the railroads' competitors than on the railroads themselves.

It would not follow, we submit, that because the local traffic would not bear a 15% rate increase, these carriers would have lost patronage because of a 1½% increase in rates.

But the most persuasive reason why any recitals in this order are wholly immaterial is that it is obviously directly opposed to the railroads' own position in these proceedings. If these carriers honestly believe what they allege in their answers, that not many of their local rates can be increased on account of competition, then *why were they before the D. P. W. in April, 1933, petitioning for an increase in such rates? And why, in September, 1934, were they again before the D. P. W. and I. C. C. seeking such an increase?* [NP Rec. 155; GN Rec. 200.]

These carriers cannot, we submit, be heard to assert in one proceeding that the facts justify an increase in their local rates and in other proceedings taken but a few weeks before the trial of these cases, that such increases are wholly unwarranted.

Nor, as already pointed out (Ante, pp. 35-36) is there anything in the Occupational Tax Act indicating a legislative purpose to forbid the public service companies so taxed from thus shifting the burden by an increase of rates. See *State ex rel. Stiner v. Yelle,* 174 Wash. 402,

410; *American Exp. Co. v. Michigan,* 177 U. S. 404, 412-3, and other cases heretofore cited.

The appellant railroads, having never applied to any regulatory body, let alone a reviewing tribunal, for permission to increase their rates *to meet the occupational tax,* cannot now be heard to assert that the same is a burden on interstate commerce either because they are doing local business at a loss, or that they are under legal compulsion to continue their intrastate operations. *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124; *Postal Tel.-Cable Co. v. Richmond,* 249 U. S. 252; *Chicago, etc. R. R. Co. v. Hedges,* 5 Fed. Supp. 752, 759-60.

As shown in our review of the evidence bearing thereon, the record does not support these appellants' claim that in 1933 either of them actually conducted its intrastate business at a loss. (See post, pp. 35-6.) But if such a showing had in fact been made, there is nothing in the record to show that 1933 was representative of what was to be expected in future years. The G. N. made no attempt to show that its 1933 operations were representative, and from such showing as the N. P. attempted, it appeared that 1934 showed at least some improvement over 1933. (Post, pp. 148-151.) In *Williams v. Talladega,* 226 U. S. 404, 417, a eleven-months test period was held insufficient, and in *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124, 126, a finding of the State Court that a two-year test period was insufficient was not disturbed. In his concurring opinion in *Chicago, etc. R. Co. v. Hedges,* 5 Fed. Supp. 752, 760, Judge Cushman said:

"The bills of complaint make no disclosure as to income and expense other than for the years 1932 and 1933. It was stated, in effect, upon the hearing, and not disputed, that no application had been made under the

Public Service Commission Law to increase rates.

* * * * * * * *

"Complainants' case is based upon the presumption that future results will be similar to those already experienced, but such presumption cannot be indulged where there have been so numerous, radical, and far-reaching changes. When such presumption obtains, it depends upon the existence and continuance of the applicable precedent conditions. Any determination now reached, it is clear, would be based upon little more than conjecture and speculation."

Inasmuch as the reasonableness of a rate depends upon whether or not it yields a fair return, the sum required to meet the operating expenses of the utility must be considered. Taxes to which the utility is subject in the performance of its public duties, including state taxes on earnings and federal income taxes are to be considered as part of its operating expenses.

51 C. J. 25;

Galveston Elec. Co. v. Galveston, 258 U. S. 388, 399;

Georgia Ry. v. R. R. Com., 262 U. S. 625, 633.

We submit that the Act is not vulnerable to attack by reason of the claimed present inadequacy of appellants' earnings from intrastate business.

CONTENTION THAT OCCUPATIONAL TAX ACT IS VIOLATIVE OF COMMERCE CLAUSE IF APPELLANTS, AS MATTER OF LAW, CANNOT RENOUNCE THEIR INTRASTATE BUSINESS WITHOUT ALSO WITHDRAWING FROM THEIR INTERSTATE BUSINESS.

Answering this contention, the State supreme court said (*State v. N. P. Ry. Co.,* 83 Wash. Dec. 52, 56, 48 Pac. (2d) 931, NP Rec. 54, 57-61):

"In the case of *Sprout v. South Bend,* 277 U. S. 163, 48 S. Ct. 502, 62 A. L. R. 45, the court had before it an ordinance of the city, in the state of Indiana, which prescribed license fees varying in amount depending upon

the seating capacity of a bus, the bus company being engaged in both intrastate and interstate business, and it was there held that 'the ordinance is void because of the imposition of the license fee.' In the course of the opinion, it was said that a state may, by appropriate legislation, require the payment of an occupation tax from one engaged in both intrastate and interstate commerce, but, in order that the fee or tax may be valid,

"'* * * it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.'

"It will be observed that one of the conditions there placed upon the right of a state to impose the tax is that the person or corporation taxed 'could discontinue the intrastate business without withdrawing also from the interstate business.' The last quoted expression, so far as we are informed, was first used in the case of *Pullman Co. v. Adams,* 189 U. S. 420, 23 S. Ct. 494, where the tax involved was in a specific amount, levied upon

"'* * * each sleeping and palace-car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad-track over which the company runs its cars.'

"In the case of *Cooney v. Mountain States Tel. & Tel. Co.,*— U. S. —, 55 S. Ct. 477, there was involved a statute of the state of Montana prescribing a tax 'for each telephone instrument used in the conduct of the business of operating or maintaining telephone lines and furnishing telephone service in the state of Montana.' There, the telephone company, as is the railroad company here, engaged in both intrastate and interstate business, and it was held that a privilege or occupation tax which a state imposes with reference to both kinds of business, though an indiscriminate 'application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid.'

"It will be observed that in none of the three cases mentioned was the tax based upon the gross income of the intrastate business. There is a difference between

a tax imposed as a license to do business or upon the instrumentality and a tax based upon the gross income. If the tax be a license tax or one upon the instrumentality, it necessarily inheres in the interstate as well as the intrastate business. Where the tax is upon the gross income, the income from the interstate business may be segregated from the intrastate and be held valid.

"In the case of *Bowman v. Continental Oil Co.*, 256 U. S. 642, 41 S. Ct. 606, the state of New Mexico had imposed an excise tax of two cents for each gallon of gasoline sold or used, and an annual license tax of fifty dollars for each distributing station or place of business. The oil company was engaged in both interstate and intrastate business. It was held that the two cents tax per gallon could be sustained because the income from the intrastate business could be segregated from the interstate, but that the fifty dollar tax was void because no such segregation could be made. It was there said:

" 'The applicable rule is that laid down in *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, where, in response to a question whether a single tax, assessed by a state upon the receipts of a telegraph company derived partly from interstate commerce and partly from commerce within the State, but returned and assessed in gross and without separation or apportionment, was wholly invalid or invalid only in proportion and to the extent that the receipts were derived from interstate commerce, this court unanimously answered that so far as levied upon receipts derived from interstate commerce the tax was void, but so far as levied upon receipts from commerce wholly within the State it was valid. This case has been cited repeatedly with approval and its principle accepted. *Western Union Telegraph Co. v. Alabama*, 132 U. S. 472, 476-477; *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192, 200-201; *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692, 697; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 31.

" 'But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void under the authority of *Leloup v. Port of Mobile*, 127 U. S. 640,

647; *Crutcher v. Kentucky*, 141 U. S. 47, 58-59; *Williams v. Talladega*, 226 U. S. 404, 419; and other cases of that character'.

"In the case of *Cooney v. Mountain States Tel. & Tel. Co., supra*, it was distinctly pointed out that the tax there involved was

"'* * * not laid on revenue derived from monthly rates as distinguished from toll charges. It is not imposed with respect either to the nature of the revenue, or to the character of the service from which the revenue is derived, or to the manner in which the charges for the service are fixed.'

"From what is there said, it would appear to be a reasonable inference that, if the tax were of the character described in the quotation just made from the opinion, the result might be different.

"In *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 51 S. Ct. 499, the state of Ohio imposed upon every corporation engaged in the business of supplying consumers within the state with natural gas for light, heat or power a tax based upon the gross receipts, and the law was sustained. The East Ohio Gas Company, which resisted the tax, was engaged both in interstate and intrastate business. It brought gas from the states of West Virginia and Pennsylvania over high pressure pipes, and, as stated in the opinion, this was interstate commerce until it reached the distributing pipes which supplied the consumers, and after that it became intrastate and was subject to the tax. In the course of the opinion in that case, we find the same statement with reference to the conditions precedent to the right of a state to impose a tax upon a person or corporation engaged in both intrastate and interstate business, as appears in the quotation from the case of *Sprout v. South Bend, supra*. In the *Ohio Gas Co.* case, however, the court did not apply the provisions that the gas company could not retire from its intrastate business without withdrawing from its interstate business. The facts, as they appear in the opinion, make it plain that, if the gas company had withdrawn from its intrastate business, it would have completely destroyed its interstate business. The tax there involved was not one upon the instrumentality or a license tax, but was an excise or a tax upon the privilege of doing business.

"The result of the holding in that case, as we view it, would sustain a holding in the case now before us that the tax upon the gross income of the intrastate business was valid, even though the railway company could not withdraw from that business without also withdrawing from its interstate business. We do not look upon cases which involve either a tax upon instrumentalities or a license tax as applicable to the law now in question, which imposes, as already indicated, an excise or tax on the privilege of engaging or continuing in business."

EVEN WERE APPELLANTS UNDER LEGAL COMPULSION TO CONTINUE THEIR INTRASTATE BUSINESS EVEN AT A LOSS, TAX WOULD NOT BE DEEMED AN UNLAWFUL BURDEN ON INTERSTATE BUSINESS UNTIL APPELLANTS HAD BEEN DENIED RATE INCREASES TO MEET TAX.

The same contention as made here by appellants, was made without success in *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124, 128. May we here repeat the following language already quoted from that case:

"The company, as we have seen, cites § 7408 as a compulsion upon it to engage in intrastate business and at designated rates. From the rigor of the requirement § 7409 provides a mode of relief, and until it is denied the company cannot complain under the circumstances presented by this record. In other words, if § 7408 is imperative upon the company to continue intrastate business, § 7409 affords a means of obtaining relief from burdensome obedience. The sections are counterparts. If submission to § 7408 results in insufficient revenue and a burden upon interstate commerce, it is made the duty of the Railway Commission by § 7409 upon complaint of the Postal Company to raise the intrastate rate 'fixed' in § 7408. No attempt to secure relief under § 7409 appears to have been made."

True, here the revenue measure does not itself provide the machinery for an application for rate increases, but other regulatory measures do, and until appellants have exhausted the remedy thus afforded, they have no reason to complain.

It would, we feel, be an impertinence to attempt to add anything further to what has been so clearly stated by the State supreme court in this connection.

But we do not agree that there is any such legal obligation as the court assumes.

STATE SUPREME COURT HAS NOT CONSTRUED STATE STATUTES AND CONSTITUTION AS REQUIRING APPELLANTS TO RENOUNCE THEIR INTERSTATE BUSINESS IF THEY WITHDRAW FROM THEIR INTRASTATE BUSINESS.

As heretofore noted, in the present cases the State supreme court merely assumed such to be the law, for argument's sake. And obviously, if in other cases the State supreme court has not construed the State constitutional and statutes as thus assumed, appellants' contention must be without merit.

Appellants contend that under the Public Service Commission Law (Ch. 117, Laws of 1911) and Article XII, Sections 13, 14, 15, and 19, of the state constitution, they cannot withdraw from their intrastate activities while continuing to carry on their interstate business.

Before examining the local decisions, may we suggest that only the sovereign could complain should appellants elect to withdraw from their local business. No one, we submit, can question appellants' right to retire from their local business *with the State's consent. Day v. T. R. & R. Co.*, 80 Wash. 161, 166 and cases cited. But neither appellant contends that it has ever sought the State's permission to renounce its local business. Until it does so, it is hardly in a position to claim that such consent, if in fact necessary, would be withheld.

TAX ACT ITSELF PERMITS WITHDRAWAL.

The Act provides:

"If any person shall engage or continue in any business * * * for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington, a license under this act to engage in and to conduct such business * * * for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such function." (Sec. 3, ch. 191, Laws of 1933.)

Another section (Sec. 17, ch. 1[illegible], Laws 1933) provides for the institution of injunction proceedings in the name of the state to restrain the continuance of any taxable business until the tax is paid.

Any person or corporation engaged in a taxable activity is thus given the option of either withdrawing therefrom, or paying the tax. Surely the sovereign State exacting such tax could not be heard to complain of such renunciation.

By the very constitutional provisions upon which appellants rely, railroad, telegraph and telephone companies are "declared to be common carriers and *subject to legislative control.*" (See Art. XII, Secs. 13 and 19.) Surely, no form of "legislative control" could be deemed more legitimate than the exercise of the right of taxation. Nor could the prohibition until payment of the continuance of the business taxed, be deemed an unreasonable or unusual method of tax enforcement.

Article 11, Sec. 5, of the Idaho Constitution provides:

"All railroads shall be public highways, and all railroad, transportation, and express companies shall be

common carriers, and *subject to legislative control,*" etc.

The case of *Northern Pacific Ry. Co. v. Gifford,* 25 Ida. 196, 136 Pac. 1131, 1136, involved the validity of a license tax measured by authorized capital stock, imposed upon all foreign and domestic corporations doing a local business in the state of Idaho. In upholding the tax as to foreign railroad and express companies doing an interstate and local business the court said:

"In this connection it has been suggested by counsel for respondent that under the provisions of section 5 of article 11, of the state Constitution the respondent corporation as a common carrier could not decline or refuse to carry on domestic or intrastate business. This provision of the Constitution is dealing with domestic business and with corporations doing business in this state as distinguished from interstate business. *Foore v. Simon Piano Co., supra.* But, if it were otherwise, this provision of the Constitution says they are subject to *legislative control,* and in the case at bar the Legislature has spoken and designated the terms on which respondent can do business in the state, and that, upon failure to comply with the legislative requirement, it shall have no existence or standing in the state so far as local and intrastate business is concerned, and shall have no standing in the courts for the purpose of prosecuting actions or defending any rights of property. *We conclude, therefore, that to refuse to comply with this provision of the statute, and to become outlawed so far as it involves its right to do business in this state, would not subject it to another process compelling it to do the very business that it is prohibited doing under this legislative direction.*" (Italics ours.)

The foregoing decision was later adhered to in *Northern Pacific Ry. Co. v. Gifford,* 27 Ida. 667, 151 Pac. 909.

Here, as in the Idaho case, the legislature has designated the terms on which appellants may do a local business in this state, namely, by paying the occupational tax exacted, and that upon failure so to do, they have no

right to continue a local business. In view of this requirement, it would seem that the conclusion of the Idaho court is inevitable.

In *State v. Northern Express Co.*, 80 Wash. 309, it was held that a state law levying an excise or privilege tax upon express companies measured by 5% of their gross receipts from intrastate business only, did not impose a burden upon interstate commerce.

It was further held that since the State had no power to place a burden upon interstate commerce, an interstate express company doing business in that state was free to renounce its intrastate business, notwithstanding the constitutional and statutory provisions making express companies common carriers subject to state control, and prohibiting discrimination in privileges and transportation charges.

The case was heard *en banc*, the court overruling its former departmental decision (76 Wash. 636) relied upon by appellants here.

Answering the express company's contention that under the state statutes and constitution it was not at liberty to abandon its intrastate business while continuing its interstate activities within the State, the Court said, after reviewing numerous decisions including *Pullman Co. v. Adams*, 189 U. S. 420:

"Respondents make a general reference to the public service commission law of 1911 as supporting their contentions. It may be answered that no provision of that law could operate as a regulation upon interstate commerce. All that it seeks to do, and all that the state has power to do, is to impose regulations upon local business, and while the state cannot say to the foreign corporation, 'We will annex certain conditions with which you must comply before you can do an inter-

state business in or through this state,' it can say to such corporation, 'If you choose to do a business which is purely local in its character and which has attached to it no elements of interstate commerce, you must submit that business to the regulation and control of the laws of this state.' To go further than this, the state has not attempted, or if it has, its attempt is vain. So far as any constitutional provision is concerned, we find no essential difference between our constitution and that of the State of Mississippi referred to in the *Adams* case. Our constitution provides, in Sec. 13, Art. 12, that 'all railroad, canal and other transportation companies are declared to be common carriers and subject to legislative control.' Section 195 of the constitution of Mississippi reads: 'Express, telegraph, telephone, and sleeping car companies are declared common carriers in their respective lines of business, and subject to liability as such.' If, under this provision of the Mississippi constitution, nothing could be found compelling express companies to do a local business, we can find nothing in the language of our constitution which adds any such power. The whole theory of state control of public service corporations is based upon the doctrine, as expressed in *Munn v. Illinois,* 94 U. S. 113, that, when one devotes his property to a public use, he grants to the public an interest in that use, and must submit to be controlled by the public for the public good to the extent of the interest he has created. 'He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to control.' So here the express company may withdraw its property from any local use and discontinue such use; but so long as it continues in such use, it must submit to state control and regulation.'' (pp. 324-5.)

It will be urged that the *Northern Express* case was modified or overruled in the later case of *Great Northern Railway Co. v. State,* 147 Wash. 630, 646-7, likewise an *en banc* decision, wherein appears the following language:

''We are firmly convinced, however, and we are bound by our convictions to so decide, that under the more recent cases of the supreme court of the United

States, particularly that largely quoted from, *International Paper Co. v. Commonwealth of Massachusetts, supra,* the operation of the statutes in question here, under the commerce clause of the federal constitution, necessarily burdens such interstate commerce, *because (1)of the legal condition that respondent is a public carrier largely engaged in business in this state and not free to withdraw therefrom;* (2) under such conditions the state by the exaction of these fees is compelling such foreign corporation, as a condition of its right to do a local business in this state, to submit to a burden on its interstate business; and, (3) that the statutes violate the due process clause of the Fourteenth Amendment to the federal constitution because of imposing a tax on property beyond the jurisdiction of the state." (Italics ours.)

The court does not say, it is to be noted, whether the company's want of ability to withdraw was due to restrictions in the State or federal statutes, or to practical necessity.

What the court intended to say, we submit, is that the interstate railroad company was not free to withdraw as a practical matter, by reason of the intercommingling of its intra and interstate activities—and for the following reasons:

(1) The court says, it will be noted:

"We are firmly convinced * * * that *under the more recent cases of the supreme court of the United States* * * * the statutes in question * * * necessarily burdens such interstate commerce, because (1) of the legal condition that respondent is a public carrier largely engaged in business in this state and not free to withdraw therefrom;" etc. (Italics ours.)

But a careful search shows that there were no United States supreme court decisions tending to support the conclusion that the railroad company was forbidden by constitution or statute from withdrawing from its local business.

(2) Other language used in the opinion shows that the court could not have intended that the company was forbidden by law from withdrawing from its local business. Thus, in commenting on a case relied upon by counsel, the court said (147 Wash. 646):

"It will be noted that that case was not a case involving a public carrier required to do business in this state and unable to withdraw therefrom. *It was more free to withdraw* than was Northern Express Company in the case cited in 80 Wash. 309, 141 Pac. 757, and perhaps as free to withdraw as the two complaining parties in 136 Wash. 285, 239 Pac. 840 and 138 Wash. 72, 244 Pac. 398, cases heretofore cited." (Italics ours.)

It is apparent, of course, that here the court was speaking of the ability of the company to withdraw from its state business *as a practical matter*. Otherwise, why imply that there were different degrees of freedom to withdraw? If continued operation was made mandatory by constitution or statute, the duty was absolute, not relative.

(3) After having so exhaustively considered the question in the *Northern Express* case (80 Wash. 309), and having concluded that an interstate carrier was under no statutory or constitutional compulsion to continue its intrastate operations, it is inconceivable that the court could have intended, without discussion, to have overruled its earlier decision.

But were there any doubt as to the effect of the Great Northern case on the attitude of the present court, it is, we submit, set at rest by what was said in the cases from which these appeals are taken. To quote:

"So far as the opinion in the case of *Great Northern R. Co. v. State*, 147 Wash. 630, 267 Pac. 506, is out of harmony with the holding in this case, it will be dis-

approved." *State v. N. P. Ry. Co.*, 83 Wash. Dec. 52, 62, 48 Pac. (2d) 931, NP Rec. 54, 63.

IT IS NO LONGER WITHIN THE STATE'S POWER TO DENY THE APPELLANT RAILROADS THE RIGHT TO DISCONTINUE THEIR INTRASTATE ACTIVITIES.

It is, of course, recognized by all courts that Congress has the unquestioned right to regulate intrastate commerce when the situation becomes such, by reason of the interblending of the interstate and intrastate operations of the enterprise that adequate regulation of the particular commerce between the states cannot be maintained without regulating intrastate transactions of a like character.

This rule is elaborately and convincingly explained in the well considered case of *Stafford v. Wallace*, 258 U. S. 495, 517 *et seq.*, where the authorities are cited and reviewed. More recent cases affirming this rule are: *Georgia Public Service Com. v. U. S.*, 283 U. S. 765; *Alabama v. U. S.*, 283 U. S. 776, and *U. S. v. Louisiana*, 290 U. S. 70.

Thus, in *Railroad Commission v. C. B. & Q. R. Co.*, 257 U. S. 563, it was held that the I. C. C. had authority under the Transportation Act of 1920 to fix passenger rates on intrastate business to the end "that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system," both intra and interstate.

And in *Colorado v. U. S.*, 271 U. S. 153, it was held that under the 1920 Transportation Act the I. C. C. had power to authorize abandonment, as respects both intrastate and interstate traffic, of a branch line of railroad lying wholly within a state, upon the ground that con-

tinued operation would result in large operating deficits constituting an undue burden upon interstate commerce, even where the State was present resisting such abandonment.

In *Texas v. U. S.*, 292 U. S. 522, it was held that the I. C. C. has power to authorize a lease of one interstate railway to another permitting the lessee to abandon or remove general offices and shops of the lessor, the maintenance of which as found by the Commission would entail unnecessary and wasteful expenditures, even though such abandonment or removal was forbidden by the statutes of the State of the lessor's incorporation in which such offices and shops were located.

"Even explicit charter provisions," it was there said, "must yield to the paramount regulatory power of the Congress."

And Your Honors cited numerous authorities as supporting the following excerpt:

"Obligations assumed by the corporation under its charter of providing intrastate service are subordinate to the performance by it of its federal duty, also assumed, 'efficiently to render transportation services in interstate commerce.'" (292 U. S. 531-2.)

It must therefore follow that whatever provisions may be found in the constitution and statutes of the state of Washington which might be so construed as to impose the absolute duty upon interstate railroads of continuing their intrastate business, such provisions, even if otherwise valid, are now, if not wholly superseded, at least suspended and no longer effective by reason of the field being wholly occupied by paramount federal regulations.

FEDERAL REGULATION DOES NOT PREVENT STATE TAXATION.

But it is equally true that Congress has never undertaken to control the action of the states in the imposition

on interstate carriers of either *ad valorem* or privilege taxes.

In *Federal Compress & Warehouse Co. v. McLean,* 291 U. S. 17, 23, this Court said:

"The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy."

No such "obstacle" is, we submit, presented where, as heretofore shown, the State's New Tax Plan actually results in a substantial reduction of the carrier's aggregate tax burden.

The tax there involved was a non-discriminatory tax on the business of storing and compressing cotton.

The following is quoted from *Western Union Tel. Co. v. Texas,* 105 U. S. 460, 466:

"The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a state, and does not affect other nations or states or the Indian Tribes, that is to say, the purely internal commerce of a state, belongs exclusively to the state, is as well settled as that the regulation of commerce which does affect other nations or states or the Indian Tribes belongs to Congress. Any tax, therefore, which the state may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States."

In *Osborne v. Florida,* 164 U. S. 650, 655, it was said:

"It has never been held * * * that when the business of the company which is wholly within the state, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local."

(Quoted in *Kehrer v. Stewart*, 197 U. S. 60, 68, and *Allen v. Pullman Car Co.*, 191 U. S. 171, 181.)

"The importance of the commerce clause to the Union," said Mr. Justice Holmes in *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 395, "of course is very great. *But it also is important to prevent that clause being used to deprive the States of their life-blood by a strained interpretation of facts.*" (Italics ours.)

The following language of the supreme court of Mississippi is impressive:

"It does not matter whether the intrastate business done was nearly equal to the interstate business, the state's control over the intrastate business is full and complete, subject only to the provisions of the Federal Constitution. The powers of the state, not given to the United States government by the Federal Constitution, are reserved to the state or the people. The state constitutes an essential unit in the federal scheme, and the state should not be embarrassed in the operation of its functions within its sphere, but should be left to discharge those functions according to its own conception thereof. This nation, as it was founded, cannot exist without the states fulfilling their proper functions in the scheme. The importance of the powers and rights of the states have not been magnified, and have been frequently overlooked. The power of the state is not restricted except by the Federal Constitution or the State Constitution.

"That which is inherent in intrastate commerce does not lose its essential nature when it becomes a part of transactions in interstate commerce. *York Mfg. Co. v. Colley*, 247 U. S. 21. • • •

"The constitutional equality of the states is essential to the harmonious operation of the scheme upon which the republic was organized. This country is an indestructible union of indestructible states. *Coyle v. Smith*, 221 U. S. 559, 31 S. Ct. 688, 55 L. Ed. 853; *White v. Hart et al.*, 13 Wall. (80 U. S.) 646, 20 L. Ed. 685. In *Texas v. White* it was held that, if a state would exercise its sovereign power, then it must be permitted to exercise its legitimate power in all legitimate ways." *Chassanoil v. Greenwood*, 166 Miss. 848, 148 So. 781, 786.

"We must remember," as Your Honors emphasized in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 154, "that the revenues of the United States must be obtained in the same territory, from the same people, and excise taxes must be collected from the same activities, as are also reached by the states in order to support their local government."

Of course the interstate carrier is enabled to enjoy its privilege of engaging in local business primarily as a result of the privilege so to do originally derived from the states themselves. The respective privileges enjoyed by the carrier, derived from the national and state governments respectively, may be likened to two franchises, one from the federal government, and one from the State. Each is a valuable right, taxable by the sovereignty from whom derived, even when such right, having once been exercised, can be abandoned only with the consent of both.

In *Central Pacific R. R. v. California,* 162 U. S. 91, it appeared that the interstate road had two franchises, one from the Federal government and one from the State. The possession of either would have entitled it to operate without the other. The Court sustained the action of the State assessing board in its assessment and taxation of the State franchise notwithstanding the possession by the road of the Federal franchise which was alone sufficient to authorize its operation. In so holding it was said (p. 127):

"If the state franchise to be assessed were confined to the right to operate the road and take tolls, such a franchise was originally granted by the State to this company, and as such was taxable property. If the subsequent acts of Congress had the effect of creating a Federal franchise to operate the road, that merely rendered the state right subordinate to the Federal right, and did not destroy the state right nor merge it into

the Federal right, and no authority is cited to sustain any such proposition. * * * Whether plaintiff in error now operates its road under the franchise derived from the United States or from the state is immaterial, as the Supreme Court well said. The right to operate the road is valuable, whether it is being exercised or not, and the question, we repeat, relates to the existence of the franchise, and not to the extent of its value."

Recognizing the principle that because intrastate activities are not immune from state taxation simply because subject to federal regulation, this court has repeatedly held that decisions holding a given activity subject to state taxation, are not pertinent in determining whether such activity is subject to federal regulation. For example:

"The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. It does not follow that because a thing is subject to state taxation it is also immune from Federal regulation under the Commerce Clause. *Stafford v. Wallace, supra,* pp. 525-527; *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, 245."

Binderup v. Pathe Exchange, 263 U. S. 291, 311.

Besides the cases cited in the above excerpt, see also *Swift & Co. v. U. S.*, 196 U. S. 375, 400.

STATE IS LIKEWISE WITHOUT POWER TO PREVENT THE APPELLANT TELEPHONE COMPANY FROM RENOUNCING ITS INTRASTATE BUSINESS.

What has been said in this connection with respect to the appellant railroads, applies also with respect to the appellant telephone company. The intra and interstate activities and instrumentalities of this company are, we submit, no less completely interwoven than are those of the railroad appellants.

It must follow that any state law, whether embodied in constitution or statute, which would seek to condition this company's continued operation as an interstate

instrumentality, upon its continuing to carry on its intrastate activities, however unprofitable the latter might become, would be unquestionably obnoxious to the commerce clause.

True, Congress, while having delegated to the Federal Communication Commission the complete regulation of the interstate activities of telephone companies, has not yet given such Commission jurisdiction of local telephone exchange service where regulated by state commissions (USCA Title 47, Ch. 5, Sec. 221 (b)). But this, we submit, is wholly immaterial. Congress unquestionably has this power if and when it seeks to exercise it, just as truly as in the case of interstate railroads. And a State statute requiring continued intrastate operation as a condition to a continuance of interstate operation would quite obviously just as truly violate the commerce clause, whether Congress has or has not undertaken the regulation of the company's intrastate activities.

This leads us to our next point:

STATE CANNOT LAWFULLY CONDITION A PUBLIC SERVICE COMPANY'S RIGHT TO DO AN INTERSTATE BUSINESS, ON ITS CONTINUING TO DO A LOCAL BUSINESS.

State statutes, imposing conditions on corporations precedent to their right to transact business within the state, are ineffectual to prevent transactions constituting interstate commerce.

Thus a state statute requiring certain classes of foreign corporations to file statements is an invalid restriction and burden and unconstitutional as to foreign corporations engaged in interstate commerce. *Buck Stove and Range Co. v. Vickers*, 226 U. S. 205; *Inter-*

nationa Textbook Co. v. Pigg, 217 U. S. 91; *Crutcher v. Kentucky*, 141 U. S. 47, 56, 57.

And, in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 291, it was said:

"A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce, and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. *Crutcher v. Kentucky*, 141 U. S. 47, 57; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 27; *International Text-Book Co. v. Pigg*, 217 U. S. 91, 112; *Sioux Remedy Co. v. Cope*, 235 U. S. 197."

It is of course apparent that if a State may not lawfully impose conditions on the right of a corporation to carry on interstate commerce within its territorial limits, it cannot impose conditions on its continuing to carry on its existing interstate business.

Again—a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. *Terral v. Burke Const. Co.*, 257 U. S. 529, 532-3.

Conversely, a State cannot lawfully condition a foreign corporation's constitutional right to engage in interstate commerce within its boundaries, upon its doing a local business therein, or thereafter forbid such interstate activities because of such foreign corporation's renouncing a local business already established.

And see also *Michigan Commission v. Duke*, 266 U. S. 570, and *Buck v. Kuykendall*, 267 U. S. 307.

The Constitution of Mississippi, Art. 7, section 195, provides:

"Express, telegraph, telephone, and sleeping-car companies are declared common carriers in their respective lines of business, and subject to liability as such."

Mississippi Code 1892, Sec. 3378, imposed a privilege tax on each sleeping and palace car company carrying passengers from one point to another in the state of "$100, and, in addition thereto, 25 cents a mile for each mile of railroad over which the company runs its cars."

In *Pullman Co. v. Adams*, 78 Miss. 814, 30 So. 757, it was held no defense to a suit for such taxes, that the local business of defendant, an interstate and intrastate sleeping car company, was done at a loss, and that it could not have declined the business, because, by the above constitutional provision, it was made a common carrier. The court said:

"The contention that the appellant does its local business at a loss, and yet must do it under the constitution of 1890 making it a common carrier, and hence that its interstate business is indirectly burdened, is fallacious. Were that so, it would be the provisions of law declaring the sleeping car companies, common carriers, that would contravene the interstate commerce clause of the federal constitution, not this license tax.

"It is not for the appellant to get all out of the local business the 'traffic will bear' and then escape the correlative burden of this license tax by pleading that it, though conforming to the law making it a common carrier, as to profits, should not conform to the law taxing the business it does wholly local and entirely within this state."

The Mississippi decision was affirmed by the United States Supreme Court in *Pullman Co. v. Adams*, 189 U. S. 420, on the assumption that interstate sleeping car

companies would be held free by the state court to abandon the local business taxed if they saw fit, and in so holding, said:

"If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in *Crutcher v. Kentucky,* 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by *Osborne v. Florida;* 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax.

"* * * If the constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the constitution or the tax act, is invalid. But we assume that the opinion of the Supreme Court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, *and we take it so the more readily that we can see no ground for a different view.*" (Italics ours.)

Thus, not only did Your Honors conclude that under the decision of the Mississippi court interstate common carriers are free, if they choose, to renounce their local business while continuing their interstate activities, but expressly say that it "*can see no ground for a different view.*"

The State supreme court took the same view in *State*

v. Northern Express Co., 80 Wash. 309, 324-5, where it was said:

"It is equally fallacious if it is meant by this assertion that, as a condition for engaging in interstate commerce, the state requires the corporation to also engage in intrastate commerce. Such a plea violates a rule concerning which there is now no dispute, that the state can impose no burden upon interstate commerce nor exact any condition upon which foreign corporations may engage in such business within this state. If the constitution should be read as imposing an obligation upon corporations doing an interstate business to also engage in a local business, then, as said in the *Adams* case, 'the question for us might be which, if not both, the clause of the constitution or the tax act, is invalid.'

"Respondents make a general reference to the public service commission law of 1911 as supporting their contentions. It may be answered that no provision of that law could operate as a regulation upon interstate commerce. All that it seeks to do, and all that the state has power to do, is to impose regulations upon local business, and while the state cannot say to the foreign corporation, 'We will annex certain conditions with which you must comply before you can do an interstate business in or through this state,' it can say to such corporation, 'If you choose to do business which is purely local in its character and which has attached to it no elements of interstate commerce, you must submit that business to the regulation and control of the laws of this state.' To go further than this, the state has not attempted, or if it has, its attempt is vain."

Answering a similar contention made by the complaining interstate railroad companies, Judge Neterer said, in *Chicago, M., St. P. & P. R. Co. v. Hedges*, 5 Fed. Supp. 752, 758:

"The contention that the law must fail for that intra and inter state business of the complainants is so inseparably interwoven that interstate (intrastate) business cannot be renounced, is not convincing. Equity does not require a useless thing. The complainants would not renounce intrastate business, which is: N. P., $6,613,-

958.98; interstate, $6,231,366.63. O-W., intrastate, $779,-676.88; interstate, $3,026,256.60. Milwaukee, intrastate, $1,171,236.56; interstate, $2,163,054.27. G. N., intrastate, $1,860,608; interstate, $2,616,837. S. C. P., intrastate, $81,568.98; interstate, $1,333,410.73. Such claim, in the face of the history and record in the case, is fallible. *Ohio Tax Cases,* 232 U. S. 576, 34 S. Ct. 372, 58 L. Ed. 737; *Gant v. Oklahoma City, supra.* While these cases are not directly in point, they are lucid and bear upon the history in the instant issue. Complainants' claim is narrow and without equity, and does not weigh upon conscience. No attempt has been made to renounce, nor purpose to do so, and, until this is done, complainants cannot complain. No right is withheld or denied. The laws and constitution of the state give way to the commerce clause of the United States Constitution (Art. 1, Sec. 8, cl. 3), and the vitalizing Commerce Act (49 USCA-Sec. 1 *et seq.*). See *Colorado v. United States,* 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878. And the rate-making body could and would afford relief, and, if denied, complaint might be available."

That the P. T.'s interstate business is negligible compared with its local business, is shown by the following figures taken from its returns to the tax commission for the last five months of 1933. (Plff's Ex. "22" PT Rec. 131-150):

	Pacific Company
Gross revenues from local and interstate business.....	$4,175,350
Gross revenues from interstate and foreign commerce..	355,662
Percentage of gross revenues from interstate and foreign commerce of total gross revenues within the State.	8.52%

Thus, the language of Judge Neterer is particularly pertinent to that company.

APPELLANTS MAY WITHDRAW FROM LOCAL BUSINESS IF NOT MAKING A FAIR RETURN.

The appellant Telephone Company alleges that for the first six months of 1933 its net earnings on intrastate business were not in excess of 1.75% of the fair value of the property used and useful in furnishing such service.

(PT Rec. 4.) And the N. P. and G. N. each contend that in 1933 it lost money on its intrastate business.

If this be true, then each complaining company has the undoubted right to withdraw from its local business, since the state would certainly not be in a position to compel operation at less than a fair return. But, having voluntarily continued their local operations, they cannot now be heard to claim exoneration from the business tax imposed.

To repeat what was said in *Pullman Co. v. Adams*, 78 Miss. 814, 30 So. 757 (affirmed: 189 U. S. 420):

"It is not for the appellant to get all out of the local business the 'traffic will bear' and then escape the correlative burden of this license tax by pleading that it, though conforming to the law making it a common carrier, as to profits, should not conform to the law taxing the business it does wholly local and entirely within this state."

In this connection, may we observe that the payment of the offending tax is not made a condition precedent to the carrying on of the business upon which the same is imposed. Thus as already noted, section 3, chapter 191, Laws of Washington, 1933, provides:

"If any person shall engage or continue in any business * * * for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

In other words, it is not made unlawful for a person to engage in a taxable business without having first

secured a license. Failure to pay the tax is not made a criminal offense. But if a person continued in the taxable activity after August 1, 1933, he became subject to the tax which could be collected either summarily or by an action at law. (See Sec. 16, ch. 191, Laws 1933.)

That even a domestic corporation may renounce its unprofitable local business though its operations be controlled by regulatory measures similar to those upon which appellants here rely, has been definitely settled by this court.

Thus in *Railroad Commission v. Eastern Texas R. R.*, 264 U. S. 79, it was held that the usual permissive charter of a domestic railroad company did not obligate the company to operate its railroad at a loss, nor was such obligation to be implied from the acceptance of its charter and operation thereunder. In so holding, Your Honors said:

"The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return."

There the Texas statutes relating to railroads were carefully analyzed, from which analysis it was found that they were all of the usual permissive type which did not obligate the company to continue to operate indefinitely.

What was said in that case as to the Texas regulatory statutes applies, we submit, with equal force to all of the numerous statutes and constitutional provisions cited in appellants' briefs and pleadings. *State v. Northern Express Co.*, 80 Wash. 309, 325.

In *I. C. C. v. Oregon-Wash. R. Co.*, 288 U. S. 14, it was held that because the charter of a railroad company authorized it so to do, it was not made its duty to construct and operate an extension to its existing lines.

From the cases cited it seems that a railroad company is under no compulsion to construct a line for the rendition of either interstate or intrastate service even though its charter contemplates such construction and service. Having constructed such line and finding the local business unprofitable, it may abandon such service. Under such circumstances can it be said that there is any contractual obligation to continue operations whether its operations be profitable or unprofitable? We submit not. If there be a contract obligation to operate, it must necessarily exist whether or not its operations prove remunerative.

In this connection, attention is also called to *Williams v. Mayor*, 289 U. S. 36, involving the right of the state of Maryland to grant an exemption from *ad valorem* taxes to a railroad corporation for a period of two years. The railroad was already in operation, and had there been a contract obligation on its part to continue operation, the grant of a tax exemption would, of course, have been without consideration and void. But in upholding the right of the company to such exemption, the court said in part (pp. 44-5):

"It is idle to say that a railroad, when once it has been organized, is under a duty to go on, and hence that its distress is not important for any one except itself. Science has wrought her wonders, but the time is not yet here when trains will run under the impulsion of duty without more. There is room, indeed, for question whether even the duty is so absolute as the respondents' argument assumes. *Railroad Commission v. Eastern Texas R. Co.*, 264 U. S. 79, 85. Certain it is, in any

event, that operation may end with the consent of the Public Service Commission when the earnings are inadequate."

CORPORATION SUBJECT TO PRIVILEGE TAX THOUGH FRANCHISE REQUIRES CONTINUATION OF SERVICE.

That any provisions of the constitution or statutes claimed to impose upon public service companies the continuing duty to operate must be construed in the light of the state's paramount power of taxation, is, we submit, well illustrated by those cases upholding the right of a municipality to impose license taxes upon public service companies operating under an unexpired franchise from the very municipality exacting the tax.

It is of course well established that where a municipal ordinance or state law grants to a public service corporation the right, for the benefit of its inhabitants, to occupy the streets of a city with mains and pipes for furnishing water or gas, wires and poles for lighting or telephone service, or tracks for street car service, and such franchise is accepted and acted upon, the same cannot be revoked by the state or municipality during the life of such franchise. *Northern Ohio Traction & Light Co. v. Ohio*, 245 U. S. 574, 585; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 117; *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, 73; *Grand Trunk Western Ry. Co. v. South Bend*, 227 U. S. 544, 556; *Louisville v. Cumberland Tel. Co.*, 224 U. S. 649, 664.

It is equally true that when such a franchise has been accepted by the grantee, the same becomes a contract binding the public service company to furnish public service on the terms and conditions set forth in, and *during the life of the franchise. Columbus Ry. & Power Co. v. Columbus*, 249 U. S. 399; *Cleveland v.*

Cleveland City Ry. Co., 194 U. S. 517; *Opelika v. Opelika Sewer Co.*, 265 U. S. 215; *St. Cloud Public Service Co. v. St. Cloud*, 265 U. S. 352; *Henderson Water Co. v. Corporation Com.*, 269 U. S. 278; *Thomas v. Railroad Co.*, 101 U. S. 71, 83; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396; *Russell v. Sebastian*, 233 U. S. 195, 209.

But notwithstanding such contract obligation assumed by the public service company to continue its public utility operations during the life of its franchise, and the reciprocal obligations of the state or municipality, it is well-recognized that the municipality may nevertheless exact from such public utility company a license tax for the privilege of so performing its franchise obligations.

Memphis Gas Light Co. v. Shelby County, 109 U. S. 398;

Erie Railroad Co. v. Pennsylvania, 21 Wall. 492;

Railway Co. v. Philadelphia, 101 U. S. 528;

St. Louis v. United Railways Co., 210 U. S. 266;

Puget Sound P. & L. Co. v. Seattle, 291 U. S. 619, 627.

In the case last cited it was said:

"Appellant asserts a contract under its franchise to use the streets of the city for the purpose of carrying on its business for an unexpired term of years. It argues that the franchise is a contract license to carry on the business, and that the exaction of a tax as a condition precedent to the enjoyment of the license will operate to destroy the privilege granted by the franchise. This argument was made and answered in *Memphis Gas Co. v. Shelby County*, 109 U. S. 398, and in *St. Louis v. United Railways Co.*, 210 U. S. 266. Surrender of the state's power to tax the privilege is not to be implied from the grant of it. Hence, appellant took its franchise subject to the power of the state to tax the granted privilege in common with all other privileges

and property in the state. Without a clearly expressed obligation on the part of the city to surrender that power the contract clause does not limit it." (Citing authorities.)

None of the appellants either alleged or proved when they began to do an intrastate business within the state of Washington. As a matter of fact it was in each case, long after the adoption of the State constitution in 1889. Hence, if the obligations imposed by the state constitution be likened to the contract obligations assumed by the Puget Sound Light & Power Company in the case last cited, then obviously such obligations were assumed with full knowledge of the State's right to impose the tax now complained of just as the Puget Sound Company did in that case.

Every presumption is in favor of the reservation by the State of the complete exercise of its fundamental right to tax. *Tacoma v. State Tax Commission,* 177 Wash. 604, 611.

We respectfully submit that this presumption obtains just as truly to constitutional provisions as to statutes. By simply imposing upon certain corporations the obligations of public service companies, the constitutional convention did not, we insist, evidence an intent to relieve such corporations from taxation for the privilege of so functioning. Instead, a contrary purpose is evidenced by section 1, article 12, of the State constitution, providing that "all laws relating to corporations may be altered, amended, or repealed by the legislature at any time," and that "all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law." Surely, conditioning the right to continue operations upon the payment of a legiti-

mate occupational tax does violence neither to this section nor to the right of "legislative control" reserved as to these public service companies. (See Art. 12, Sec. 13, 19 Wash. St. Const.)

CONTENTION THAT SAME INSTRUMENTALITIES ARE USED IN BOTH INTRA AND INTERSTATE BUSINESS, AND RENUNCIATION OF INTRASTATE BUSINESS WOULD RESULT IN INTERSTATE RATES GREATER THAN TRAFFIC COULD BEAR.

The P. T. alleges that its interstate and intrastate business is done over the same lines, through the same exchanges, by the same employees, and with the same facilities, and that it is impossible for it to operate otherwise, and that if it could and should abandon its intrastate business, the entire burden of maintaining and operating its intrastate system, equipped to handle both classes of business, would fall entirely on interstate business and would necessitate an increase of rates greater than the same could bear and would result in the destruction of an essential instrument of interstate commerce and of the value of its properties in amounts of many millions of dollars. (PT Rec. 5-6.)

The answers of the appellant railroads contain similar allegations. (NP Rec. 10-11; GN Rec. 17-19.)

Whether or not these averments are supported by the evidence is discussed in Appendix "C," Post, pp. 181-7.

But even accepting such allegations at their face value, this, we submit, would be no defense to a business tax measured solely by a percentage of their intrastate revenues.

May we first point out that appellants constructed

their properties fully conscious of the State's undoubted right to impose excises on their intrastate business. They need not renounce such local business so long as they pay the tax. It is not shown, as we have seen, that, by adjustment of intrastate rates, the offending tax cannot be passed on to appellants' customers. Their election to withdraw from intrastate business will, if made, be purely voluntary.

Obviously the same objection here advanced might be made with equal plausibility to any duty imposed on appellants in connection with their intrastate business, whether it be the payment of a license tax or compliance with some rule or order of the state regulatory body. Let us suppose that the D. P. W. should promulgate some (to appellants) offensive rule or regulation affecting telephone or railroad intrastate operations. Could appellants be heard to question the validity of such regulation on the ground that the expense of carrying on their interstate business would be increased by the abandonment of their intrastate business thereby necessitating an increase of interstate rates and a consequent burden on interstate commerce?

Were appellants' operations confined wholly to intrastate business, the validity of the occupation tax as applied to these objecting companies could not be questioned. Because these companies are also engaged in interstate business, this tax which is imposed only on their intrastate receipts and which is not in the slightest degree increased by their interstate operations cannot, we submit, be said to constitute an unlawful burden on interstate commerce. The possible indirect effect on their interstate business visioned by appellants is, we

submit, too remote and fanciful to be deemed a valid objection to the tax.

While the states are without power directly to regulate, prohibit, or burden interstate commerce, yet, to come within the rule, such interference must be direct and substantial, and not merely incidental. The states may, so long as they do no more than legitimately exercise their reserved police and taxing power, enact laws which will be valid, although they may incidentally affect interstate commerce. 12 C. J. 13, 50; *Boston & Maine R. Co. v. Armburg,* 285 U. S. 234, 238, and cases cited.

The length to which this court has gone in upholding state legislation potentially but not directly affecting interstate commerce is, we submit, illustrated by its early decisions in *Reading R. Co. v. Pennsylvania,* 15 Wall. 284, and *State of Maine v. Grand Trunk Ry. Co.,* 142 U. S. 217, upholding state excise taxes measured by the gross receipts of foreign and domestic railway companies derived from both their intra and interstate business.

And while, as heretofore shown, Your Honors, in *Galveston, Harrisburg etc. Ry. Co. v. Texas,* 210 U. S. 217, in a five-to-four decision, held invalid a Texas statute of this kind, so far as interstate revenues were concerned, never, so far as we can find, has this court held a state occupational tax, measured only by the intrastate gross receipts of interstate public service companies, whether foreign or domestic, unconstitutional as violative of the commerce clause.

Were it true, as claimed, that appellants' intra and interstate businesses are hopelessly commingled we may

assume that a state excise imposed directly upon their instrumentalities used in both activities, such as cars, engines, or telephone instruments, would offend the commerce clause.

But this, if the court pleases, is not true of *a tax measured by a percentage of gross receipts from intrastate business only.* Such a tax cannot, we submit, be held to burden appellants' interstate operations. Appellants' instrumentalities used in interstate operations are taxed only to the extent that the same are used in local service. If not so used, they are not taxed at all.

We know of no decision, and are confident counsel can cite none, striking down an occupational tax measured only by intrastate revenues, however intercommingled may be the local and interstate operations of the public service company. On the other hand, such a tax has been in numerous cases sustained by this court.

It is a matter of common knowledge, of course, that the instrumentalities of railroads and telegraph companies in carrying on their intra and interstate activities are no less commingled than are those of interstate telephone companies. To possibly a lesser extent this is likewise true of express and sleeping car companies.

In *Pacific Express Co. v. Seibert,* 142 U. S. 339, a privilege tax measured by 2% of the interstate express company's local revenues was sustained. On the other hand, in the later case of *Barrett v. New York,* 232 U. S. 14, a city ordinance imposing a license tax *directly on an interstate express company's express wagons* used in hauling both interstate and local express was condemned as a burden on interstate commerce.

We may add that in *Osborne v. Florida,* 164 U. S. 650, a lump-sum license tax imposed by cities upon ex-

press companies doing both intra and interstate business was sustained.

In *Pullman Co. v. Adams,* 189 U. S. 420, an excise measured in part by the mileage of line operated by a sleeping car company doing both local and interstate business was sustained. A lump sum excise tax was sustained as to a company doing the same kind of business in *Allen v. Pullman Co.,* 191 U. S. 171.

In *Western Union Tel. Co. v. Alabama,* 132 U. S. 472, and *Ratterman v. Western Union Tel. Co.,* 127 U. S. 411, occupational taxes measured by a percentage of local revenues were sustained as to telegraph companies doing both a local and interstate business, while in *Telegraph Co. v. Texas,* 105 U. S. 460, an excise measured by the number of intrastate messages sent, was sustained as to an interstate company.

And in *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124, *Postal Tel.-Cable Co. v. Richmond,* 249 U. S. 252, and *Postal Tel.-Cable Co. v. Charleston,* 153 U. S. 692, lump sum license taxes imposed by municipalities on interstate telegraph companies for the privilege of doing a local business were sustained.

In *Lehigh Valley R. Co. v. Pennsylvania,* 145 U. S. 192, and the well-considered case of *Ohio River & W. R. Co. v. Dittey,* 232 U. S. 576 (the "Ohio Tax Cases"), occupational taxes measured by a percentage of local revenue, were sustained as to railroad companies doing both intra and interstate business.

In *St. Louis S. Ry. Co. v. Arkansas ex rel. Norwood,* 235 U. S. 350, a privilege tax measured by the proportion of the company's capital stock used within the state,

was sustained as to a foreign railway company doing both intra and interstate business.

In *People ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549, a privilege tax measured by local gross earnings was sustained as to a navigation company doing both local and interstate business.

Is it not, we ask, most remarkable that if counsel's position be sound, the same would not have been successfully urged in some one of these numerous cases?

Were counsel's contention meritorious, no good reason could, we submit, be suggested why the tax should not for the same reason be condemned as to every private enterprise compelled by economic necessity to use the same instrumentalities in doing both a local and interstate business. Yet who would seriously urge that such institutions as Sears-Roebuck or Montgomery Ward should be relieved from the tax on this ground?

Indeed, this court has held directly contrary to appellants' contention.

In *Bowman v. Continental Oil Co.*, 256 U. S. 642, a statute of New Mexico, applicable to distributors of gasoline, imposed an excise of two cents for each gallon sold or used, and an annual license tax of $50.00, payable in advance, for each distributing station, place of business or agency. The law was held invalid as to the $50.00 license tax *on each distributing station* as a direct tax on an interstate instrumentality, the court saying (p. 648):

"No doubt the State might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the State has not done this by any act of legislation. • • •

But the difficulty is that, since *plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce.* * * *." (Italics ours.)

Thus, in the *Bowman* case the contestant established precisely the same defense asserted here, namely, that it necessarily conducted its interstate and domestic commerce in gasoline at the same stations and by the same agencies. Yet this court upheld that part of the law imposing a 2 cent gallonage tax on gasoline in so far as it applied to domestic sales, Your Honors saying (p. 646):

"* * * so far as the excise tax is concerned—imposed as it is upon the sale and use of gasoline according to the number of gallons sold and used—the divisible nature of the subject renders it feasible to control the operation and effect of the tax so as to prevent it from being imposed upon sales in interstate commerce, while allowing the State to enforce it with respect to domestic transactions and with the allowance of an injunction limited accordingly plaintiff will receive the full protection to which it is entitled under the Constitution of the United States."

Examination will show that in all of the cases relied upon by appellants, the tax was imposed on *the interstate instrumentality itself,* and not merely measured by intrastate revenues from such instrumentality, as shown by the following review:

Interstate Busses v. Holyoke Street Ry., 273 U. S. 45:

There the state law complained of by the carrier operating an interstate and intrastate bus line required a license of *all* for-hire motor vehicles and also a certificate of public convenience and necessity issued by the state regulatory body. Neither license nor certificate

were required as to carriage exclusively interstate. The carrier contended that since it carried both interstate and local passengers on the same busses, the state regulation was invalid and unenforcible as to it, as a burden on interstate commerce. But the court said (p. 51):

"It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried efficiently and economically in busses used exclusively for that purpose or that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the Act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employes."

Now, let us assume that the court had there actually found that the bus company was in fact compelled by unavoidable circumstances to use the same busses for the carriage of both interstate and local passengers, and for that reason had held the state law invalid as a burden on interstate commerce, would this case, even on this assumption, lend color to counsel's contention? Obviously not, for the reason that such statutory requirement of a license and certificate of necessity would then have been a *direct burden* on the carrier's interstate business—a regulation of the *instrumentalities themselves,* used by the carrier in its interstate operations. The issuance of licenses and granting of a certificate of necessity being within the discretion of the state officers, the extent of the service rendered would likewise obviously be within the control of such authorities. Such a law, it might plausibly be argued, would directly burden and restrict interstate commerce.

On the contrary, the Washington Occupational Tax

Act in no way interferes with appellants' interstate operations. These companies may carry on their interstate business as they see fit, and are limited in their local operations only to the extent that they must contribute to the support of the state government for the privilege of so doing. Surely, this is not a *direct* burden on interstate commerce forbidden by the commerce clause.

LeLoup v. Port of Mobile, 127 U. S. 640:

In that case the offending city ordinance exacted a license tax from telegraph companies doing business within the city, of $225 per year. The ordinance was applicable to all companies whether engaged in intrastate or interstate business, or both, and imposed a fine for failure to pay the license fee imposed. The court said as to the point involved:

"The question is squarely presented to us, therefore, whether a state, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one state to another and between the United States and foreign countries * * *. We are not prepared to say that this can be done."

There, the burden on interstate commerce was more direct even than had the tax been directly imposed on the interstate instrumentality. It was exacted of the interstate telegraph company itself.

It is interesting to note that in that case the companies were paying in addition to a property tax, "a tax of three-quarters of one per cent on their gross receipts within the state." (p. 645.) *As to this occupational tax, no question was raised.*

Western Union Tel. Co. v. Kansas, 216 U. S. 1:

There the offending law required that the telegraph company pay a given percentage of its authorized capital, whenever and however employed, as a condition to its right to continue to do domestic business in Kansas. It was held that such a tax burdened interstate commerce and taxed property beyond the limits of the State.

It thus appears that the tax here assailed is in no way similar to that imposed under the Kansas law.

Postal Tel.-Cable Co. v. Richmond, 249 U. S. 252:

There a license tax imposed on intrastate business was upheld as against the objection that it imposed a burden on the company's interstate business because the net receipts from its intrastate business were insufficient to pay the tax, and the payment would therefore have to be made from inferstate receipts.

Barrett v. New York, 232 U. S. 14:

There an ordinance of the city of New York imposed a license fee, not upon or measured by the intrastate revenues of the express company, but upon the *very instrumentality* used in its interstate business, namely, the express wagons used to haul both kinds of business.

Bowman v. Continental Oil Co., 256 U. S. 642:

The tax there held bad was a license tax of $50 per station imposed on companies distributing gasoline in both domestic and interstate commerce. It was shown that the company necessarily conducted its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies. It was held under those circumstances that the tax was void as a burden on interstate commerce. There again, the tax

was on the interstate instrumentality itself, the gasoline station.

As already noted, this case is a highly presuasive authority in support of the tax here in question.

The distinction between this class of cases and the case at bar is, we submit, clearly pointed out in the recent case of *Cooney v. Mountain States Tel. & Tel. Co.*, — U. S. —, 55 Sup. Ct. 477, 482, 79 L. Ed. 498, 504, where Your Honors said as to a privilege tax made applicable to telephone instruments used in both interstate and intrastate business:

"A privilege or occupation tax which a State imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid. • • • *Barrett v. New York*, 232 U. S. 14, 29, 31. • • • *Bowman v. Continental Oil Co.*, 256 U. S. 642, 647, 648, 65 L. Ed. 1130, 1144, 1145, 41 S. Ct. 606. In the cases of the express companies, the principle was applied to a privilege tax imposed alike with respect to wagons used in the movement of both interstate and intrastate shipments. The local shipments 'were handled in the same vehicles, and by the same men' that were employed in connection with the interstate transportation and it was impracticable to effect a separation. *Barrett v. New York*, 232 U. S. 14, 58 L. Ed. 483, 34 S. Ct. 203, and *Platt v. New York*, 232 U. S. 35, 58 L. Ed. 492, 34 S. Ct. 209, *supra*. In *Bowman v. Continental Oil Co.*, 256 U. S. 642, 65 L. Ed. 1139, 41 S. Ct. 606, supra, the question arose under a statute of New Mexico laying an annual license tax of five dollars for each station distributing gasoline. The court pointed out the distinction between an excise tax on sales of gasoline where, as the subject matter was separable, full protection could be afforded by enjoining enforcement as to the interstate business, and the license tax which with its prohibition fell upon the business as a whole. The Court said: 'But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect

this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void.' The difficulty, continued the Court, 'is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence, it cannot be enforced at all.'

"In the instant case, the tax, being indivisible and indiscriminate in its application, necessarily burdens interstate commerce."

Although we have reviewed only those cases relied upon by appellants' counsel, we are satisfied that all cases in which state or municipal regulatory or tax measures have been held repugnant to the commerce clause are readily distinguishable for the same reason pointed out with respect to the *Holyoke* and *Adams Express* cases. And in no case decided by the highest court, has a state excise tax or ordinance been adjudged offensive to the commerce clause, where imposed for the privilege of doing, and measured by gross income from, interstate business alone.

For the reasons urged, we respectfully submit that the judgments of the State supreme court should in each instance be affirmed.

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,

Attorneys for Appellees.

APPENDIX "A"

Challenge to Trial Court's Findings of Fact and rulings on admissibility of evidence in N. P. Ry. Co. v. State, No. 529.

ASSIGNMENTS NP-3 TO NP-33

Each railroad appellant owns and operates a railroad between Puget Sound and the Great Lakes. As such interstate carrier, each keeps its system accounts as prescribed by the I. C. C. (GN Rec. 110, NP Rec. 79.) The I. C. C., however, does not prescribe rules for the apportionment of system revenues and expenses as between the various states through which such appellants operate. (GN Rec. 110.)

Whether each road's local business is profitable or unprofitable depends, of course, upon the amount of its intrastate revenues less operating expenses and taxes properly chargeable to its intrastate operations.

Such local revenues can obviously be ascertained with reasonable accuracy. But where, as here, these companies' local traffic is handled at the same terminals, and hauled over the same rails, on the same trains, by the same engines, and with the same employes, as their interstate traffic, the extreme difficulty of accurately apportioning these joint operating expenses to local traffic becomes at once apparent. Consequently, any method or methods proposed for so doing, must, we submit, be scrutinized with the utmost caution before the court can set aside a revenue measure on the theory

that the railroad so taxed is in fact losing money on its local business.

It must be remembered that these roads do both an intra and interstate passenger business, and an intra and interstate freight business over the same rails. Consequently, to discover what proportion of their operating expenses should equitably be apportioned to their intrastate traffic, these roads were confronted, among numerous others, with the following problems:

(1) The apportionment of system operating expenses as between freight and passenger service;

(2) The apportionment of each of some hundreds of different items of system passenger expenses and system freight expenses to its Washington operations;

(3) The apportionment of each of these numerous items of passenger and freight expenses (so apportioned to Washington) as between Washington intra and interstate freight and passenger service.

Pursuant to the I. C. C.'s instructions, each railroad divides its system operating expenses under some 197 separate and distinct accounts, and in reporting its operating expenses in Washington to the D. P. W., each company uses these same accounts and account numbers. (See NP Ex. "9," pp. 702-707, NP Rec. 276-281.) These accounts are divided into the following six main divisions of operating expenses:

(1) "Maintenance of Way and Structures"; (2) "Maintenance of Equipment"; (3) "Traffic"; (4) "Transportation — Rail Line"; (5) "Miscellaneous Operations" (which includes such items as dining and buffet service, hotels and restaurants, grain elevators,

stockyards, etc.); and (6) "General" (which includes salaries of officers and clerks, legal expenses, etc.).

Confronted with the problem of isolating its operating expenses incident to local traffic, each road pursued the following course:

It proceeded on the assumption, first, that its operating expenses incident to its operations, both intra and interstate, in the state of Washington, were, as to both freight and passenger traffic, accurately shown in its reports to the D. P. W. for 1933 and previous years.

All intra and interstate passenger service expense as so reported was apportioned as between intra and interstate passenger service (a) by the N. P. according to relative intra and interstate passenger miles (a method challenged by the State); and (b) by the G. N., according to the relative intra and interstate passenger revenue (a method not contested by the State).

But the segregation of intrastate freight service expenses did not prove so simple. Intra and interstate freight, it was found, was hauled (as above noted) over the same rails, by the same engines, in the same cars and trains, by the same employes, and by means of the same terminal facilities. Moreover, freight movements were found to involve at least two distinct classes of expenses: (1) line-haul expense and (2) terminal expense. Each road, therefore, undertook to make two special studies each covering a seven-day period—one to determine the average cost of the various elements of terminal or switching expense, and the other to ascertain the line-haul expense incident to local freight traffic. Having purported to find the total line-haul expense for the test week chosen, and the number and character of

the various switching operations incident thereto, and having, in a separate study, purported to find the cost of such various switching operations, it purported to calculate therefrom the total operating expenses incident to the intrastate operations for the test week. The total operating expenses incident to intrastate freight traffic for 1933 were then computed by the two roads in substantially the following manner: As to the N. P., the cost per intrastate revenue ton mile was found for the week, and such cost multiplied by the total intrastate revenue ton miles for the year. The G. N.'s method was somewhat more complicated, but substantially the same in principle.

To the intrastate freight service operating expenses as so computed, each company then added certain other items of claimed expense (questioned by the State), and thus arrived at what each claimed to be its total intrastate operating expenses for 1933. This amount was then deducted from its claimed total operating revenues for the year (a figure likewise contested by the State), and reached what was termed its "net revenue from railway operations." From the latter figure, each road then deducted what it claimed to be the amount of its 1933 taxes properly apportionable to its intrastate operations. To arrive at this amount, each road apportioned its property taxes as between its intra and interstate traffic in the relation which its intrastate revenues bore to Washington's mileage proportion of its revenues from interstate traffic (a method most vigorously challenged by the State).

The figure arrived at by such deduction of taxes and railway operating expenses from its railway operat-

ing revenues is known as "Railway operating income," and it is this figure which the N. P. claims to be determinative of whether the company has made or lost money for the year. (NP Rec. 97.)

The G. N. contended, however, that for the purpose of determining whether it was doing business at a loss, it was entitled to make the following additional deductions: (1) the excess of rental paid and rental received for the use of equipment ("equipment rentals"); and (2) the excess of rentals paid for the use of tracks and other facilities of other carriers over the rentals received for its own facilities from other carriers ("joint facility rent").

These joint facility rents were apportioned by the G. N. to intrastate traffic in the relation which it found all its operating expenses incident to intrastate traffic bore to its total operating expenses for the year within the state (a method protested by the State).

This was a debit item as to the G. N., but a very substantial credit item for the N. P., which possibly explains the difference in the attitude of counsel for the two companies.

Before specifically pointing out the different results reached by the State's and railroads' witnesses, it is thought appropriate at this point to discuss the various Assignments of Error involving the admissibility of evidence and the propriety of the appellant railroad's methods of apportioning operating expenses, taxes, and joint facility rents.

ASSIGNMENT NP-3*

COURT'S ERROR IN PERMITTING N. P.'s WITNESS, PETERSON, TO TESTIFY AS TO RELATIVE AMOUNT OF FREIGHT TRAFFIC DURING TEST WEEK AND ENTIRE YEAR 1933.

The N. P.'s claim that it lost money on its intrastate business for 1933 was based as above noted, on a purported special study of line-haul intrastate freight traffic during the week of October 22, 1933 (NP Rec. 89, *et seq.*), and a special study as to switching operations during the week of June 3, 1934. (NP Rec. 102, *et seq.*) For the purpose of attempting to show that this October test week was representative of the year's business, Peterson testified that a study was made for the purpose of comparing the relative revenues earned and ton miles and car miles operated during October and said test week in October, with the total for the year. (NP Rec. 89.) The State's counsel objected to any testimony as to such study if the same was based on entries in the company's books not introduced in evidence. (NP Rec. 90.) The objection being overruled, the witness testified to such comparative figures, from which he concluded that October was more favorable to both intra and interstate traffic than the average for the year. He further testified that to obtain the figures for October, 1933, he had the auditor of freight receipts make a special compilation, which figures were not reported to the D. P. W. (NP Rec. 90.) The court thereupon denied

*(NP 3) The court erred in permitting the N. P.'s witness, Peterson, to testify over objection that the same was hearsay and that the underlying data was not produced, as to the relative ton miles, revenue and average miles of haul of Washington traffic in October, 1933, and during the week of October 22, 1933, as compared with the entire year, and in refusing to strike such testimony after received. (NP Rec. 90-92.)

the State's motion that the testimony with respect to such comparative figures be stricken as hearsay and as based on the company's books not introduced in evidence. (NP Rec. 91.) The witness then testified over objection of the State's counsel as to the same kind of a comparison made with respect to the week of October 22, 1933, and the entire month of October. (NP Rec. 91-2.)

It would seem that the mere recital of these proceedings is sufficiently convincing that this evidence was not admissible under the hearsay and best evidence rules. Not only were the books not produced, but the individual who, it is claimed, took this data from the original records was not produced as a witness. Neither was this data (for the month and test week) reported to any state department. It would seem that in a proceeding in which a state law is assailed as unconstitutional, the State's counsel should not be left in a position where it is entirely impossible for him to verify figures and conclusions sought to be injected into the record in violation of some of the most fundamental rules of evidence.

The evidence, we submit, was not admissible.

ASSIGNMENT NP-4*

COURT'S ERROR IN RECEIVING IN EVIDENCE N. P.'s EXHIBIT "7" OVER OBJECTION THAT SAME WAS BASED ON HEARSAY AND RECORDS NOT RECEIVED IN EVIDENCE.

N. P. Exhibit "7" consisted of 22 pages of set-ups and computations based upon the special traffic study made during the week of October 22, 1933. (NP Rec. 93-4.)

This exhibit was received in evidence over the State's objection that the same was hearsay, largely based on conclusions and on estimates not made by a qualified expert, and from data taken from books not introduced in evidence and which the State's counsel had no opportunity to examine, and compiled by persons whom the State's counsel was given no opportunity to examine. (NP Rec. 101-2.)

As pointed out under Assignment NP-3, the value of the exhibit hinges on whether or not the test week chosen was representative of the year's traffic. The data bearing upon whether or not this was in fact a representative week was based upon records not received in evidence and the individual who took such data from the company's books was not even called as a witness.

Moreover, it appears that the revenues shown upon the N. P.'s books and reported under oath to the D. P. W. as the revenues received from intrastate freight traffic were not used in the preparation of such exhibit, but a lesser figure resulting from deducting therefrom certain revenues claimed to have been derived from

*(NP 4) The court erred in receiving in evidence N. P.'s Exhibit "7" over objection that the same was hearsay, and that the data upon which based was taken from the N. P.'s records not introduced in evidence. (NP 101-2.)

interstate or foreign shipments and switching although theretofore reported under oath to the D. P. W. as intrastate revenues. Mr. Peterson testified that these deductions were taken from the answers to interrogatories submitted by the N. P. (NP Rec. 94.) This is not the fact. No deductions of any kind were made in the answers to interrogatories *sworn to be true* by the N. P.'s assistant general auditor. (NP Rec. 78-9.) They were taken instead from so-called supplemental answers to interrogatories, verified by Mr. da Ponte, one of the N. P.'s attorneys, who only avers such answers to be true "to the best of affiant's knowledge and belief." (NP Rec. 84.) Da Ponte most certainly would not have been qualified to testify as an accountant. How, then, can his affidavit on mere information and belief be deemed to override the positive sworn statement of the N. P.'s assistant general auditor, and the sworn report to the D. P. W. which the N. P. itself introduced in evidence? (NP Ex. "9," Rec. 284.)

This information was contained in the records at the N. P.'s storage elevators (NP Rec. 151) and there is nothing to show that the same could not have been readily produced.

As shown under Assignment NP-17 (Post, pp. 131-133), the deductions attempted to be made as so-called interstate switching revenue were not shown by any exhibit of any kind although the records from which such showing might have been made were available in the state. (NP Rec. 248.)

Without going into further detail, we submit that, for the reasons shown, N. P.'s Exhibit "7" was not admissible and should be disregarded.

ASSIGNMENT NP-5*

COURT'S ERROR IN FINDING THAT N. P.'s METHOD OF APPORTIONING OPERATING EXPENSES TO ITS WASHINGTON TRAFFIC IS CORRECT.

In support of this assignment we need hardly do more than call attention to the following footnote that appeared in the N. P.'s report to the D. P. W. and tax commission for 1933 and for a number of years theretofore (NP Rec. 117):

"The statements herein either of revenues or expenses attributed to Washington are misleading unless properly understood. They are necessarily based on arbitrary assumptions as follows:

"Revenues contain (first) the revenues of business wholly local within the State and in addition a proportion of interstate revenues determined by the proportion of mileage which each interstate freight shipment or passenger is carried within the State.

"Charges for expenses contain (first) those expenses incurred in each state, and are considered wholly applicable to that state, and in addition some mileage proportion of expenses which cannot be localized. *Apportioning either such revenues or such expenses on a mileage basis is purely arbitrary* and has been adopted for want of any other basis." (Italics ours.)

Asked whether in his opinion the method used for apportioning operating expenses to Washington was the best method that can be used for the purpose of determining the propriety of rates both in this and other states, N. P.'s witness, Mr. Peterson, replied:

"I think each question there will have to depend largely on the local situation. You ask whether or not, for the purpose of determining the propriety of a local

---

*(NP 5) The court erred in finding that the method used by the N. P. in assigning operating expenses to its Washington properties is the method prescribed by the D. P. W., and that the expenses incurred in Washington by the N. P. were correctly stated in Finding VI. (Finding VIII-b, NP Rec. 36-7.)

rate in any one of the states traversed by the N. P. the method used in the apportionment of these operating expenses as I have reported them to the state of Washington is the best method that could be used for the purpose of making such apportionment. I would say no. You ask me why. Well, because the conditions are constantly changing." (NP Rec. 118.)

We can only wonder if Mr. Peterson's replies were not actuated by apprehension that perhaps his answers might be used against him later in some rate hearing in the middle or "bridge" states.

Operating expenses incident to maintenance of way and structures, with the exception of superintendence, insurance, stationery and printing and "general" were practically all, Mr. Peterson testified (NP Rec. 115), directly assignable to Washington.

Mr. Peterson testified further:

"The expenses incident to all terminal services rendered within the state as to both interstate and intrastate traffic are all apportioned directly to the state. In addition to the actual operating expenses that are incident to the terminal services, the N. P. maintains large terminal facilities, such as docks, warehouses, yards, repair shops, depots, and so on in the larger cities of the state of Washington," etc. (NP Rec. 123.)

And see also the testimony of Mr. Lonergan. (NP Rec. 172-3.)

This, we submit, is an important reason why the N. P.'s method of apportioning operating expenses to Washington is indefensible in a case in which its true earnings from local business is in issue. Washington is a terminal state where the long-haul interstate business is assembled and distributed. The intermediate or "bridge" states have no terminal facilities comparable with the terminal states. (NP Rec. 128.) C. R. Loner-

gan, since 1927 chief of traffic division of the D. P. W., and for 33 years in the N. P.'s employ in various capacities, including that of traveling freight agent, general agent, assistant general freight agent, general freight agent, and assistant to the vice-president in charge of traffic (NP Rec. 172), testified:

"I am familiar with the method of accounting of the N. P. to the state of Washington in accounting for its railway operating expenses. (NP Rec. 173.) * * *

"The objection to the apportionment of all of the expenses connected with the maintenance of way and structures of a terminal state such as Washington as applies to the N. P., to the state of Washington, and the apportionment of none of those expenses whatever to the bridge state is that it does not place the proper charge upon interstate traffic; it places it all where it is expended, in the state of Washington. The terminal facilities located in Washington are of benefit to the traffic traversing the intermediate states, and in my opinion some of that expense should be apportioned to those intermediate states. That should also be true in regard to the maintenance of the terminals in Wisconsin and Minnesota. That should likewise be apportioned to this state and to the intermediate states as well. A portion of the taxes imposed by the state of Washington on the N. P. terminal facilities in Washington should likewise be apportioned to the bridge states, for the *same reasons* I have stated." (NP Rec. 175-6.)

It follows, of course, that if it is improper that all the terminal expense be assigned to Washington, an unjust maintenance expense burden must fall on intrastate business when such total terminal expenses are divided between Washington intra and interstate business according to relative freight car miles as was used in the N. P.'s special study. (See NP Ex. "7," p. 19, NP Rec. 167.)

We submit that a method of apportionment of expenses between states which the N. P., in its reports,

concedes to be "purely arbitrary" (NP Rec. 117-8), cannot yield results from which the court can set aside a state tax on the theory that this appellant is losing money in the state.

ASSIGNMENTS NP-6 TO NP-8*

COURT'S ERROR IN FINDING THAT STATE CONTENDED THAT N. P. SHOULD CREDIT PART OF ITS MAIL AND EXPRESS REVENUE TO LOCAL BUSINESS (NP AB. 288) AND IN FINDING THAT ANY PART OF SUCH REVENUE SHOULD BE APPORTIONED TO INTRASTATE.

These findings are wholly unsupported by the record. The State's only contention with respect to the N. P.'s revenues from mail and express was in connection with the method adopted by N. P.'s witness Peterson in apportioning passenger operating expenses between intra and interstate traffic. Peterson had prepared an exhibit in which he apportioned such expenses on a relative passenger mileage basis. (NP Ex. "7," p. 11.†)

---

*(NP 6) The court erred in finding that plaintiff contended that the N. P. should credit part of its mail and express revenue to local business, whereas no such contention was in fact made. (Finding XII, NP Rec. 43-4.)

(NP 7) The court erred in finding that $221,359 or any other sum should be added to the N. P.'s intrastate passenger revenue for 1933, for intrastate mail and express, such finding being wholly unsupported by the record. (Findings IX-h, IX-i and IX-j, NP Rec. 40-41.)

(NP 8) The court erred in finding that the N. P.'s intrastate passenger revenue for 1933 was any sum greater than $429,635 as shown by plaintiff's Exhibit "25." (Finding IX-j, NP Rec. 42, 212A.)

†Defendant's Exhibit "7," p. 11, was omitted from the printed Transcript of Record, possibly because of its being inadvertently omitted from the transcript certified to this court by the clerk of the State supreme court. The same has now been properly certified to

The State sought to show on cross-examination (NP Rec. 132-3) that the use of this method wholly ignored the expenses incurred in connection with mail and express traffic, all of the revenues from which were assigned by the N. P. to interstate traffic. (NP Rec. 132.) *There is not a suggestion in the record that counsel for the State ever made the slightest objection to the apportionment of all mail and express revenue to interstate.* Counsel for the N. P. thereafter had Peterson prepare another exhibit apportioning a certain proportion of this mail and express revenue to intrastate based on relative passenger miles (NP Ex. "53," p. 2; NP Rec. 229), but without the slightest basis therefor since Peterson conceded what the court well knows to be the fact, that there is no relation between the proportion of interstate passengers and the proportion of interstate mail and express carried on a given train. Peterson testified:

"You ask if, as a matter of fact, it is impossible to make any apportionment of mail and express. It is, unless you consider that the mail that moves on local

---

this court, but not having been printed as part of the Transcript of Record, it is herein set forth, as follows:

Def.'s Ex. "7," p. 11

NORTHERN PACIFIC RAILWAY COMPANY

State of Washington—Year 1933

Passenger proportion of Operating Expenses, Intrastate.		
Total passenger proportion of Operating Expenses year 1933, Intra and Interstate		**$3,142,708**
Revenue Passenger miles		**%**
Intrastate	**18,052,604**	**47.76**
Interstate	**19,749,788**	**52.24**
	37,802,392	**100.00**
Passenger proportion of Operating Expenses as applicable to Intrastate Traffic 47.76% of $3,142,708 or		**1,500,957**

trains is intrastate mail. That is the only way. That is not used. You ask if you can safely assume that. *No, I can't assume it, it is a false assumption.*" (NP Rec. 141.)

And again:

"You ask how much money the lines in the state of Washington realize from local mail and local express. I don't know. We know there is some, but the matter of division is a matter I can't inform you on." (NP Rec. 209.)

And again asked as to the relation between such revenue and passenger miles, he said:

"You ask if it is not true that I don't know anything about the relation. I can't give an exact opinion of the relationship, no." (NP Rec. 210.)

Counsel for the N. P. was, of course, actuated by no mere spirit of generosity in attempting to slough off a part of this mail and express revenue to intrastate traffic. He realized that whereas the total passenger revenue, intrastate and interstate, for 1933 was only $1,351,082 (Plff.'s Ex. "25," NP Rec. 212a), the operating expenses in connection therewith were $3,142,708 (Plff.'s Ex. "26," NP Rec. 217); *i. e.*, that the reported expenses were 232% of the reported revenues. Consequently the more passenger business he could donate to local operations, the more operating expenses he could pile up on the intrastate side of the ledger.

The offending findings should, we submit, be wholly ignored.

ASSIGNMENTS NP-9 AND NP-10*

COURT'S ERROR IN FINDING THAT N. P.'s PASSENGER SERVICE OPERATING EXPENSES SHOULD BE APPORTIONED TO INTRASTATE ON RELATIVE PASSENGER MILE BASIS INSTEAD OF RELATIVE REVENUE BASIS.

As part of its purported operating expenses, the N. P. made the following charge:

> "Passenger proportion of operating expenses applicable to Intrastate Traffic..... $1,500,957."
> (N. P. Ex. "7," p. 11; NP see footnote *ante*, pp. 105-6.)

This result was reached by apportioning the total intra and interstate operating expenses incident to Washington passenger traffic ($3,142,708) to intrastate traffic on the basis of relative passenger miles hauled in intra and interstate service. In so doing, the N. P.'s witness wholly ignored the obvious fact that its passenger trains are operated largely for the purpose of hauling express and mail, all of the revenues from which are apportioned to its interstate business. (Plff.'s Ex. "25," accts. 106-7, NP Rec. 212a:) It is, of course, clear that the relative number of Washington interstate and intrastate passengers hauled one mile has no logical relation to the amount of mail and express hauled on the passenger trains accommodating passengers. This was virtually conceded by N. P.'s witness Peterson, who prepared the exhibit. (NP Rec. 132-3.)

---

*(NP 9) The court erred in finding that the correct method of apportioning the N. P.'s passenger service operating expenses as between intra and interstate passenger service is in the relation of relative revenue passenger miles, and not relative gross revenues. (Finding IX-i, NP Rec. 41-2.)

(NP 10) The court erred in finding that the N. P.'s expense of intrastate passenger business for 1933 was $1,500,000, or any other sum greater than $999,381 as shown by plaintiff's Exhibit "26." (Finding IX-j, NP Rec. 42.)

Take, for example, the passenger trains operating between Seattle and Grays Harbor. These trains, as we well know, are operated principally to afford mail and express service, yet, according to the N. P.'s theory, if on an average ten revenue passengers were carried or these trains, only one of which was an interstate passenger, then 90% of the operating expenses would be apportioned to the N. P.'s intrastate passenger service, although all of the revenue from mail and express is apportioned to interstate operations. Such an apportionment of expense, is, of course, wholly indefensible. Expenses must logically be apportioned as between intra and interstate operations with reference to the relative amount of interstate and intrastate business handled, and *since relative revenues is our only available data* as to the relative amount of intra and interstate passenger train business done (including mail, express, milk and other activities; see Plff.'s Ex. "25"; NP Rec. 212a) it is, we submit, impossible to conceive of how these expenses can logically be apportioned on any basis other than relative revenues. And were further justification for our position necessary, we need but turn to the G. N. exhibits, where we find the G. N. apportioning passenger operating expenses by precisely the method we urge here. To quote (G. N. Ex. "11," p. 7; GN Rec. 265-6):

"2. PASSENGER PROPORTION OF OPERATING EXPENSES—INTRASTATE:

"(a) Passenger proportion of operating revenues Intrastate and Interstate	$1,540,264
"(b) Passenger proportion of operating expenses—Interstate and Intrastate—as reported to W. D. P. W.	2,481,136
"(c) Operating Ratio	161.09%*
"(d) Intrastate Operating Revenues Passenger proportion	551,845

"(e) Intrastate Operating Expenses—Passenger proportion (d) × (c) ..... 888,967"

*Arrived at by dividing (b) by (a)—expenses by revenues.

Thus, in making its apportionment, the G. N. first finds the ratio of passenger operating expenses, both interstate and intrastate, to passenger operating revenues, both interstate and intrastate, and applies that ratio (161.09%) to the total intrastate passenger operating revenues to ascertain the passenger service proportion of intrastate operating expenses. In other words, it apportions its operating expenses as between intra and interstate passenger service on the basis of relative operating revenues from the two classes of service. That there may be no mistake, let us follow the G. N.'s method in the N. P. case:

"PASSENGER PROPORTION OF OPERATING EXPENSES—INTRASTATE:

"(a) Passenger proportion of operating revenues intrastate and interstate (Plff's Ex. "25"; NP Rec. 212a)	$1,351,082
"(b) Passenger proportion of operating expenses—Interstate and Intrastate (N. P. Ex. "7," p. 11; see footnote, *ante*, pp. 105-6)	3,142,708
"(c) Operating ratio (b ÷ a)	232.61%
"(d) Intrastate operating revenues, Passenger proportion (N. P. Ex. "7," p. 7, 1st figure in 5th line; Plff's Ex. "25," total of 2nd vertical column; NP Rec. 212a.)	429,635
"(e) Intrastate Operating Expenses—Passenger proportion ("d" × "c")	999,374"

And this figure, it will be observed, is just $7 less than the figure reached by plaintiff's witness, Manschreck, who followed the method here urged by plaintiff. (See Plff.'s Ex. "26," NP Rec. 213.)

But as shown, the N. P. charged $1,500,957 as its 1933 intrastate passenger operating expenses, or $501,-

576 more than can be reached on any reasonable theory. (N. P. Ex. "7," p. 11, see footnote, *ante* pp. 105-6.)

ASSIGNMENTS NP-11 AND GN-10*

COURT'S ERROR IN FINDING THAT THE MILEAGE PRORATE DIVISION OF REVENUES FROM INTERSTATE SHIPMENTS AS BETWEEN STATES IS THE CORRECT METHOD OF APPORTIONING SUCH REVENUES TO WASHINGTON.

Both the N. P. (N. P. Ex. "7," p. 7; NP Rec. 161) and the G. N. (G. N. Ex. "11," pp. "9," and "C;" GN Rec. 256, 267-8) contend that the ad valorem taxes on their respective operating properties in Washington should be apportioned between intrastate and interstate traffic in that proportion which the revenues from intrastate traffic bear to the revenues from interstate traffic. It is further conceded that for the purpose of determining the amount of such interstate revenue the total revenue from each interstate shipment is apportioned to Washington in that proportion which the miles of haul in Washington bear to the total mileage of haul as to each individual shipment. (NP Rec. 118-9; GN Rec. 127). The State contends in each case that this method of apportionment of taxes is improper, for the reason, if for none other, that this mileage prorate division, while it may do for purely statistical purposes, is

*(NP 11) The court erred in finding that the mileage prorate division of revenues from interstate shipments is the method prescribed by the D. P. W. and the I. C. C., and is the correct method for apportioning such revenues to Washington. (Finding VIII-a, NP Rec. 36.)

(GN 10) The court erred in finding that in the apportionment of operating revenues received from interstate freight business to the G. N.'s Washington operating properties, such properties were not entitled to more than a mileage prorate of such interstate freight revenues. (Finding VII-e, GN Rec. 65-7.)

purely arbitrary and is unfair to a terminal state such as Washington, and for this reason: The rate exacted for handling traffic involves at least two services, (1) the line-haul service, and (2) the terminal service. The terminal service is just as essential as the line-haul service, and falls most heavily on terminal states such as Washington where a large part of the profitable long-haul business originates and terminates. The mileage prorate is computed on a station-to-station movement only (GN Rec. 146; NP Rec. 120), and consequently, such apportionment method wholly ignores both the terminal service rendered and terminal expenses incurred in the movement. Thus, Mr. Peterson testifying for the N. P., said:

"The company furnishes a large amount of service in connection with the movement of that traffic (interstate) which is included in the tariff aside from the purely line haul. * * * I will say that it includes the large expenses in connection with switching, also handling of freight at terminals for both classes of traffic, both intrastate and interstate. * * * The assembling of the cars into the originating trains would involve some switching, none of which would be reflected in the mileage prorate division. The mileage prorate would include the line haul only." (NP Rec. 120-121.)

Mr. Burn of the G. N. testified substantially to the same effect. (GN Rec. 146-7.)

It is rather startling to compare the court's findings that the mileage prorate is "the method prescribed by the Department of Public Works" (NP Rec. 35), with the following testimony of Mr. Lonergan, since 1927 chief of the D. P. W.'s traffic division (NP Rec. 172):

"You ask me to state whether or not in my opinion such method of apportioning revenues followed by the N. P. is a proper method of apportioning revenues to

the state of Washington for the purpose of determining the true net railway revenues in the state. I would say not for ratemaking purposes. (NP Rec. 174.) * * *

"You ask whether it is my opinion that the interstate revenues should be apportioned to Washington on a mileage prorate. No. You ask why not. Because that division does not allow for the terminal service. In other words, if the expenses are to be apportioned locally, to the terminal state, then a greater proportion of the earnings or the revenues should be apportioned to that state. You should either apportion a certain proportion of the expenses connected with this terminal service to the remainder of the states, or you should apportion a greater percentage of the interstate revenues to the state to equalize those expenses. (NP Rec. 176.) * * *

"The rate is made to compensate for the haulage over the mountains. It is also made to cover cost of terminal services. The terminal service charge is absorbed in the line haul rate. The terminal services and the line haul service is all included as part of the structure of the service, the total service, to be paid for by the imposition of this tariff. If the computation of mileage is from station to station, the terminal service is in no way whatever reflected by the apportionment on a mileage prorate. It wholly ignores it and considers only the mileage of haul." (NP Rec. 182.)

"It is," Mr. Lonergan said, "a matter of common knowledge that these figures that are filed in the annual reports of the railroads covering their state revenues and expenses are incorrect." (NP Rec. 175.) With respect to the recognition of this principle by the D. P. W., Mr. Lonergan said:

"In all consideration of intrastate rates we have always taken into account these arbitrary assumptions that are contained in the state figures, and to quite an extent have disregarded them. That is, the mileage prorate which gives the state of North Dakota or Montana the same revenue per mile as it does in the state of Washington without regard to the terminal services, the absorption of competitive switching on interstate busi-

ness, and many other factors which distort the figures." (NP Rec. 175.)

And we find the D. P. W. making the following finding of fact in 1930 in a proceeding in which the G. N. and N. P. were parties:

"All of the operating cost figures are based upon the arbitrary allocation of revenues and expenses now employed under which interstate revenues are apportioned to states on basis of a mileage pro-rate. This disregards the terminal proportion of the revenue and gives the intermediate states as great a share in proportion to mileage as the states in which the traffic originates and terminates. It gives no consideration to relative costs in different states as constituting any measure of relative revenue which should be apportioned to such states. Non-revenue freight or company material is a large factor in the operating costs in Washington, but under the existing plan of localizing expenses to the state in which they occur, the costs of handling company freight is not distributed in proportion to their responsibility for the expenses. Absorption of competitive switching charges on interstate traffic and many other factors also contribute to distort the facts." (Plf.'s Ex. "24," NP Rec. 211-2.)

In this connection it is also important to note that in the division of revenues as between connecting carriers on through shipments, the originating and terminating carrier is commonly allowed far more than a mileage prorate division. The terminal line usually receives a minimum of 25% of the through rate with the local rate as the maximum.

Asked whether there was any general principle governing the apportionment of interline revenue as between two terminal lines and an intermediate line, Mr. Edmunds, assistant traffic manager of the Union Pacific System (NP Rec. 199; GN Rec. 247) testified:

"The basis most generally used has been a mileage prorate with a minimum of 25% to any line, whether the terminal lines or the intermediate line. The local rate is the maximum generally, yes. It might be less than 25%, depending on the agreement of the parties. These divisions would apply both west and east, to traffic going in both directions. As a rule the short line would get the 25% minimum whether it received the traffic or originated the traffic." (NP Rec. 201; GN Rec. 248.)

The Oregon-Washington ("O-W") operates between Portland and Huntington (on the Idaho-Oregon boundary); the Oregon Short Line ("O. S. L."), between Huntington and Granger, Wyoming; and the Union Pacific ("U. P.") between Granger and Omaha. Huntington corresponds roughly with the location of Spokane on the G. N. and N. P., and Omaha is approximately the same distance from Chicago as St. Paul. 100% of the O-W stock is owned by the O. S. L. and approximately all of the O. S. L. stock is owned by the U. P. On a shipment between Portland and Omaha the O. W. receives 35%, the O. S. L. 27% and the U. P. 38% of the through rate. On the same haul, the mileage prorate would give the O-W 22.05%, the O. S. L. 30.44% and the U. P. 47.51%. (NP Rec. 199-203; GN Rec. 247-50.)

A graph is set forth in the record (NP Rec. 228a; GN Rec. 250a) comparing the divisions as compared with the mileage prorate division between the O-W and the Milwaukee and G. N. east and west of Spokane, and as between the N. P. and O-W east and west of Wallula.

On shipments between the points on the Southern Pacific ("S. P.") and Omaha via the U. P. system, the S. P. receives about twice its maximum mileage prorate of the West of Missouri River revenue. (GN Rec. 252.)

The through rate on lumber from Longview points

to Omaha is 62.5 cents. Of this, the railroad there (before being absorbed by other roads) received 3½ cents for a 5-mile or 23-mile haul. (GN Rec. 253.)

A striking illustration of the inadequacy of the mileage prorate as to terminal states exists in the cases of Oregon and Wisconsin, as to which Mr. Peterson testified:

"The N. P. reports to the regulatory bodies of Oregon and Wisconsin: The states of Wisconsin and Oregon have a considerably higher expense because of the short mileage in the state and the terminal operations in that state. In making its reports to Wisconsin and Oregon regulatory bodies it uses the same basis of allocation to the state as it did the state of Washington. The net revenue from operation in the state shows a deficit for the year 1933 for Wisconsin and Oregon. I know that has been true for a good many years. No, I would not say that the lines in Oregon and Wisconsin are not a valuable part of the N. P. system. You ask if that means that the N. P. is not actually making money from its railway operations in Wisconsin and Oregon. We are making money probably from the operations as a whole, but not necessarily from the operations in that state. It does not mean that the N. P. system would profit by having the portion of its system located in Oregon and Wisconsin eliminated." (NP Rec. 121-2.)

It is interesting to note the trial court finds that the mileage prorate method is "the method prescribed by the * * * Interstate Commerce Commission." (NP Rec. 36.) Let us quote from a few of the I. C. C. decisions:

"Fundamentally, this statement proceeds on what we consider to be an erroneous theory; that is, that certain portions of a system of railroad can be segregated from the whole and the expenses and earnings be charged and credited to such portions on a mileage-prorata basis." *Investigation of Advances in Rates on Grain,* 21 I. C. C. 22, 25-26.

"It is to be expected that an originating division would apparently not be self-supporting any more than would the average large terminal in a city. To make them self-supporting it is necessary to assign to the originating division and to the terminal a sufficient portion of the revenues to more than offset the expenses. This would have to be an arbitrary sum. It could hardly be accomplished by the ordinary method of prorating the revenue or dividing it under a block-mileage system." *Louisville & Nashville R. R. Coal and Coke Rates,* 26 I. C. C. 20, 29.

"The apportionments of revenues, expenses, and other income items between the line of the United States and Canada and the lines of the Grand Trunk in Canada are in many instances made upon bases of road mileage, car-mileage, or train mileage. We have held that a portion of a railroad system can not be separated from the whole, and the earnings and expenses charged, and credited to such portion on a mileage prorate basis. *Investigation of Advances in Rates on Grain,* 21 I. C. C. 22, 25; *Louisville & Nashville R. R. Coal and Coke Rates,* 26 I. C. C. 20, 30. It is well known that a mileage prorate of transportation revenues or expenses will in many cases result in a showing of deficits for branch lines of light traffic density, notwithstanding the showing for the system as a whole is a substantial profit." *Deficit Status of U. S. & Canada R. R.,* 76 I. C. C. 455, 457-8.

It is to be particularly noted that these companies themselves each year set out in an impressive foot note in their reports to the D. P. W.:

"Apportioning either such revenues or such expenses on a mileage basis is purely arbitrary and has been adopted for want of any other basis." (NP Ab. 82.)

"The figures entered as 'revenues earned within the State on interstate traffic,' are compiled upon a straight mileage basis in accordance with order of the Railroad Commission and are given under protest for the reason that *this Company claims that basis does not accurately reflect the revenues earned within the state of Wash-*

ington from such traffic.'' (GN Rec. 147-8.) (Italics ours.)

We respectfully submit that by apportioning *ad valorem* taxes on the basis of the relation of intrastate earnings which are known, and interstate "earnings" apportioned to Washington, a terminal state, on this mileage prorate basis, the court would by these companies' own admissions, be resorting to most arbitrary and erroneous assumptions for the purpose of defeating the occupational tax. This, we are confident, the court will not do.

ASSIGNMENTS NP-12 TO NP-14*

COURT'S ERROR IN IGNORING TAXES PAID BY N. P.'s TENANT LINES, AND HOLDING THAT TAXES SHOULD BE APPORTIONED BETWEEN INTRA AND INTERSTATE TRAFFIC ON RELATIVE REVENUE BASIS.

The N. P.'s first error was in attempting to apportion the entire amount of *ad valorem* taxes payable on its Washington operating property ($2,005,015) to its intra and interstate operations (N. P. Ex. "7," p. 7; NP Rec. 161) whereas $227,600.74 of these taxes were in fact paid by its tenant companies. (Plff.'s Ex. "28;" NP Rec. 214.) Thus, in reality, the N. P. paid in taxes on its operating properties only $2,005,015 less $227,601, or $1,777,414.

Having determined the correct figures, how should these taxes be apportioned as between the N. P.'s Washington intrastate and interstate freight operations? On a relative revenue basis? We submit not. If A and B have the joint use of a private roadway and A uses the same four times as much as B, clearly A should equitably pay 4/5ths of the taxes payable by A and B jointly. And it is immaterial, we submit, whether B receives pro-

---

*(NP 12) The court erred in finding that the 1933 ad valorem taxes on the N. P.'s Washington operating property should not be apportioned as between intrastate and interstate traffic on a relative use (car-mileage) basis, but instead on a relative revenue basis, with interstate freight revenues apportioned to Washington on a mileage prorate basis. (Finding XII, NP Rec. 43-4.)

(NP 13) The court erred in finding that in computing the ad valorem taxes properly apportionable to the N. P.'s intrastate traffic for 1933, credit should not be allowed such traffic for the taxes contributed by the N. P.'s tenant lines. (Finding XII, NP Ab. Rec. 43-4.)

(NP 14) The court erred in finding that the N. P.'s intrastate traffic for 1933 should be charged with ad valorem taxes paid in the sum of $876,083 or any greater sum than $678,662. (Finding XI-b, NP Ab. Rec. 43, 215-6.)

portionally more gross revenue from his use of such roadway than does A. To support our contention, we need fortunately go no further than the N. P.'s own agreements with the G. N. and O. W. for the joint use of the N. P.'s tracks between Portland and Seattle. The N. P. owns these tracks but the G. N. and O-W. use them in their railway operations jointly with the N. P. For this privilege the G. N. and O-W. pay the N. P. an annual rental based on a certain percentage of the cost of construction plus betterments, and in addition, contribute a certain proportion of the taxes paid on this portion of the N. P.'s road. Now how are those taxes apportioned as between the N. P., G. N. and O-W.? According to the relative amount of gross revenue received by each carrier? No. *The taxes are apportioned according to the relative amount of use made of such property by the respective roads.* To quote from the O-W. agreement (p. 13, Sec. 2):

"The Oregon Company (O-W.) also will pay such pro rata proportion of the cost actually incurred by the Pacific Company (N. P.) in the maintenance and operation of the Point Defiance Line (which cost shall include insurance and *taxes* and a just sum to cover cost of superintendence and management) as the number of miles on the said railway or any part thereof run by engines and cars in its trains bears to the whole number of miles run by engines and cars in trains of all the parties using the same or any part thereof." (NP Rec. 156.)

And further quoting from the G. N. agreement (p. 6, sec. 2):

"The Northern Company (G. N.) will also pay such pro rata proportion of the cost actually incurred by the Pacific Company (N. P.) in the maintenance and operation of the property (which cost shall include insurance and taxes and a just sum to cover cost of superinten-

dence and management) as the number of miles on said railway or any part thereof run by engines and cars in its trains bears to the whole number of miles run by engines and cars in trains of all the parties using the same or any part thereof." (NP Rec. 131.)

This, then, is the way these litigants by their own voluntary agreements apportion taxes as between themselves. Nor have they offered any valid reason for apportioning taxes on a different basis as between intrastate and interstate operations. It is to be noted that no distinction is made in these joint user agreements as between passenger and freight train cars.

Nor are we without authority. In the *Minnesota Rate Cases*, 230 U. S. 352, certain railroad companies including the N. P. and G. N. were contending that certain intrastate rates fixed by the Minnesota regulatory authority were confiscatory, as not yielding a fair return upon that portion of the complaining carriers' operating property used in intrastate operations. Having established the value of all of their respective Minnesota operating properties used in both interstate and intrastate operations, they then attempted to apportion such value as between their interstate and intrastate operations on the basis of relative gross revenues received in these two classes of service. But in condemning this method the court said (230 U. S. p. 458 *et seq.*):

"The apportionment of the value of the property, as found, between the interstate and intrastate business, was made upon the basis of the gross revenue derived from each. This is a simple method, easily applied, and for that reason has been repeatedly used. It has not, however, been approved by this court, and its correctness is now challenged. * * *

"In support of this method, it is said that a division of the value of the property according to gross

earnings is a division according to the 'value of the use,' and therefore proper. But it would seem to be clear that the value of the use is not shown by *gross* earnings. The gross earnings may be consumed by expenses, leaving little or no profit. * * *

"When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business, and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments respectively, the property exclusively used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common. It is suggested that other methods of calculation would be equally unfavorable to the state rates but this we cannot assume.

"It is sufficient to say that the method here adopted is not of a character to justify the court in basing upon it a finding that the rates are confiscatory."

In brief, the Supreme Court holds that the value of operating property should be apportioned as between such interstate and intrastate business in proportion to the *extent* of the use made of such property in each business, and not in proportion to the relative gross revenue derived therefrom.

And since taxes are based upon property *values* it must logically follow that the relative amount of taxes chargeable to each of two kinds of business jointly utilizing the same property must be determined by the same

method; namely, by the *relative extent of use* made of the joint property in such two classes of business—not by the relative gross revenues derived therefrom.

The N. P., as already shown, has used the gross revenues method condemned by the Supreme Court. The State, on the contrary, has apportioned taxes on the basis of relative extent of use, the method approved by the Supreme Court.

Thus, in Plaintiff's Exhibit "29" (NP Rec. 215-6) Mr. Manschreck first finds the ratio of total state *passenger* car and locomotive mileage to total state *freight and passenger* car and locomotive mileage to be 15.91%. He therefore apportions 15.91% of the total N. P.'s taxes to passenger service and the remainder (84.09%) to freight service. The ratio of interstate freight car mileage to total of intra and interstate freight car mileage for the test period was found by defendant to be 42.30%. (N. P. Ex. "7," p. 13; NP Rec. 164.) Manschreck therefore apportions 42.30% of the total taxes apportionable to state intra and interstate freight service to intrastate freight service, or $632,227. There being no other factor available, Manschreck finds the ratio of intrastate passenger revenue to the total intra and interstate passenger revenue and apportions to intrastate passenger operations that percentage (31.80%) of the total taxes apportionable to both intra and interstate passenger service, or $89,926, making a total of $722,153. This added to the $13,236 regulatory license tax makes a grand total of $735,389 apportionable to Washington intrastate operations. The taxes apportioned to this service under the N. P.'s calculations, are $889,319, or $153,930 less than the maximum apportionable by the proper method used by Mr. Manschreck.

80

But if the N. P. is to be allowed to transfer $369,606 reported under oath to the D. P. W. as intrastate freight revenue, to interstate freight revenue, then obviously Mr. Manschreck has apportioned too much taxes to intrastate freight traffic. Mr. Manschreck's figures were based on the assumption that all of the freight business reported as intrastate was in fact intrastate. The total freight revenues reported by the N. P. as intrastate were $5,372,895 (Plff.'s Ex. "25," NP Rec. 212a, 1st vertical column). The N. P. contends (erroneously as we will show later) that $369,606, of this revenue was in fact revenue derived from shipments for export and therefore foreign and not intrastate traffic. Since we are not furnished with data as to the corresponding number of freight car miles involved, we are compelled to assume that a reduction should be made corresponding with the revenue involved, *i. e.*, in the relation of $369,606 to $5,372,895, or 6.879%. This percentage of $632,227 (the taxes Manschreck found should be apportioned to intrastate freight service) is $43,491. Deducting this amount from the grand total of taxes which Manschreck found should be apportioned to intrastate freight and passenger traffic, we have $735,389 less $43,491, or $691,898, or $197,421 less than the $889,319 reached by the N. P.'s calculations.

It will be observed in making this modified calculation we have ignored the $161,031 which the N. P. contended should be transferred from its reported intrastate switching revenue, to interstate. (NP Ex. "7," p. 4; NP Rec. 159-160.)

ASSIGNMENTS NP-15 AND GN-13*

COURT'S ERROR IN FINDING THAT PENSIONS PAID WERE PROPERLY CHARGEABLE AS PART OF THE N. P.'s AND G. N.'s OPERATING EXPENSES.

It was shown that if "pensions" were eliminated as an item of operating expense, the operating expenses incident to intrastate traffic would be reduced by at least $103,471 in the case of the N. P. (Plff.'s Ex. "37," NP Rec. 231, Test. of Manschreck, NP Rec. 191-2), and $22,066 in the case of the G. N. (Plff.'s Ex. "25," GN Rec. 233-4.)

Mr. Manschreck's computation as to the G. N. was based on the G. N.'s "book showing," *i. e.*, the assumption that all its operating revenues reported as intrastate were in fact intrastate. If, however, the court finds it to be established by competent evidence that a certain amount of the G. N.'s revenues reported as intrastate, should be transferred to interstate, then its intrastate freight revenue for 1933 would be $1,622,644 (G. N. Ex. "11," p. "B," GN Rec. 255), instead of $2,753,703 as shown by its books and sworn report to the D. P. W. (GN Ex. "11," p. 11, GN Rec. 268a), and this item of $22,066 would have to be reduced to an amount represented by the proportion which $1,622,644 bears to

---

*(NP 15) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "General Expenses," for the week of October 22, 1933, was $5,945.44, or was any sum in excess of $4,407.89, which error was the result of the court including "pensions" as an item of operating expenses. (Finding IX-e, NP Rec. 39, 221.)

(GN 13) The court erred in finding that pensions paid were properly chargeable as part of the G. N.'s operating expenses for the purpose of determining its railway operating income for 1933. (Finding VII-j, GN Rec. 69.)

$2,753,703, or 58.92%, making the amount 58.92% of $22,066, or $13,001 only.

However commendable the practice of these roads of paying pensions, we cannot believe it a good defense in an action for a legitimate tax, that the company elects to pay pensions to its ex-employes and hence cannot pay the contested tax without drawing on its interstate earnings.

Mr. Manschreck testified in the G. N. case:

"My thought on the pensions was that pensions are a donation by the owners of this property to its former employees, and would be in the same class as paying dividends on this stock. I think pensions should be charged to profit and loss, and not to operating expenses. I think this is a gift or a grant. I don't think it is deferred compensation to those employees." (GN Rec. 224.)

In Railroad Retirement Board v. Alton R. Co., — U. S. —, 55 Sup. Ct. 758, 770-773, the court said in holding invalid the Federal Compulsory Retirement and Pension Act:

"We think it cannot be denied and indeed, is in effect admitted, that the sole reliance of the petitioners is upon the theory that contentment and assurance of security are the major purposes of the act. We cannot agree that these ends if dictated by statute, and not voluntarily extended by the employer, encourage loyalty and continuity of service. We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the states, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment

of the railroads' duty to serve the public in interstate transportation."

If the payment of pensions to superannuated employees is not a duty which regulatory bodies may lawfully impose on public service companies, does it not logically follow that if such companies, voluntarily elect to pay such pensions, they are not at liberty to set up such payments as claims against their gross operating revenues superior to the right of the sovereign authority to collect its taxes? We submit not, Your Honors.

ASSIGNMENT NP-16*

COURT'S ERROR IN FINDING THAT $530,637, OR ANY OTHER SUM WHICH WAS REPORTED BY THE N. P. TO THE D. P. W. FOR 1933 AS INTRASTATE FREIGHT REVENUE WAS IN FACT INTERSTATE REVENUE.

The first item on page 4, NP's Ex. "7" (Ab. NP Rec. 159) is as follows:

"Operating revenues State of Washington Intrastate as reported to Department of Public Works.....$5,802,530."

There is then deducted from this amount the sum of $530,637 as "deduction account of amount as included in connection with foreign commerce $369,606," and "deduction account of switching in connection with interstate traffic included as intrastate, $161,031."

There is, we submit, nothing in the record justifying these deductions. These revenues, as indicated by the exhibit itself, were reported to the D. P. W. intra-

*(NP 16) The court erred in finding that $530,637, or any other sum reported by the N. P. to the D. P. W. for 1933 as intrastate freight revenue was in fact interstate revenue. (Finding X, NP Rec. 42-3.)

state revenues. That this was true was likewise testified to by Mr. Peterson, defendant's statistician. (Plff.'s Ex. "25," NP Rec. 182, 212a.)

Counsel for the N. P. seem to justify these deductions by certain purported supplemental answers to interrogatories filed in the cause by this appellant's counsel. But this, we submit, is no justification whatever. The N. P. filed with the D. P. W. its report for 1933, sworn to be the Assistant General Auditor to the following effect:

"That it is his duty to have supervision over the books of account of the respondent and to control the manner in which such books are kept; that he knows that such books have, during the period covered by the foregoing report, been kept in good faith in accordance with the accounting and other orders of the Interstate Commerce Commission, effective during the said period; that he has carefully examined the said report and to the best of his knowledge and belief the entries contained in the said report have, so far as they relate to matters of accounts, been accurately taken from the said books of account and are in exact accordance therewith; that he believes that all other statements of fact contained in the said report are true, and that the said report is a correct and complete statement of the business and affairs of the above-named respondent during the period of time from and including January 1, 1933, to and including December 31, 1933." (N. P. Ex. "9," NP Rec. 284.)

Such report was also sworn to by the company's vice president to the effect that he has carefully examined the foregoing report; that he believes that all statements of fact contained therein are true, and that the said report is a correct and complete statement of the business and affairs of the N. P. and the operations of its property during the year 1933. (NP Ex. "9," p. 915, NP Rec. 284.)

On page 700 of this report (NP Rec. 275) the revenues of the N. P. on intrastate traffic are shown to have been $5,802,530.12.

In the N. P.'s answers to interrogatories the revenues of the N. P. on intrastate traffic are set forth for each of the months of August, September, October, November, and December, 1933, both by accounts and in the total amounts, and such answers are verified by W. C. Pinger, defendant's assistant general auditor, who avers:

"That he prepared the foregoing answers to the interrogatories propounded by plaintiff and made the same for and in behalf of said Northern Pacific Railway Company; that said answers are to affiant's knowledge true and correct." (Plff.'s Ex. "2," NP Rec. 78-9.)

Then on June 27, 1934, a paper is filed denominated "Defendant's Second Supplemental Answers to Interrogatories" in which it is stated that certain amounts should be deducted from the amounts shown under account No. 101 in the original answers to interrogatories. But these so-called "supplemental answers" are merely verified by L. D. da Ponte, attorney for defendant, to the effect that the same are "true and correct to the best of affiant's knowledge and belief." (NP Rec. 84.) Moreover, not a word is said in these so-called supplemental answers as to switching in connection with interstate traffic.

We have then, on the one side, the N. P.'s report to the D. P. W. sworn to by the N. P.'s assistant general auditor and vice-president that the N. P.'s intrastate revenues for 1933 were $5,802,530, and the answers to interrogatories sworn to by the N. P.'s assistant general auditor that the same are *"to affiant's knowledge,*

true and correct," and on the other, the affidavit of one of the N. P.'s attorneys that to the best of his knowledge and belief, the original answers to interrogatories are erroneous in certain particulars. Whom should the court believe? The sworn report of the company's vice-president and assistant general auditor who are in a position to know, and the sworn statement of the company's assistant general auditor that the answers to interrogatories are correct, or the attempted controverting statement of counsel sworn to merely on information and belief with no averment that he has knowledge of the facts? Had counsel attempted to testify at the trial as to the matters set forth in his affidavit he of course could not have qualified as such witness. How, then, can it be said that his written statement sworn to merely on information and belief, can change the effect of the assistant general auditor's sworn statement? We submit that Mr. daPonte's statement should be utterly disregarded, and the company's report and the original answers to interrogatories should be accepted as undisputed evidence.

See 32 C. J. 354, 357;
Lake Shore & M. S. Ry. Co. v. Felton (C. C. A.), 103 F. 227;
Behre v. Anchor Ins. Co. (C. C. A.), 297 Fed. 986;
Pine-Coffin v. Erie R. Co., 69 N. Y. S. 333.

Unless Mr. daPonte's affidavit made on mere information and belief be held to overcome the positive sworn statement of the company's assistant general auditor, and the company's verified report to the state regulatory body, then N. P.'s Exhibit "7," p. 4 (NP Rec. 159-160), is erroneous and $530,637 must be added to the company's intrastate revenues for 1933.

But a corresponding amount of operating expenses must also be added. The relation of operating expenses to revenues is shown by N. P.'s Exhibit "7," p. 4, to be 68.06%. Consequently .6806 × $530,637 or $361,152 must be added to operating expenses, and the difference of $169,485 should be added to the "net revenue from railway operation" as shown in line "3," NP Ex. "7," p. 1, NP Rec. 159-160.)

ASSIGNMENT NP-17*

COURT'S ERROR IN REFUSING TO STRIKE AVERMENT IN PETERSON AFFIDAVIT THAT AMOUNT OF N. P.'s INTERSTATE SWITCHING REVENUE FOR 1933 WAS $207,965.

On November 13, 1934, the court, on the State's motion, reopened the case for the purpose of permitting it to introduce further evidence as to the matters set forth in Manschreck's affidavit (NP Rec. 232-241), and on November 16, 1934, the date set for such hearing, Manschreck's affidavit was received in lieu of his testimony, it being stipulated that the N. P. might file an affidavit in rebuttal thereto, but that the State might have the right to cross-examine such witness if it so desired. (NP Rec. 251.) Nothing was set forth in the Manschreck affidavit except a criticism of the calculations made, and conclusions reached, by Peterson in N. P. Exhibit "7," based on the special studies for the weeks of October 22, 1933, and June 3, 1934. (NP Rec. 232-241.)

---

*(NP 17) The court erred in refusing to strike paragraph 7 of Peterson's affidavit to the effect that the amount of the N. P.'s interstate switching revenue for 1933 was $207,965 because not based on any record evidence before the court (NP Rec. 248-9.)

On November 26, 1934, the N. P. offered in evidence the affidavit of E. V. Peterson which was received in evidence over the State's said objection. (NP Rec. 242.)

In paragraph 7 of the Peterson affidavit above referred to it is stated that an analysis had been made for the year 1933 showing that the amount of the N. P.'s interstate switching revenue for 1933 was $207,965. (NP Rec. 245.) It will be recalled that this switching revenue was all reported to the D. P. W. as intrastate revenue (NP Rec. 132), but in the N. P.'s studies the N. P. attempted to transfer a large part ($161,031) from intrastate to interstate. (N. P. Ex. "7," p. 4; NP Rec. 159-160.)

With regard to this switching revenue, Peterson testified:

"You ask if it is not a fact that there is no record in the state of Washington anywhere, that would show these facts. No, the only report we furnished to the D. P. W. for 1933 was in Ex. '9,' the annual report, in which it showed the entire amount of switching revenue. It was all shown as intrastate. That was sworn to by our officers and filed. It was made March 4, 1934, and was made on the same basis of previous years. The record in the state would be available at the various stations. You ask if there is any record here to show the change in our book accounts. No, there is no record here. There is no record offered in exhibits of any kind that would tend to show whether these were interstate or intrastate movements. I couldn't do that without going to our records scattered around throughout different parts of the state or our records in St. Paul." (NP Rec. 248.)

The State's counsel thereupon moved to strike paragraph 7 as not based on anything shown of record, and because based on record evidence not produced, which motion was denied. (NP Rec. 248-9.)

For the reasons pointed out in the motion to strike we respectfully submit that this portion of the Peterson affidavit should have been stricken and the same disregarded.

ASSIGNMENT NP-18*

COURT'S ERROR IN FINDING THAT "TRAFFIC" EXPENSE SHOULD PROPERLY BE APPORTIONED BETWEEN INTRA AND INTERSTATE OPERATIONS ON A RELATIVE TONNAGE BASIS INSTEAD OF A RELATIVE REVENUE BASIS.

"Traffic" expenses are those incident to the solicitation of traffic. The purpose of such expenditures is to secure revenue-bearing traffic. It is logical, therefore, to assume that expenses in the solicitation of freight traffic are proportional to the amount of freight *revenue* received and not to the amount of *tonnage* originated. For example, the intrastate tonnage of logs for 1933 was 2,000,463 and all other intrastate freight, 1,776,398 (see N. P. Ex. "7," p. 16; NP Rec. 166.) We think the court judicially knows that the N. P.'s log traffic is largely if not entirely non-competitive. Consequently, little or no "traffic expense" can rightfully be charged to that kind of traffic. Yet said appellant apportions as much "traffic expense" to a ton of logs as to a ton of automobiles with perhaps ten times the revenue per ton mile.

Logs are a very low revenue-producing commodity. (NP Rec. 126.) The length of haul is very short even

*(NP 18) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "Traffic Expenses" for the week of October 22, 1933, was $3,086.41, or was any sum in excess of $2,366.77, as shown by Exhibit "B" attached to the affidavit of State's witness, Manschreck. (Finding IX-e, NP Rec. 39, 241.)

as compared with other intrastate business. The greatest volume of this traffic is 18 miles. (NP Rec. 146.) Something, we submit, is decidedly wrong with a method of apportionment which assigns the same proportion of expense to a ton of logs hauled but a few miles, and to a ton of silk hauled 2,000 miles.

Mr. Manschreck apportioned these "traffic" expenses as between intra and interstate on a relative revenue basis, rather than on a relative tonnage basis (NP Rec. 241) which, we submit, yields a result as nearly correct as the limited data supplied by the N. P. permits. This apportions 50.149% to intrastate. The percentages apportioned by other possible factors would be as follows: relative freight car miles, 42.30%, relative gross ton miles, 41.92%; relative net ton miles, 46.47%. (NP Ex. "7," p. 13; NP Rec. 164.)

Using the relative revenue basis, the State's calculations in "Exhibit B" attached to the Manschreck affidavit (NP Rec. 241), shows that the N. P.'s 1933 intrastate freight expenses charged to "traffic" would have been $37,525.65 less, and its operating income correspondingly greater than as shown by N. P.'s Exhibit "7."

In his criticisms of Exhibit "B" attached to Mr. Manschreck's affidavit (NP Rec. 241) Mr. Peterson insists that the total reduction on Mr. Manschreck's theory should be $31,552.81 instead of $37,525.65 as shown in Mr. Manschreck's exhibit. In our final calculations we will therefore use the figure of $31,552.81 instead of the figure found by Mr. Manschreck.

ASSIGNMENTS NP-19 TO NP-21*

COURT'S ERROR IN FINDING THAT OPERATING EXPENSES INCIDENT TO MAINTENANCE OF WAY AND STRUCTURES AND FREIGHT-TRAIN CAR REPAIRS SHOULD BE DETERMINED BY THREE-YEAR INSTEAD OF ONE-YEAR AVERAGE.

With the above exceptions the operating expenses and revenues for the single year, 1933, were taken by the N. P. as the test in making its calculations. But as to maintenance of way and structures and freight-train car repairs, the annual average for 1931 to 1933 was taken. It would seem that if the results of more than one year's operations were taken as to these large items of expense, the same period should be used as to all other items of expense and revenues. There was no showing as to the amount of deferred maintenance of way and structures and equipment there may have been at the beginning of this three-year period taken as the test. The amount of freight-train car repairs expense necessary for a given period would, of course, depend upon the condition of the cars at the beginning of the period, as well as the extent of the use of the cars during such period. Mr.

---

*(NP 19) The court erred in finding that the N. P.'s operating expenses incident to maintenance of way and structures should be determined by taking the annual average for three years instead of for 1933 alone, or that the N. P. had any deferred maintenance in 1933. (Finding XIII, NP Rec. 45.)

(NP 20) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "Maintenance of Way and Structures," for the week of October 22, 1933, was $11,202.01, or was any sum in excess of $8,724.02 as shown by plaintiff's Exhibit "31." (Finding IX-e, NP Rec. 39, 217.)

(NP 21) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "Freight car repairs, depreciation and retirement," for the week of October 22, 1933, was $9,552.01, or was any sum in excess of $8,372.41, as shown by plaintiff's Exhibit "32." (Finding IX-e, NP Rec. 39, 218.)

Peterson, who sponsored the three-year test, had no personal knowledge as to extent of such deferred maintenance if any. (NP Rec. 127, 210.)

Whatever may be said in justification of using a three-year instead of a one-year average as to these items, the fact remains that had only a one-year period been taken, the expenses for the year chargeable to intrastate freight traffic would have been $167,563 less than the amount charged in the N. P. Exhibit as shown by Manschreck's figures. (See item "M," Plff's Ex. "36," NP Rec. 220.) And see Manschreck's testimony in explanation of this and companion exhibits. (NP Rec. 188-192.)

ASSIGNMENT NP-22*

COURT'S ERROR IN FINDING THAT ANY SUM LESS THAN $1,127,464 SHOULD BE ASSIGNED AS NET JOINT FACILITY RENTS TO THE N. P.'s INTRASTATE OPERATIONS FOR 1933.

The N. P. pays out a certain amount each year for the use of the tracks and other facilities of other roads, and also receives from other roads certain rentals for the joint use of its own tracks and other operating property. The excess of the rentals so received over those paid out as to its Washington properties was, in the year 1933, $1,355,064 (NP Ex. "7," p. 8; NP Rec. 161.) Of this amount, the sum of $227,600.74 (NP Ab. 178) should be deducted as the net amount of the taxes

---

*(NP 22) The court erred in finding that only $582,774, or any other sum less than $1,355,064, of the net joint facility rents received by the N. P. from its Washington operating properties should be assigned to the N. P.'s intrastate operations for 1933. (Finding XIV-b, NP Rec. 46-7.)

paid by foreign lines, which taxes seem to be credited as part of the joint facility rentals. This leaves, then, $1,355,064 less $227,600, or $1,127,464 as the net amount earned by the N. P. during 1933 as rental for the joint use of its facilities in Washington by foreign lines.

It is at once apparent that since this amount represents rentals of property located in Washington, and since such property, to the extent used by other lines, is not used by the N. P. in its interstate operations, the entire amount should be credited to the N. P.'s local operations.

As will later be shown, the G. N. insists that the excess of the joint facility rentals which it pays over those which it receives, should be treated as an operating expense item in determining whether it is making or losing money on its intrastate business. (See GN Ex. "11," pp. 1 and "A," GN Rec. 254, 258.) If this be true, then clearly the net amount received as such rentals should be added to the N. P.'s income in calculations made for the same purpose. In our discussion of the evidence in the G. N. case we will later point out (Post, pp. 165-171). why it is thought that neither joint facility rental paid nor joint facility rentals received should be considered in making these calculations. We are, however, submitting the net figures as shown in the N. P. case for use by the court should it conclude that such rentals received should be deemed a proper item of revenues, and the rentals paid be deemed a proper operating expense item.

ASSIGNMENTS NP-23 TO NP-26*

COURT'S ERROR IN COMPUTING N. P.'s GROSS REVENUES, OPERATING EXPENSES, TAXES, JOINT FACILITY RENTS, AND NET INCOME FROM ITS INTRASTATE OPERATIONS.

Duplication of Operating Expenses.—In the preparation of the N. P.'s Exhibit (N. P. Ex. "7") the N. P.'s witness, Peterson, assumed that all of the expenses charged to intrastate freight operations ($3,291,785; see N. P. Ex. "7," p. 6; NP Rec. 160) were expended solely in connection with the revenues credited under account 101, "freight," and that additional operating expenses should be charged in connection with all the other freight revenue credits. These additional freight revenue credits (other than account 110 "Switching") were as follows (Pltf.'s Ex. "25," NP Rec. 212A):

---

*(NP 23) The court erred in finding that the N. P.'s total intrastate freight operating expenses for the week of October 22, 1933, was $75,078.42 or any sum in excess of $69,163.64 (Finding IX-e, NP Rec. 39); that the N. P.'s cost per revenue net ton mile was .98411c or any greater sum than $69,163.64 divided by 7,629,079 or .906579c, or that the N. P.'s total intrastate freight operating expenses for 1933 were $3,291,785 or any other sum greater than 334,493,591 multiplied by .906579c, or $3,032,448.64. (Finding IX-f, NP Rec. 39-40.)

(NP 24) The court erred in finding that the N. P.'s total intrastate operating expenses for 1933, other than taxes, were $4,796,440, or any other sum greater than $999,381 plus .6064 times the amount of the N. P.'s intrastate freight revenue for 1933. (Finding XII, NP Rec. 43-4.)

(NP 25) The court erred in finding that the N. P.'s total intrastate operating revenues for 1933 were only $5,271,893, or $5,493,252, or any other sum less than $5,802,530, as reported under oath by the N. P. to the D. P. W. for that year, and as alleged in its answer. (Findings X and XII, NP Rec. 42-4; Answer, NP Rec. 9.)

(NP 26) The court erred in finding that the N. P.'s net earnings from intrastate business for 1933 was a deficit of $228,623.22 or any other amount less than $817,443 if joint facility rents are not included, or $1,944,907 if joint facility rents are included. (Finding XII, NP Rec. 44.)

Acct. 111	Special service train	$1,149
112	Other freight train	102,002*
132	Hotel and restaurant	7,831*
135	Storage—freight	825
137	Demurrage	9,741
142	Rent of buildings and other property	5,569
143	Miscellaneous	46,504
151, 152	Joint facility—net debit	9,417 (red)
	Total	$164,204

The N. P. attempts to calculate these assumed additional operating expenses by first finding the ratio between the total operating expenses incident to intrastate freight service ($3,291,785) to the operating revenues received from intrastate freight operations credited to account 101, "freight" only, *i. e.*, $4,836,839, and then applies this percentage (68.06%) to the above sum, $164,204, thereby reaching a figure of $111,757, which it charges as additional operating expenses to intrastate freight operations. (See first calculation, NP Rec. 160.) But, as is conclusively shown by the affidavit of Mr. Manscheck (NP Rec. 232-241), in arriving at the figure of $3,291,785, the N. P.'s witness has already taken into account every item of operating expense incident to its entire intrastate freight operations with the exception of the starred items: "Other freight train, $102,002" (which we now concede, but is not shown in the Manschreck affidavit) and "Hotel and restaurant, $7,831." Excluding these starred items, the above total would be: $164,204 less $102,002 and less $7,831, leaving $54,371. Applying the operating ratio of 68.06% to this item, we have .6806 times $54,371, or $37,005 which constitutes a clear duplication of operating expenses in the N. P.'s Exhibit and should hence be deducted therefrom.

Mr. Manschreck, in his affidavit, most convincingly explains in detail this attempted duplication of expense, and to this affidavit we respectfully refer the court for further details as to our position. (NP Rec. 232-241.)

Conclusions as to N. P.'s intrastate income for 1933:

The results of the State's showing with respect to the items of expense discussed under the foregoing assignments may be summarized as follows:

N. P.'s railway operating income from 1933 intrastate operations as shown by N. P.'s calculations (N. P. Ex. "7," p. 1, NP Rec. 158)	$413,866 (red)
Plus excess charge for intrastate passenger operating expenses as shown by Manschreck (Plff's Ex. "26;" NP Rec. 213)—$1,500,957 (NP Ex. "7," p. 11, see footnote *ante*, pp. 105-6) less $999,381 (Plff's Ex. "26.") (See *ante*, pp. 108-111)	501,576
Such Ry. operating income after above correction..	$87,710
Plus excess charge for taxes apportionable to 1933 intrastate operations as shown by corrected showing made by Manschreck—$889,319 (NP Ex. "7," p. 7, NP Rec. 161) less $735,389 (Plff's Ex. "29," NP Rec. 215-6) less $43,491 (see *ante*, pp. 119-124)	$197,421
Such Ry. operating income after above corrections.	$285,131
Plus items of expense duplicated in N. P.'s calculations (see *ante*, pp. 138-9)	37,005
Such Ry. operating income after above corrections.	$322,136
Plus item of expense charged to intrastate operations as "pensions" (Plff's Ex. "37," NP Rec. 221; *ante*, pp. 125-7)	$103,471
Such Ry. operating income after above corrections	$425,607
Plus reduction in operating expenses charged to "Traffic expense," by apportionment on revenue instead of tonnage basis (Manschreck's Ex. "B," NP Rec. 241; *ante*, pp. 133-4)	$31,553
Such Ry. operating income after above corrections.	$457,160

Plus net amount by which N. P.'s railway operating income erroneously reduced by transferring revenues reported as intrastate, to interstate (*ante*, pp. 127-131), $169,485 less proportionate taxes: $43,491 (*ante*, p. 124)	$125,994
Such Ry. operating income after above corrections.	$583,154
Plus reduction in operating expense as to maintenance of way and structures and freight-train car repairs, if reported 1933 expense be taken instead of 3-year average (Item "M," Plff's Ex. "36," NP Rec. 220; *ante*, pp. 135-6)	$167,563
Such Ry. operating income after above corrections.	$750,717
N. P.'s railway operating income from 1933 intrastate operations after above corrections (Continued)	$750,717
Plus net joint facility rents received by N. P. on its Washington operating properties in 1933 (*ante*, pp. 136-7)	$1,127,464
N. P.'s net railway operating income from its 1933 intrastate operations after above corrections.	$1,878,181

EVIDENCE UNDISPUTED THAT N. P.'S NET EARNINGS WERE AT LEAST $729,940 FROM ITS INTRASTATE FREIGHT TRAFFIC IN 1933:

The N. P.'s various set-ups show its revenues and expenses incident to its intrastate passenger service separately from its revenues and expenses incident to its intrastate freight service. Consequently the results of its freight service operations alone may be readily calculated by deducting the revenues and expenses incident to its intrastate passenger service from its figures purporting to show the results of its combined intrastate freight and passenger service for that year.

The claimed "Result of Intrastate Operations" for 1933, freight and passenger, are set forth in NP's Exhibit "7", page 1 (NP Rec. 158) wherein the following results are shown:

(1) Gross operating revenues	$5,271,893
(2) Operating expenses	4,796,440
(3) Net revenue from railway operation	$475,453
(4) Railway taxes (on operating property)	889,319
(5) Railway operating income (deficit)	$413,866 (R)

Now, using this same form of set-up, and showing the corresponding figures incident to freight service alone, we have:

(1) Gross operating revenues	$5,271,893	
Less revenues from all intrastate passenger operations (Col. 2, Piff's Ex. "25", NP Rec. 212a; NP Ex. "7", p. 7, NP Rec. 161):	429,635	$4,842,258
(2) Operating expenses	$4,796,440	
Less operating expenses incident to intrastate passenger service operations (NP Ex. "7", p. 6, ln. 2, NP Rec. 160):	1,500,957	3,295,483
(3) Net revenue from freight service operations only (ln. 1 less ln. 2)		$1,546,775
(4) Railway taxes on operating property incident to passenger service only (NP Ex. "7", p. 7, NP Rec. 161)		816,835
(5) Railway operating income from freight service operations only (ln. 3 less ln. 4)		$729,940

NET LOSS CLAIMED BY N. P. ON 1933 INTRASTATE PASSENGER BUSINESS.

Revenues from passenger service (Piff's Ex. "25," vertical Col. 2, NP Rec. 212a)		$429,635
Operating expenses from passenger service other than taxes (NP Ex."7", p. 6, 2nd item, NP Rec. 160)	$1,500,957	
Taxes apportioned to passenger service (NP Ex. "7", p. 7, next to last item, NP Rec. 161)	72,484	$1,573,441

Net loss claimed by N. P. on 1933 intrastate passenger service	$1,143,806
Ratio between total expense and total revenues	366%
Cost of each dollar of revenue received	$3.66

ASSIGNMENTS NP-27 AND NP-28*

COURT'S ERROR IN PERMITTING PETERSON TO TESTIFY THAT THE N. P.'s INTRASTATE OPERATING EXPENSES WERE $251,000 GREATER IN 1933 THAN SHOWN BY THE N. P.'s SPECIAL STUDY, AND IN FINDING THAT THE USE OF SUCH TEST WEEK RESULTED IN AN UNDERSTATEMENT OF SUCH EXPENSES OF SOME $300,000.

Paragraph 4 of the Peterson affidavit, referred in Assignment NP-17 (*ante*, pp. 131-3) is to the effect that the study for the week of October 22, 1933, showed a traffic movement "greatly in excess of the average for 1/52 of a year" and if proper adjustment were made for that situation, the operating expenses as to intrastate freight traffic would be increased by $251,000 over those stated in N. P. Exhibit "7," page 1. (NP Rec. 243.) The State moved to strike this paragraph of the affidavit because not based on any record evidence before the court, which motion was denied. (NP Rec. 249-250.) The court thereupon stated that it was understood that paragraph 4 would be considered only in connection with

---

*(NP 27) The court erred in refusing to strike paragraph 4 of Peterson's affidavit (NP Rec. 243) to the effect that the N. P.'s intrastate operating expenses for 1933 were $251,000 greater than as shown by N. P.'s Exhibit "7," on the ground that the same was not based on any record evidence before the court. (NP Rec. 249-250.)

(NP 28) The court erred in finding that the N. P.'s use of the test week of October 22, 1933, to determine its intrastate operating expenses resulted in an understatement of such cost for 1933 of approximately $300,000, or any other sum. (Findings IX-b and IX-g, NP Rec. 37-8, 40.)

and in explanation of evidence already in the record. (NP Rec. 250.)

The court will find that the only data or figures in the record that could possibly afford a basis for Peterson's conclusions are the figures which he gave over the objections urged in Assignments NP-3 and NP-4 (*ante*, pp. 98-101) as to the relative revenue and traffic during the test week and the whole of 1933. This testimony was hearsay and not the best evidence and was clearly inadmissible. Hence we insist (1) that Peterson's conclusions as to the intrastate freight operating expenses being greater than the results shown by N. P. Exhibit "7," page 1 (NP Rec. 158) were inadmissible and should be disregarded; and (2) that the court erred in making a finding based on such testimony.

The data and computations, if any, by which Peterson reached his conclusions are nowhere set forth in the record. The only figures mentioned in the record were pure hearsay. The records themselves were neither produced nor offered in evidence, and witness who, it is claimed, took off this data, was not produced as a witness. (See Assignment NP-3, *ante*, pp. 98-9.) Surely a revenue measure should not be set aside on mere estimates of this character. The following is quoted from the *Minnesota Rate Cases*, 230 U. S. 352, 465-6:

"We are of opinion that on an issue of this character involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation."

The finding, it will be observed, is in any event erroneous, in that the excess is found to be $300,000,

whereas Peterson estimated it to be only $251,000. (NP Rec. 243; Findings IX-b and IX-g, Rec. 37-8, 40.)

ASSIGNMENT NP-29*

COURT'S ERROR IN REFUSING TO STRIKE AVERMENT IN PETERSON'S AFFIDAVIT THAT OPERATING RATIO ON N. P.'s SHIPMENTS FOR EXPORT WAS LOWER THAN ON ITS INTRASTATE FREIGHT TRAFFIC.

In paragraph 3 of the Peterson affidavit above referred to, the court will find certain averments as to the relative traffic density and cost per net ton mile on N. P.'s main and branch lines, and the conclusion that consequently in N. P.'s Exhibit "7" there was an excessive deduction made from intrastate freight operating expense by reason of elimination of so-called foreign commerce. (NP Rec. 243.)

Peterson conceded that there was nothing in the record to substantiate the conclusions and facts set forth in this paragraph. (NP Rec. 250.) The court denied the State's motion to strike this paragraph because not supported by anything in the record. (NP Rec. 243.)

For the reasons urged under Assignment NP-28 we submit that this paragraph should have been stricken, and that the facts therein averred should be disregarded.

---

*(NP 29) The court erred in refusing to strike paragraph 3 of Peterson's affidavit (NP Rec. 243) to the effect that the N. P.'s operating ratio on shipments for export was lower than on its intrastate freight traffic. (NP Rec. 250.)

ASSIGNMENTS NP-30 AND GN-17*

COURT'S ERROR IN FINDING THAT IN PROPORTION TO REVENUE, COST OF THE N. P.'s AND G. N.'s INTRASTATE BUSINESS WAS GREATER THAN THE COST OF THEIR INTERSTATE BUSINESS.

This is truly a most remarkable finding in the light of the undisputed evidence. By operating ratio is meant the relation between operating expenses and operating revenues. The N. P.'s statistician found the N. P.'s operating ratio for *intrastate* freight traffic for 1933 to be 68.06% (NP Rec. 160), while Mr. Manschreck, the State's witness, found it to be 64.74% (NP Rec. 220, line "G"). Mr. Manschreck found the N. P.'s operating ratio for *interstate* freight traffic for 1933 (based on the N. P.'s own calculations) to be *91.20%* (NP Rec. 219, Line "E").

As to the N. P., no operating ratio as to either intrastate or interstate passenger traffic was computed by any witness, so that the court's finding is directly contrary to the undisputed facts.

In the G. N. case we again find the court reaching a conclusion directly contrary to the undisputed evidence. The G. N.'s statistician found the G. N.'s operating ratio for intrastate freight traffic for 1933 to be 51.33%. (GN Rec. 256, lines 1-b.) The operating ratio as to interstate freight traffic was not computed by any witness, but since it is the relation of operating expenses

---

*(NP 30) The court erred in finding that, in proportion to revenue, the cost of the N. P.'s intrastate business is greater than the cost of such company's interstate business. (Finding IX-a, NP Rec. 37.)

(GN 17) The court erred in finding that in proportion to revenue, the G. N.'s cost per unit of doing intrastate business is greater than its cost per unit of doing interstate business. (Finding V, GN Rec. 60.)

to operating revenues, it is exceedingly easy to calculate. Thus:

(A) Total freight service operating revenues for 1933, interstate and intrastate (G. N.'s Ex. "11," p. 11, GN Rec. 268a)	$6,574,087
(B) Less freight service operating revenues for 1933, intrastate, as claimed by G. N. (G. N.'s Ex. "11," p. "B," GN Rec. 255)	1,622,644
(C) Total freight service operating revenues for 1933, *interstate* (A—B)	$4,951,443
(D) Total freight service operating expenses for 1933, interstate and intrastate (Piff's Ex. "25," line 2, GN Rec. 233)	$4,620,998
(E) Less total intrastate freight service operating expenses for 1933 as claimed by G. N. (GN's Ex. "11," p. "C," GN Rec. 256, line 1-c)	832,903
(F) Total freight service operating expenses, *interstate* (D—E)	$3,788,095
(G) Interstate freight service operating ratio (F ÷ C)	76.5%
Interstate freight service operating ratio (shown above)	51.33%

It is noted that in the G. N.'s calculations as to intrastate freight operating expenses a three-year average was taken as to maintenance of way and structures and freight train car repairs. This was a larger expense figure in each case than the figure for 1933 alone. Consequently, had we used the three-year average expenses as to these items as to interstate, we would have had a larger figure for line "D," and for line "F," and consequently a higher operating ratio for interstate freight service in line "G."

The operating ratio as to intrastate passenger service was shown to be 161.09% (G. N.'s Ex. "11," p. "C," GN Rec. 256, line 2-c), and a different ratio was not claimed as to interstate passenger service. Thus, as in the N. P. case, the court's finding is directly contrary to the undisputed facts.

ASSIGNMENT NP-31*

ERROR OF THE COURT IN FINDING THAT THE N. P.'S NET REVENUES WOULD BE LESS IN 1934 THAN IN 1933.

The findings of fact were made on March 25, 1935, nearly three months after the close of the year 1934, and at a time when the results of the N. P.'s 1934 operations must have been known to counsel who prepared these findings. Yet we find counsel preparing for the court a deliberate misstatement of facts regarding the N. P.'s 1934 operations. In the annual reports of the N. P. and G. N. to the tax commission for the year 1934, at pages 24 and 25, we find the following operating statistics for the years 1932 to 1934:

SYSTEM (N. P.)

	1932	1933	1934
Railway operating revenues	$47,084,176	$47,578,676	$51,407,775
Railway operating expenses	41,433,179	38,993,492	41,550,814
Net revenues from railway operations	$5,650,997	$8,585,184	$9,856,961
Railway tax accruals	6,677,354	5,883,251	5,312,592
Uncollectible railway revenues	23,209	23,848	16,575
Railway operating income	$1,049,567 (deficit)	$2,678,086	$4,527,795
Net railway operating income*	$1,990,389	$5,975,973	$7,915,209

*After adding rentals from joint facilities and equipment.

---

*(NP 31) The court erred in finding that the tendency in 1934 was towards a substantial decrease in the N. P.'s net revenues, that increased cost of operation would be still greater in 1935, and that there was nothing apparent at the time said findings were made to suggest an increase in the N. P.'s gross revenues, but that the facts known suggested a decreased net income for 1935. (Finding V, NP Rec. 34-5; Conclusion 7, NP Rec. 53.)

STATE OF WASHINGTON (N. P.)

	1932	1933	1934
Railway operating revenues	$12,845,326	$12,064,954	$13,368,674
Railway operating expenses	12,336,819	11,145,042	11,675,083
Net revenues from railway operation	$508,507	$919,912	$1,693,591
Railway tax accruals	$2,730,016	$1,882,093	$1,833,863

SYSTEM (G. N.)

	1932	1933	1934
Railway operating revenues	$55,549,246	$61,923,891	$70,752,877
Railway operating expenses	45,655,673	41,545,224	48,610,181
Net revenues from railway operation	$9,893,574	$20,378,667	$22,142,696
Railway tax accruals	$6,697,424	$6,660,944	$6,181,111
Uncollectible railway revenues	14,210	7,213	10,527
Railway operating income	$3,181,940	$13,710,510	$15,951,058
Net railway operating income	$1,290,551	$11,810,227	$14,101,650

STATE OF WASHINGTON (G. N.)

	1932	1933	1934
Railway operating revenues	$8,389,154	$8,114,350	$9,062,655
Railway operating expenses	7,682,590	7,102,133	7,955,682
Net revenues from railway operation	$706,564	$1,012,217	$1,106,973
Railway tax accruals	$1,569,162	$1,363,567	$1,247,239

These reports being made pursuant to law, it would seem that statistical data contained therein should be matters of which the court should take judicial notice, particularly in actions wherein the constitutionality of a tax is attacked on the ground of insufficient earnings.

As a matter of fact, the increase in gross and net for 1932 over the 1933 figures was sufficiently forecast by Mr. Peterson, who testified for the N. P. on direct examination:

"The total operating revenues of the system for the eight months of 1934 were $33,044,301, an increase of $3,311,859 over the same period of 1933. During the same period the total operating expenses were $27,270,562 for the eight months of 1934, or an increase of $1,175,203 over the corresponding eight months in 1933. * * * Any estimate made for the balance of the year would be wholly conjectural. I don't know that it will be better in 1934 than in 1933. I think it will be pretty much the same as 1933. That is only an estimate that I make in the light of what knowledge I now have." (NP Rec. 112.)

Mr. Peterson's figures were of value as tending to indicate the upward trend of the business of these roads in 1934. But it is apparent that as a prophet, he had no better qualifications than the rest of us. If counsel wished to attempt to portray the future, he should have produced the then known facts and allowed the court to draw its own conclusions.

We are indeed at a loss to understand how, in the light of either the figures given by Peterson or the above reports, counsel for the N. P. would have the temerity to propose findings inducing the court to find that "the tendency in the year 1934 is toward * * * decreased net revenues." (NP Rec. 34-5.)

May we note here that these studies were made in one of the worst years in the history of these two roads. Whatever their intrastate earnings in 1933, who can say that such showing is representative of future years? The occupational tax act was in force but five months in 1933. Need we point out that a similar study made in 1934

would have shown quite different results. As was said in *Postal Tel.-Cable Co. v. Richmond*, 249 U. S. 252, 258:

"But a careful examination of the record fails to convince us that it contains that clear and convincing evidence that the tax thus falls upon interstate commerce which is necessary to justify a finding that the ordinance is unconstitutional and void."

APPENDIX "B"

Challenge to Trial Court's Findings of Fact and Rulings on Admissibility of Evidence in G. N. Ry. Co. v. State, No. 573.

ASSIGNMENT GN-4*

COURT'S ERROR IN FINDING THAT THE MAKING OF ACCURATE REPORTS AS TO THE G. N.'S INTRASTATE REVENUES WAS NEVER A MATTER OF IMPORTANCE PRIOR TO OCCUPATIONAL TAX ACT.

It is at once apparent that if it were contemplated that such reports were to be used as evidence in local rate investigations, such accuracy was always a matter of importance.

Nor are we so sure that these carriers are in a position to urge that it is not a matter of importance that a report required by statute to be made under oath be accurately made, and it is at least rather startling to find the lower court reaching such a conclusion.

Moreover, ever since 1929 both the G. N. and N. P. have been required to pay a fee of 1/10th of 1% on their gross operating revenue. (Laws 1929, Ch. 107, pp. 209-210; R. R. S. Sec. 10417.) In the case of the N. P. this fee is alleged to have been $6,481.32 for 1932 and $5,700.53 in 1933. (NP Rec. 15, 85.) The N. P.'s intrastate revenues were $6,613,959 and $5,802,530, respectively, in those two years. The G. N. alleges that this fee was $3,338.97 for 1932 and $3,137.05 for 1933 (and its local revenues $3,338,973 for 1932 and $3,137,047 for

*(GN 4) The court erred in finding that the making of accurate reports to the D. P. W. of the G. N.'s intrastate revenues was never a matter of importance prior to the imposition of the Occupational Tax Act of 1933. (Finding VI, GN Rec. 60-61.)

1933. (GN Rec. 14.) From these allegations it is evident that the fee was deemed both by the D. P. W. and the carriers to have been imposed only on intrastate revenues. Confirming this conclusion, Mr. Peterson testified on behalf of the N. P.:

"In paying this 1/10th of 1% tax that I have testified to, that is computed on the amount of local business in the way I have just described. * * * The N. P. has been paying the 1/10th of 1% tax for the years since 1929." (NP Rec. 87.)

Where these carriers have each, since 1929 been paying a tax or fee measured by their reported intrastate revenues, how is it possible, we ask, to sustain a finding that prior to the enactment of the occupational tax act in 1933 there was no incentive for these carriers accurately to report under oath their intrastate revenues to the D. P. W.?

ASSIGNMENT GN-5

(GN 5) The court erred in finding that the G. N. has never accurately reported its intrastate revenues to the D. P. W. (Finding VI, GN Rec. 60.)

Under the next assignment, we will show that no competent evidence was received at the trial showing that the G. N.'s intrastate revenues were other than as reported to the D. P. W.

But how, we ask, can such a finding be thought to aid these carriers who both base their calculations on the revenues as reported to the D. P. W.?

If it be true as found, that the G. N.'s reports as to State revenues have never been "accurately made" (GN Rec. 60), then surely the G. N.'s whole contention that it is doing business at a loss must fail. If there was no in-

centive to make accurate reports how can either the State or the G. N. rely upon such reports as evidence in a law suit involving the constitutionality of a tax?

ASSIGNMENT GN-6*

ERROR IN ALLOWING TESTIMONY THAT REVENUES ENTERED IN BOOKS AND REPORTED AS INTRASTATE WERE IN FACT INTERSTATE, WITHOUT REQUIRING PRODUCTION OF RECORDS FROM WHICH TAKEN.

The G. N. introduced in evidence Exhibit "11" upon which it relied to support its contention that in 1933 it lost money on its intrastate business. Pages 1 to 27 of this exihibit were based on the division of revenues between interstate and local business as reported by the G. N. to the D. P. W. for 1933. (GN Rec. 137, 142.) The results of this study are shown on page 1 of Exhibit "11" (GN Rec. 135-6, 258), and show that according to the G. N.'s own calculations, its railway operating income for 1933, after payment of taxes, was $491,544, and its net railway operating income (after deduction of joint facility rents and equipment rents paid) was $202,458. (GN Rec. 258.) In other words, *if the G. N. correctly entered upon its books of account, and correctly reported to the D. P. W. its intrastate operating revenues, said appellant, by its own admissions, wholly failed to prove that in 1933 it lost money on its intrastate operations.*

---

*(GN 6) The court erred in permitting various of the G. N.'s witnesses to testify over plaintiff's objection that the same was hearsay and not the best evidence, that certain railway operating revenues for 1933 entered in the G. N.'s books of account and reported under oath to the D. P. W. as revenues from intrastate business, were in fact revenues from interstate business, and in refusing to strike such testimony after the same was so received. (G. N. Rec. 175-9, 183-193.)

Mr. Burn, the G. N.'s statistician (GN Rec. 115) prepared these pages 1 to 27, of Exhibit "11" and brought the same out from St. Paul to Seattle about a week before the trial, and after showing his exhibit to the company's attorneys, prepared the remaining pages, "A" to "F," in which a large amount of revenue shown on the G. N.'s books of account and report to the Washington D. P. W. to be intrastate revenues, were switched over to the interstate side of the ledger. (GN Rec. 141-2.) This revised showing was made from Identification "20" (GN Rec. 202) which was given to Mr. Burn after reaching Seattle. (GN Rec. 142.)

The following is a comparison of the G. N.'s interstate and intrastate revenues for 1933 as shown on its books of account and report to the D. P. W., with those used by Mr. Burns in the preparation of that part of Exhibit "11" which it is claimed shows that as to Washington intrastate business the G. N. was operating in the red in 1933:

Acct. No.	Account	As shown by G. N.'s books of account and report to D. P. W. (G. N.'s Ex. "11", p. 11, GN Rec. 268A)	After attempted change in G. N.'s books without production of underlying data. (Fdg. 7(g), GN Rec. 67-8)
101	Freight	$2,599,331	$1,502,153
110	Switching	41,977	38,367
111	Special Service Train	14	14
112	Other freight train	434	434
135	Storage—Freight	2,010	2,010
137	Demurrage	1,016	1,016
138	Telegraph and Telephone	4,095	3,653
142	Rents of buildings and other property	52,205	46,570
143	Miscellaneous	52,621	28,427
152	Joint facility—net debit	0	0
	Total Freight	$2,753,703	$1,622,644

Total revenue which court found without the production of any basic data, should be transferred from intrastate as shown by G. N.'s books and reports, to interstate..... $1,131,059

As noted above, this transfer of revenues from intrastate to interstate was made by Mr. Burn in accordance with a written statement (GN's Ex. "20") handed to him after reaching Seattle (GN Rec. 142). This statement was offered and received in evidence as a convenient statement showing what had been eliminated and not to prove the fact that the items thereon were properly to be eliminated as intrastate traffic (GN Rec. 175), and is as follows (GN Rec. 202):

Revenues eliminated as applicable to interstate and foreign commerce as reported in amended answers to interrogatories:

Account		Total Applicable Aug. 1, 1933, to Dec. 31, 1933	Total Applicable To Year 1933
(101)	**Freight:**		
(a)	Consignments originating in Washington and specifically billed for export..... $92,580		
(b)	Consignments originating in Washington and billed to warehouses and elevators, practically all of which would be exported or transported by water and/or rail to other states..... 65,558		
(c)	All other imports billed to Washington stations from Washington ports 8,033		
(d)	The initial local state revenue collected for shipments into transit stations..... 308,896		
(e)	Absorbed switching 14,997		
(f)	Milling in transit adjustment on grain originating outside of Washington and the products reshipped to points in Washington..... 41,055		
		$531,119	$1,097,178

Account	Total Applicable Aug. 1, 1933, to Dec. 31, 1933	Total Applicable To Year 1933
(110) **Switching:**		
Switching revenue received on shipments pertaining to (c) and (d) under account 101	1,820	3,610
(143) **Miscellaneous:**		
Wharfage		25,000
Total	$532,939	$1,125,788

The court's basis for finding that all these items of revenues were properly transferred from intrastate to interstate is the testimony of certain witnesses who testified over objection that the same was hearsay and not the best evidence, that they had examined certain records under the G. N.'s control in the state of Washington.

Thus, as to item "a," account No. 101, the G. N.'s witness Brown, testified that he made up that item of $92,580, not from the original records, but as to apples and flour from punch cards in the general office showing shipments of flour and apples from Washington stations to the Seattle dock, and as to all other shipments, from answers to letters written to all stations and ports in Washington asking for statements of billing covering all carload shipments originating in Washington and destined to the Seattle dock. (GN Rec. 175-6.) The witness believed that copies of the way bills from which the data was originally taken were in the hands of the G. N.'s forwarding agents in Washington. (Ab. Rec. 181.) He testified further that the only way the State's attorney could possibly check his figures as to item "a," would be by an examination of those way bills. (GN Rec. 181.)

The G. N.'s witness, Berger, testified that the information regarding item "a" was obtained direct from

the defendant's records in its Seattle dock office, consisting of the expense bills, demurrage records and other accounts kept there. Only one month's records were checked. (GN Rec. 191-2.)

As to item "b" the information was obtained by letter from agents in Seattle, Tacoma, Everett and Bellingham. Witness Brown wrote to the agent and asked him, and the agent wrote back and purported to give him the information asked. (GN Rec. 177-8, 180-181.) This information was shown by the G. N.'s books in Seattle.

As to item "c," the information was taken from copies of way bills and bills of lading and was shown by the G. N.'s books in Seattle. (GN Rec. 192.)

As to item "d," Brown got his information from punch cards the same as in the case of item "a." (GN Rec. 182.) The original records consisting of the expense bills were available in Seattle, and were checked there by the G. N.'s witness, Berger. Only a month's business was so checked. (GN Rec. 192.)

Item "e" was a debit item, transferred from interstate to intrastate. (GN Rec. 182.) The underlying data upon which the same was based was not offered in evidence, and the State, without success, moved to strike the testimony regarding the same on the ground that the same was hearsay and not the best evidence. (GN Rec. 183, 193.)

The information as to item "f" was taken from reports furnished to the G. N.'s witness, Brown, by the Transcontinental Freight Bureau, an agency of all the carriers. The information was contained in way bills located in the State of Washington. (GN Rec. 183.) It

was also shown by the expense bills at Seattle from which Berger purported to make his check. (GN Rec. 193.)

The information as to Account 110, "Switching," was taken from a letter received by the G. N.'s witness, Tower, from the auditor of station accounts, which was his sole source of information. (GN Rec. 185-6.)

The information as to Account 143, "Wharfage," was shown in the station records at the G. N.'s Seattle dock. (GN Rec. 185.)

The record shows that not only was the testimony offered regarding all of these items objected to as hearsay and not the best evidence, but after the same was received appropriate motions to strike were made on the same grounds. (GN Rec. 175-193.)

We respectfully submit that all of this testimony should rightfully have been excluded under the "best evidence" rule. It must be remembered that this showing was made for the purpose of attempting to establish the falsity of the G. N.'s own records and 1933 sworn report. The company's own records would, of course, be the best evidence of what constituted its intrastate revenues. And surely, when it attempted to show that these records and its official report to the State regulatory body were untrue, it should, we submit, if the best evidence rule is ever to be applied, have been required to produce the original records showing these claimed errors. It goes without saying that the State's attorney and witnesses were wholly powerless either to cross-examine or to check the statements of these witnesses as to the justification for these attempted changes.

"It is a general demand of the law that the best possible evidence be produced, and secondary evidence is admissible only when it is clearly made to appear that primary evidence is, for some good and sufficient reason, unattainable, and then only after a showing of diligence."

Kennedy v. Canadian Pac. R. Co., 87 Wash. 134, 135;

Case Threshing Machine Co. v. Wiley, 89 Wash. 301, 303;

Seid Chee v. Sanitary Fish Co., 103 Wash. 345, 348.

"Where the controversy is over the contents of a written document, the document itself is, of course, the best evidence;"

Hoptowit v. Brown, 115 Wash. 661, 669-670.

We are, of course, not unmindful of the voluminous evidence rule which, under certain conditions, permits the introduction of the results of voluminous facts contained in writings. This rule is set forth in *Corpus Juris* as follows:

"Where the results of voluminous facts contained in writings, or of the examination of many books and papers or records are to be proved, and the necessary examination of this documentary evidence cannot be conveniently or satisfactorily made in court, it may be made by an expert accountant or other competent person and the results thereof may be proved by him, if the books, papers, or records themselves are properly in evidence, or their absence satisfactorily explained, the admission of such testimony being a matter resting largely in the discretion of the trial court. It seems, however, that the jury are not bound by the result thus ascertained, but may make their own calculations from the books and papers in evidence."

22 C. J. 1017.

We submit that the admission of this testimony without requiring the production of the books and rec-

ords from which the alleged facts were ascertained for use in cross-examination and making a counter-showing, was palpably unjust to the State in the present case. The G. N., as noted, had reported all of these items of revenue as intrastate in its 1933 report to the D. P. W. This report was made under oath. (Rem. Rev. Stat. Sec. 10416.) The details of this report were, of course, based upon the same way bills, bills of lading, and other writings as were those of the witnesses produced by the G. N. to impeach its own records. Surely, before allowing this company to impeach its own books of accounts and sworn report, it should have required that the company produce its records (all available in Washington) or properly authenticated copies thereof for examination by the court and opposing counsel.

ASSIGNMENT GN-7

(GN 7) The court erred in refusing to strike pages "A" to "F" of G. N.'s Exhibit "11," on the ground that the same was hearsay and based on records available but neither produced nor offered in evidence. (GN Rec. 228-9.)

As already pointed out, pages "A" to "F" were based upon testimony shown under the last assignment to have been clearly inadmissible. For the reasons there urged, we respectfully submit that the motion to strike should have been granted.

ASSIGNMENT GN-8*

COURT'S ERROR IN FINDING THAT THE G. N.'S 1933 INTRASTATE REVENUES WERE OTHER THAN REPORTED TO THE D. P. W.

As shown under Assignment GN-6, there was no competent evidence that the G. N's 1933 intrastate revenues were other than as reported to the D. P. W. Consequently there was no basis for the court's finding that such revenues were other than as so reported.

ASSIGNMENT GN-10

(GN 10) The court erred in finding that in the apportionment of operating revenues received from nterstate freight business to the G. N.'s Washington operating properties, such properties were not entitled to more than a mileage prorate of such interstate freight revenues. (Findings VII-e, GN Rec. 64-7.)

This question has already been fully considered in connection with Assignment NP-11, to which discussion the court is respectfully referred. (*Ante*, pp. 111-118.)

---

*(GN 8) The court erred in finding with respect to the G. N.'s 1933 intrastate operating revenues,—

(GN 8-a) That the total thereof was only $2,179,760, or any sum less than $3,305,548 as reported under oath to the D. P. W. (GN Rec. 268-a);

(GN 8-b) That the amount of such revenues assignable to "Freight," Account 101, were only $1,502,153, or any sum less than $2,599,331;

(GN 8-c) That the amount of such revenues assignable to "Switching," Account 110, were only $38,367, or any sum less than $41,977;

(GN 8-d) That the amount of such freight revenues assignable to "Rents of Buildings and Other Property," Account 142, were only $46,570, or any sum less than $52,205; and

(GN 8-e) That the amount of such freight revenues assignable to "Miscellaneous" were only $28,427, or any sum less than $52,621;

All as shown by the G. N.'s books of account and sworn report to the D. P. W. for 1933. (Findings VI and VII-g, GN Rec. 60-1, 67-8, compared with G. N. Ex. "11," p. 11, GN Rec. 268a.)

ASSIGNMENTS GN-9 AND GN-11 TO GN-16*

COURT'S ERROR IN FINDING THAT G. N. CONDUCTED ITS 1933 INTRASTATE OPERATIONS AT A LOSS.

To support its contention that it lost money on its 1933 Washington intrastate business, the G. N. offered in evidence G. N. Exhibit "11." This exhibit, as heretofore noted, makes two showings as to the results of the G. N.'s 1933 intrastate operations. Pages 1 to 27 are prepared on the assumption that the company correctly entered on its books of account, and correctly reported to the D. P. W. its 1933 interstate and intrastate revenues. We will, for convenience, call this its "book

---

*(GN 9) Having found that an amount of the G. N.'s traffic reported to the D. P. W. for 1933 as intrastate, was in fact interstate traffic to the extent that such 1933 intrastate operating revenues were in fact only $2,179,760 instead of $3,305,348, as reported under oath to said D. P. W., the court erred in finding with respect to G. N.'s intrastate operations for 1933,—

(GN 9-a) That its operating expenses were $1,730,361, or any sum in excess of $1,675,206 (Finding VI, GN Rec. 60-61);

(GN 9-b) That its net revenues from railway operations were only $449,399, or any sum less than $504,554 (Finding VI, GN Rec. 61);

(GN 9-c) That its railway tax accruals were $335,247, or any sum in excess of $211,532 (Findings VI and VII-e, GN Rec. 61, 64-7);

(GN 9-d) That its Joint Facility rent—net debit, was $193,455, or any sum greater than $140,800 (Finding VI, GN Rec. 61);

(GN 9-e) That its net railway operating income was a deficit of $99,269, or any sum less than $132,256. (Finding VI, GN Rec. 61.)

(GN 11) The court erred in finding that the 1933 ad valorem taxes paid on the G. N.'s Washington operating properties should be apportioned as between intrastate and interstate service on the basis of the relative revenues derived therefrom (with only a mileage prorate of interstate revenues apportioned to Washington), or on any basis other than the relative use made by the G. N. of its Washington operating properties as reflected by the only available factors shown by the record, to-wit: relative car and locomotive

showing." But pages "A" to "F" are prepared on the theory that the company's books and official reports were untrue, and that some $1,131,059 of the revenues shown therein as intrastate, were in fact interstate revenues. This we will refer to as the "revised showing." The results of these two sections of G. N. Exhibit "11" are summarized on pages "1" (GN Rec. 258) and "A" (GN Rec. 254) of the exhibit. Page "1" shows the results of the "book showing;" page "A," the results if the company's books and reports were incorrect, i. e., its "revised showing."

---

miles (as between freight and passenger), and relative freight car miles as between intrastate and interstate freight service. (Finding VII-e, GN Rec. 64-7.)

(GN 12) The court erred in finding that the G. N.'s net debit of $794,018 for joint facility rents in Washington for 1933 were assignable to its intrastate business on the basis of relative operating expenses intrastate and interstate, or on any basis other than the G. N.'s relative use of such jointly used properties in its intra and interstate operations as reflected by the only available factors shown by the record, to-wit: relative car miles (as between freight and passenger), and relative net ton miles as between intrastate and interstate freight service. (Finding VII-d, GN Rec. 63-4.)

(GN 13) The court erred in finding that pensions paid were properly chargeable as part of the G. N.'s operating expenses for the purpose of determining its railway operating income for 1933. (Finding VII-j, GN Rec. 69.)

(GN 14) The court erred in finding that the G. N.'s operating expenses incident to maintenance of way and structures and freight car repairs should be determined by taking the annual average for three years instead of for 1933 alone. (Finding VII-i, GN Rec. 68-9.)

(GN 15) The court erred in finding that G. N.'s Exhibit "11" showed the results of the G. N.'s intrastate operations in Washington during 1933 with substantial accuracy. (Finding VII-k, GN Rec. 69.)

(GN 16) The court erred in finding that the G. N.'s intrastate business as a steam railway company was conducted at a loss during 1933. (Finding VIII, GN Rec. 69-70.)

Joint facility rents paid not deductible as an operating expense:

Before analyzing the G. N. computations, let us first consider whether it is the deficit or earnings status of the *property,* or the deficit or earnings status of the *operating company,* which is determinative of whether the occupational tax is a burden on interstate commerce. If the intrastate operations of the operated properties themselves (independent of the question of ownership) show a railway operating income sufficient to pay the occupational tax payable on such operations, can it be said that because the operating company is losing money, the occupational tax must be paid from interstate revenues and is consequently a burden on interstate commerce?

In other words, is the criterion the *earnings of the properties operated* or the *earnings of the operating company?*

It is our position that it is the results of the operations of the particular *properties* operated by the tax-paying company which is the test, and it is not material whether the operating *company* is in fact losing or making money as a result of such operations. In other words, in determining whether the occupational tax is a drain on interstate revenues, it must be assumed that the operating company is the absolute owner of all of the property and interests in property employed in its railway operations. Thus, if a company has the legal title to its operating property, but such property is heavily mortgaged, the interest payable on such mortgages is not to be treated as an operating expense. And if, instead of constructing its own road, a company elects to

rent operating rights over another road, the rentals paid can no more be deemed an operating expense than can the bond interest payments on the portion of its operating property as to which it chances to hold the legal title. The same is true as to the equipment used. It can have no greater right to deduct as an operating expense the rentals paid for the use of the equipment it uses, than it would have to deduct as an operating expense the interest on the equipment trust notes which may be a lien upon its own equipment.

The fact is that the joint facility rental paid is the practical equivalent of interest payments on bonds issued for the construction of the company's own road. Had the G. N. constructed its own line from Seattle to Portland, it would have issued bonds to finance the new construction and would have paid, we may fairly assume, 4% to 5% interest thereon. Instead, it is, under the joint user agreement, required to pay one-third of 4½% on the cost of the property including additions and betterments. Surely this rental can no more be deemed an operating expense than could the interest payments on the company's outstanding bonds.

Moreover, it was the N. P.'s contention that in determining whether that company was making or losing money on its intrastate business, the test figure was "Railway Operating Income" computed by deducting "operating expenses" and taxes paid from "Gross operating revenues." (See NP Ex. "7," p. 1; NP Rec. 158.) In other words, counsel for the N. P. contended that join facility rentals *received* were not to be considered as operating income. (NP Rec. 97-8.) If this be true, we must likewise insist that the joint facility rental *paid*

by the G. N. cannot be deemed an operating expense in determining whether that road is making or losing money on its intrastate business.

The test is, we submit, is the *property* making a profit on intrastate business sufficient to pay the occupational tax imposed? If so, the tax cannot be deemed a direct burden on interstate commerce, even though the operating *company,* because of fixed interest and rental charges, is not making a corporate profit.

The case of *Atlantic Coast Line v. Daughton,* 262 U. S. 413, is, we submit, in point. There the Income Tax Law of North Carolina directed that the "net operating income" of railroads within the State be determined upon the basis of accounts to be kept according to the methods established by the Interstate Commerce Commission, and laid a tax upon the "net income," to be ascertained by deducting from "net operating income" only uncollectible revenue, certain taxes, and amounts paid for car hire, thus treating the railroad property within the State as the thing of which the income is taxed, and taking no account of other income of the corporation owning the railroad and making no deduction of its capital charges such as rent paid for lease of road or joint user rights. It was held that the statute, considering this distinction, did not, in effect, depart from the I. C. C.'s definition of net income, nor, as applied to interstate railroads, did it directly burden interstate commerce.

The same is true of the occupational tax here under consideration. It is the business of operating the particular property which is taxable, and not the individual

or corporation chancing to conduct such operations. Section 2 (2), subdiv. (e), Ch. 191, Laws 1933, provides:

"Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business, as follows:

* * * * * * * * *

"III. Steam railways: one and one-half percent;"

Thus, the tax is measured by the gross income from the operation of the steam railway property, not by the income of the corporation. Just as in the *Daughton* case, the railroad property within the State is the thing of which the income is taxed, and no account is taken of the other income of the corporation chancing to own or operate such property. The following is quoted from the *Daughton* case (262 U. S. 413, 416, *et seq.*):

"Whether the statute is unconstitutional because it fails to include among the deductions from income allowed public service corporations the capital charges, including other rentals paid, is the main question for decision.

* * * * * * * * *

"* * * The contentions are that the statute, in fact, taxes gross income; that the classification as made by it is unreasonable; and that for these, and other, reasons it violates both the federal and the state constitution. All the contentions are, in our opinion, unsound."

After pointing out that the net income is computed by deducting from operating revenues, the operating expenses, uncollectible revenue, taxes paid, and car hire, the court then shows it to be the contention of the contesting railroads that the State should have credited as revenues all of its other corporate income including income from lease of road and joint facility rent income, and charged against such revenues all of its corporate

expenses including rent paid for lease of road and rents paid for joint facilities. Answering this contention, the court continues (p. 419):

"Thus the State takes, as the entity to be taxed, the railroad property operated by the Seaboard within the State. Therefore, it takes, as the primary basis for the tax, only operating revenues; that is, the gross receipts from operating such property. The Seaboard, on the other hand, assumes, as the entity which should be taxed, the company in respect to its North Carolina interests. Therefore the Seaboard takes, as the primary basis for the tax, in addition to the operating revenues of the lines within the State, North Carolina's proportion of the non-operating income of the company derived from other property owned by it, wherever situated. For the Seaboard, like most other railroad systems, is, to some extent, a holding company, as well as an operating company; and, as holding company, receives dividends from other concerns, interest on bonds of other concerns, and rental from property owned but not operated. As the State treats the operated property as the entity, it does not concern itself with interest charges and the rentals paid, just as it does not concern itself with a mortgage upon the real estate when it lays the *ad valorem* tax. On the other hand, as the Seaboard treats the company—the person—as the entity to be taxed, it undertakes to ascertain the net income of the company. This includes as gross income, a proportion of the receipts from property not within the State and includes among the deductions from the gross income of the company, the capital charges.

"That a State may, consistently with the Federal Constitution, impose a tax upon the net income of property, as distinguished from the net income of him who owns or operates it, although the property is used in interstate commerce, was settled in *Shaffer v. Carter*, 252 U. S. 37, 44, 52. There an Oklahoma statute was sustained which laid the tax upon the net income of Oklahoma oil property owned by a citizen and resident of Illinois. * * * It is a common provision in state income tax laws to tax the net income of property within the State which is owned, or operated, by non-residents. The differences between the parties arise, in the main,

not from difference in the method of determining what is net income, but from difference as to what is the subject of the tax. In other words, they differ as to the thing of which the net income is to be ascertained. This will appear from an examination of the several grounds on which the validity of the statute is assailed.

"*First.* The contention that the statute is obnoxious to the commerce clause rests upon the argument that the State's definition of net income differs from that adopted by the Interstate Commerce Commission * * *. A conclusive answer to that argument is found in the fact that the State adopts (without modification) the commission's definition for the net income of that which it taxes. For treating as the entity to be taxed, the railroad property operated by the company within the State, it appears that every item which the railroad claims the statute wrongly disallowed as a deduction is of such a character, that it is either clearly a capital charge (as distinguished from an operating charge) or reasonably may be deemed such as a matter of accounting."

At this point, the Court continues in a note to which reference is made (p. 421):

"To prove that the statute, in fact, taxes some part of the gross earnings, attention is called specifically to some minor items which the statute does not allow as deductions. But these stand in no different position than the major items—interest on funded debt and leased line rentals—discussed above. Prominent among these lesser items is 'joint facility rents' which, in the case of the Seaboard, amounted net to $21,816.81. Joint facility rents paid were $34,480.98; those received (credited as non-operating income) were $12,664.17. This is rental paid for railroad facilities—like tracks, terminals and roundhouses. They are needed by the carrier as a part of the plant and, not being owned, are rented from others. The fact that they are used jointly with others, is, of course, immaterial. This rent, like the rent of a leased line, is paid to secure control of the property operated. Hire of freight cars might have been treated in the same way, but the State, for reasons satisfactory to it, permitted that financial charge to be deducted, and to that extent reduced the tax."

The occupational tax is imposed on the activity of operating the railroad operating property under the control of the G. N. and is measured solely by the intrastate revenues derived from such operation. Clearly, such tax cannot be a burden on the interstate business handled on this same property if the net income from these *properties'* intrastate activities is sufficient to pay the tax imposed.

We submit that the case cited is squarely in point.

IF JOINT FACILITIES RENTS NOT AN OPERATING CHARGE, THE G. N. IS ADMITTEDLY MAKING A SUBSTANTIAL PROFIT ON ITS INTRASTATE OPERATIONS.

In its "book showing" (G. N. Ex. "11," p. 1, line 5; GN Rec. 258) the "railway operating income" from the G. N.'s intrastate operations (after allowance for taxes) was shown to be $491,544. And even assuming the validity of its claim that a portion of the revenue reported and shown on its books as intrastate, was in fact, interstate revenue, its 1933 "railway operating income" from intrastate operations (after allowance for taxes) was $114,152 (G. N. Ex. "11," p. "A," line 5; GN Rec. 254).

Hence, even on its own showing, if joint facility rents are not a proper operating charge, the G. N. admittedly made a substantial profit on its intrastate operations even in so abnormal a year as 1933.

G. N. MADE A PROFIT ON ITS 1933 INTRASTATE BUSINESS THOUGH JOINT FACILITY RENT BE DEEMED AN OPERATING EXPENSE.

This is true, the State contends, because of fundamentally wrong theories followed in the G. N. calculations. Thus:

Duplication of operating expenses—The G. N. charged $79,239 as an operating expense under the head-

ing: "Operating expenses applicable to intrastate revenues (freight proportion) other than account 101 ($150,554 × 51.33%)." (G. N. Ex. "11," p. 7, line "C;" GN Rec. 265-6.) But it clearly appears from Manschreck's testimony (GN Rec. 203-4) that all of the G. N. operating expenses had already been charged in computing its "total freight operating expenses" amounting to $1,334,268 (G. N. Ex. "11," p. 7, line "B;" GN Rec. 265-6) except the item of $21,547 for "switching," (Plff's. Ex. "21," line "E;" GN Rec. 230) and that there was consequently an attempted duplication of expense in the G. N. figures amounting to $79,239 minus $21,547, or $57,692. This correction is on the "book showing" figures. On the "revised showing" (G. N. Ex. "11," pp. "A" to "F;" GN Rec. 254-7) the corresponding reduction would be: all items of intrastate freight revenue other than Acct. 101 "Freight," and Acct. 110 "Switching" (G. N. Ex. "11," p. "B"; GN Rec. 255), or $82,124 times 51.33% (the operating ratio applied by the G. N. See G. N. Ex. "11," p. "C," line "1-b"; GN Rec. 256) or $42,154.

Correction as to taxes—The state contends in the G. N. as in the N. P. case that taxes should be apportioned on the basis of the relative *extent* of use made of the G. N. properties in its intrastate and interstate operations. Thus, apportioning tax accruals on the same basis as we have more fully explained in the N. P. case (*ante*, pp. 123-4) we find that the taxes allocated to intrastate operations for 1933 (based on the G. N. "book showing") should have been $294,318 (Plff.'s Ex. "22," line "S;" GN Rec. 230-232) instead of $511,530 as contended for by the G. N. (G. N. Ex. "11," p. 9, line 5-f;

GN Rec. 267-8), or a reduction in expense of $511,530 minus $294,318 or $217,212. The corresponding reduction in the G. N.'s "revised showing," would be the difference between $211,532 (Plff.'s Ex. "27," line "I," GN Rec. 235-6) and $335,247 (G. N. Ex. "11," p. "C," line 4-c, GN Rec. 256), or a reduction of $123,715.

Correction as to joint facility rents—The G. N. attempts to apportion its net joint facility rentals paid, first as between freight and passenger (both intra and interstate) according to relative operating expenses, and then to apportion the total thus allocated as between intra and interstate according to relative gross revenues received in the two services. (G. N. Ex. "11," p. 9, GN Rec. 267.) The State contends on the contrary, that these rentals paid should be apportioned (if at all), as between freight and passenger (both intra and interstate) according to relative *extent* of use (*i. e.*, freight car miles as compared with passenger car miles), and that the intrastate freight proportion should be then determined according to relative net ton miles hauled in intra and interstate service, and that the intrastate passenger proportion (there being no other available factor) should be determined on a relative gross revenue basis. (Plff.'s Ex. "23," GN Rec. 232-3.) Following this method, the State reaches a total charge (based on the G. N. "book showing") of $193,027 (Plff.'s Ex. "23," line "M," GN Rec. 233) as compared with $257,427 contended for by the G. N. (G. N. Ex. "11," p. 9, sum of lines 4-g and 4-h, GN Rec. 267), or a reduction in this item of expense of $257,427 less $193,027 or $64,400. The corresponding reduction in the G. N.'s revised showing, would be the difference between $140,800 (Plff.'s Ex.

"28," line "G," GN Rec. 237-8) and $193,455 (G. N. Ex. "11," p. "E," GN Rec. 257) or $52,655.

Elimination of "pensions" as operating expense item—The propriety of charging "pensions" as an item of operating expense in a case of this kind, has been heretofore discussed in connection with the N. P. case. (*Ante,* pp. 125-7.) The evidence shows that if this item be eliminated the G. N.'s net railway operating income (according to its "book showing," G. N. Ex. "11," p. 1, GN Rec. 258) would be increased by $22,066. (Plff.'s Ex. "25," GN Rec. 233-4.)

If, on the other hand, the court finds it to be established by competent evidence that a certain amount of the G. N.'s revenues reported as intrastate, should be transferred to interstate, then its intrastate freight revenue for 1933 would be $1,622,644 (G. N. Ex. "11," p. "B," GN Rec. 255), instead of $2,753,703, as shown by its books and report to the D. P. W. (G. N. Ex. "11," p. 11, GN Rec. 268-a) and this item of $22,066, would have to be reduced to an amount represented by the proportion which $1,622,644 bears to $2,753,703, or 58.92%, making the amount 58.92% of $22,066, or $13,001.

Effect of above corrections—Summaries of the G. N.'s contentions are set forth on pages "1" and "A" of G. N. Exhibit "11." (GN Rec. 254, 258.) As already observed, the summary as to its "book showing" (G. N. Ex. "11," p. 1, line 9) shows that by its own calculations, taking the G. N. books and reports as to its division of intra and interstate earnings at their face value, its "Net Railway Operating Income" (after deducting joint facility rents and equipment rents in addition to taxes) on its Washington 1933 intrastate operations was

$202,458. Corrections as above indicated, however, give the following results:

Net Railway Operating Income as computed by defendant.	$202,458
Plus excess charge by reason of duplication of operating expenses as above indicated	57,692
Plus excess charge for taxes as above indicated	217,212
Plus amount improperly charged for "pensions" (*ante*, pp. —)	22,066
Plus excess charge for joint facility rents paid as above indicated	64,400
Total net railway operating income on G. N. Wash. 1933 intrastate operations as shown by plaintiff's correction of defendant's figures	$563,828

Except as to "pensions," this showing is summarized and the same result reached in a different manner by Mr. Manschreck. (Plff.'s Ex. "24," line 8; GN Rec. 233.)

The summary as to the G. N.'s "revised showing" (assuming certain of its revenues shown in its reports and on its books as intrastate, to be in fact interstate) shows the G. N. "Net Railway Operating Income" (after deducting joint facility rents and equipment rents in addition to taxes) on its Washington 1933 intrastate operations to be a deficit of $99,269. (G. N. Ex. "11" p. "A," line 9, GN Rec. 254.) Corrections as above indicated, however, yield the following results:

Net railway operating income as computed by G. N. on its "revised showing"	$99,269 (red)
Plus excess charge by reason of duplication of operating expenses as above indicated	42,154
Plus excess charge for taxes as above indicated	123,715
Plus excess charge for joint facility rents paid as above indicated	52,655

Plus amount improperly charged for pensions as above indicated	13,001
Total net railway operating income from G. N.'s Washington 1933 intrastate operations as shown by the state's correction of the G. N.'s figures	$132,256

Except as to "pensions," this showing is summarized and the same result reached in a different way by Mr. Manschreck. (Plff.'s Ex. "29," line 8, GN Rec. 238.)

From the foregoing it follows: (1) that if the G. N.'s books and reports are correct, the G. N. confessedly made a substantial profit on its intrastate operations; (2) that if joint facility rents are not deductible as an operating expense, the G. N. confessedly made a substantial profit on such operations, even if allowed to transfer to interstate, some $1,131,059 in revenues reported as intrastate; and (3) that even allowing such wholesale transfer of revenues, and allowing joint facility rents as an operating expense, the company still made $132,256 from such 1933 intrastate operations, were its intrastate expenses properly computed.

We respectfully submit, therefore, that neither the N. P. nor the G. N. has sustained its defense that it lost money on its 1933 intrastate operations and will consequently be compelled to pay its occupational tax out of interstate earnings.

EVIDENCE UNDISPUTED THAT G. N.'S NET EARNINGS WERE AT LEAST $430,184 FROM ITS INTRASTATE FREIGHT TRAFFIC IN 1933.

As in the case of the N. P., the G. N.'s set-ups show its revenues and expenses incident to its intrastate passenger service separately from its revenues and expenses incident to its intrastate freight service. Con-

sequently, the results of its freight service operations alone may be readily calculated.

The revised claimed results of the G. N.'s intrastate operations for 1933, freight and passenger, are set forth in GN's Ex. "11," p. "A" (GN Rec. 254) wherein the following results are shown:

(1) Gross operating revenues	$2,179,760
(2) Operating expenses	1,730,361
(3) Net revenue from railway operations	449,399
(4) Railway tax accruals	335,247
(5) Railway operating income	114,152
(6) Equipment rents—Net debit	19,966
(7) Joint facility rent—Net debit	193,455
(8) Total rentals—Net debit	213,421
(9) Net railway operating deficit (Item 5 less item 8)	99,269 (R)

Now, using this same form of set-up, and showing the corresponding figures incident to freight service alone, we have:

(1) Gross operating revenues from freight service only (GN Ex. "11", p. "B", Col. 2; GN Rec. 255):	$1,622,644
(2) Operating expenses incident to freight service only (GN Ex. "11", p. "C", GN Rec. 256, ln. 1-c)	832,903
(3) Net revenue from railway operations from freight service only (ln. 1 less ln. 2):	$789,741
(4) Railway tax accruals incident to freight service only (GN Ex. "11", p. "C", GN Rec. 256, ln. 4-c—15.38% of $1,622,644):	249,563
(5) Railway operating income from freight service only (ln. 3 less ln. 4):	540,178
(6) Equipment rents incident to freight service only (GN Ex. "11", p. "D", ln. 5-e, GN Rec. 256)—Net debit	16,825
(7) Joint facility rent incident to freight service only (GN Ex. "11", p. "E", ln. 7-e, GN Rec. 257)—Net debit	93,119

(8) Total rentals incident to freight service only (ln. 6 pluss ln. 7)—Net debit		109,944
(9) Net railway operating income incident to freight service only (ln. 5 less ln. 8)		$430,234

NET LOSS CLAIMED BY G. N. ON 1933 INTRASTATE PASSENGER BUSINESS.

Revenues from passenger service (GN Ex. "11", p. "B", 2nd vertical Col., GN Rec. 255)		$557,116
Operating expenses from passenger service other than taxes, car rentals and joint facility rentals (GN Ex. "11", p. "C", item 2-e, GN Rec. 256)	$897,458	
Passenger car rentals (GN Ex. "11", p. "D", item 5-j, GN Rec. 256)	3,141	
Joint facility rentals—Debit (GN Ex. "11", p. "E", item 7-j, GN Rec. 257)	100,336	
Taxes (15.38% of $557,116, See GN Ex. "11", p. "C", calculation line 4-c applied to passenger revenues; GN Rec. 256)	85,684	$1,086,619
Net loss claimed by G. N. on 1933 intrastate passenger service		$529,503
Ratio between total expense and total revenues		195%
Cost of each dollar of revenue received		$1.95

ASSIGNMENT GN-14

(GN 14) The court erred in finding that the G. N.'s operating expenses incident to maintenance of way and structure and freight car repairs should be determined by taking the annual average for three years instead of for 1933 alone. (Finding VII-i, GN Rec. 68-9.)

The propriety of using a three-year instead of a one-year average as the measure of operating expenses incident to maintenance of way and structures and freight train car repairs has already been considered in connection with Assignments NP-19 to NP-21, to which discussion the court is respectfully referred. (*Ante*, pp. 135-6.)

ASSIGNMENT GN-17

(GN 17) The court erred in finding that in proportion to revenue, the G. N.'s cost per unit of doing intrastate business is greater than its cost per unit of doing interstate business. (Finding V, GN Rec. 60.)

This assignment is covered by Assignment NP-30, to which reference is hereby made. (*Ante*, pp. 146-7.)

ASSIGNMENT GN-19

(GN 19) The court erred in finding that a substantial part of the G. N.'s investment in its railways in Washington was made by order of the Washington regulatory bodies. (Finding IX, GN Rec. 70.)

We are unable to find where this finding is substantiated by any evidence in the record. If such exists, the G. N.'s counsel will no doubt favor the court with the proper citations.

ASSIGNMENT GN-20

(GN 20) The court erred in permitting the G. N.'s witness, Burn, to testify over objection, as to the operating ratio in switching seven specified cars at different terminals. (GN Rec.158-9, 230.)

Mr. Burn, the G. N.'s witness, was permitted to testify over the objection of the State's counsel as to the switching cost, revenue and operating ratio in connection with the intra-terminal switching of seven different cars at different terminals of the G. N. (GN Rec. 158-9.) The State's objection and motion to strike were made on the following grounds:

"The ground that unless they are all put in, they are not material. That they might make a considerable revenue on one and no revenue on another. That defendant should not be allowed to detail a few instances

and not give them all. That if that is to be investigated, we will have to open up the whole subject of G. N.'s operating ratio as to switching service." (GN Rec. 158.)

We respectfully submit that the testimony was objectionable for the reasons set forth in the objection and motion to strike, and consequently should be wholly disregarded by this court.

APPENDIX "C"

Evidence Bearing on Appellants' Contention that Their Intra and Interstate Instrumentalities Are Inseparably Commingled.

It is, of course, unquestionably true that both the appellant telephone company and the appellant railroads use the same instrumentalities in carrying on their intra and interstate operations.

But it is equally certain that if either of these appellants proposed to renounce its intrastate business, the purchaser or purchasers thereof would continue to use such appellant's interstate instrumentalities in continuing such intrastate business, with the practical result that there would be no duplication of equipment or operating expense in carrying on the two activities.

Let us first consider the position of the appellant telephone company: As a practical proposition, it cannot, we submit, be assumed that on renouncing its local business, the P. T., less than 10% of whose business is interstate (*ante*, p. 74), would be entitled to interstate rates yielding a fair return on all of its present operating properties. True, the company showed that it uses 92½% of its present property in its intrastate telephone and telegraph service. (PT Rec. 40.) But this does not mean that on surrendering its local business it would be compelled to retain the *exclusive use* of such properties for its long-distance service. It is, of course, inconceivable, that the various communities of Washington are to go without exchange and intrastate long-distance telephone service because of the imposition of this 3% gross earnings tax.

"The Company supplies something the public wants. If by a catastrophe, or series of catastrophies, all that it has was either wiped out of existence or made altogether useless for its present purpose, the people of the state would be deprived of all telephone facilities. The demand that they should be replaced would be general and insistent. To meet it, a new plant would be required." *Chesapeake & Potomac Telephone Co. v. Whitman*, 3 Fed. (2d) 938, 941.

The people would demand and would receive local telephone service. But the P. T.'s renunciation of its local business would certainly not mean a duplication of service in the different communities which it now serves. It must be presumed that such company and any new organizations proposing to furnish the local service so renounced, would proceed like ordinary business men confronted by the same problem. Where local exchange telephone service is supplied by one company, a company furnishing long-distance but not local exchange service to the same community, does not duplicate the local plant, but makes proper joint user arrangements with the local exchange company whereby long-distance messages are sent and received through the local exchange. This is exactly what would happen should the P. T. elect to surrender its local business. It would dispose of that portion of its plant chiefly valuable for handling local business, reserving joint user rights for handling interstate long-distance telephone messages thereover. Consequently, no duplication of equipment or operating property would be required.

It was agreed that the telephone system in Ellensburg is owned by a company independent of the P. T. (PT Rec. 66). With respect to this and other similar independent properties, R. W. Mastick, this company's

chief witness, testified on cross-examination to the following effect:

The Pacific Company makes connections of long distance service between Ellensburg and Seattle. The making of connection between Ellensburg and Seattle differs none at all from the method of making connections between Olympia, where the company owns the plant, and Seattle. The character of the property utilized in the Ellensburg plant differs not at all from the plant in Olympia in making the connection, as far as the exchange plant is concerned. The Pacific Company owns the toll lines between the Ellensburg Company and Seattle. The Ellensburg Company owns the equipment in the toll offices in Ellensburg. It is proper to speak of Ellensburg as a "foreign exchange area" or an "independent exchange." There are 100 or 102 independent exchanges in Washington comparable with Ellensburg. He presumed that all of these 102 companies connect with the Pacific system. And the inter-exchange service, which is the toll service, is handled in exactly the same way between each of these 102 companies and exchanges belonging to the Pacific Company as between stations belonging to the Pacific Company. The P. T. doesn't have any plant and equipment in the independent exchanges. It operates it itself. The P. T. has no duplication of plant and equipment with any exchanges in the state of Washington belonging to another company. (PT Rec. 66-8.)

Where long distance telephone messages are transmitted from foreign exchanges to exchanges of the Pacific Company, the latter company has certain contractual relations with the company operating the

foreign exchanges. Foreign exchanges get 30% of whatever the Pacific Company is entitled to on originating business. If the message were received by the foreign exchange and originated on the Pacific line, the foreign line would not get anything at all. (PT Rec. 68-71.)

Referring to foreign exchanges as exchanges that are independent not only of the Pacific Company but of the Bell system there would undoubtedly be several thousand of such foreign exchanges in the whole United States. Asked whether, so far as he knew, the operations of the Pacific Company with any of these foreign exchanges located outside of Washington are or are not competitive, he replied that he didn't know of any competitive system on the Pacific Coast. Asked if the P. T. has any competitive system in territory served by the Bell system as far as long distance is concerned, he replied, not to his own knowledge; that he did not specifically know of any case as to any of these foreign exchanges, either within or outside the state of Washington where there is a duplication of service as between the Pacific Company or the Bell system and the independent companies. In each of those cases the arrangement for handling long distance messages as between the foreign exchanges and the Pacific Company is handled as a result of a contract entered into between the Pacific Company and the independent company. What he had said of the relation between the exchange at Ellensburg and the Pacific Company and the transmission of toll messages between Ellensburg and the Pacific Company would apply equally to the transmission of toll messages between the Pacific Company and any one of these foreign exchanges, either within or without

the state of Washington. If the Ellensburg company should sell out all of its operating property to the Pacific Company and the latter should thereafter continue to furnish to Ellensburg the same service, both local and long distance that it now enjoys, he didn't see that the Pacific Company would have to acquire any additional property in order to furnish such service. Should the Pacific Company conclude that it didn't care to operate the Olympia exchange any more as part of the Pacific Company's property, it would be perfectly possible for some independent company to buy the Olympia exchange properties, and to have the same operating agreements with the Pacific Company which the Ellensburg Company has. In that case, the two companies would not have to acquire any additional property in order to carry on the operation in the same manner the property is now being operated by the Pacific Company. That would be true of all local exchanges such as Olympia that are now being operated by the Pacific Company in the state of Washington. In other words, if the two companies were split, one operating the local exchange and one continuing to operate the balance of the system, you wouldn't have to acquire any more property and you wouldn't sell any more in order to continue to function with the same degree of efficiency. (Pt. Rec. 73-6.)

As to all long distance messages transmitted to and from stations in said foreign exchange areas and points reached by the Pacific Company's long distance service, the Pacific Company, by contract with such owning companies, utilizes the telephone equipment of such local companies in the transmission of such long distance messages to and from telephone stations in such foreign exchange areas for which said Pacific Company pays such

other company an agreed service charge or division of the long distance tolls. (PT Rec. 89.)

If the Pacific Company did elect to cease to perform intrastate local or long distance service, and elected thereafter to render only interstate long distance service, as it now performs, and if the company could secure a purchaser for its property principally used for its local service or intrastate service, it could, of course, sell and convey that property to another company, but it wouldn't be doing a solely interstate business that way, because the local exchange does an interstate business over those facilities. If the Pacific Company, having elected to handle only interstate service, did elect to sell its property to some other company, he supposed that by a contractual arrangement it could reserve the right to use that property by a joint user arrangement for its interstate service. And if if did, by a satisfactory arrangement, enter into that sort of contract with the purchasing company, it wouldn't be necessary, then, to duplicate the actual equipment of the two companies, to increase the amount of the equipment of the two companies in handling the two classes of service. And if, on the same hypotheses, it sold out one piece of property, say Olympia property, to one company and its Seattle property to another company, it could make the same joint user contracts with each of those companies. (PT Rec. 90-92.)

There are now in the United States a large number of telephone companies doing a long distance telephone business between thousands of local exchange areas in which the local telephone service is supplied by local telephone companies other than the company or com-

panies doing the long distance business. So far as he knew, in none of those areas does the long distance company handling the long distance messages, maintain separate equipment for long distance use only. But in such cases the long distance companies utilize by joint user agreements, the facilities of such local telephone companies in handling the long distance service. (PT Rec. 92-3.)

APPELLANT RAILROADS:

Obviously the intrastate operations of these roads are even more essential to the people of Washington than those of the appellant telephone company. And it would seem that either of these railroads would likewise, if it chose to dispose of its intrastate business to another company, enter into joint user arrangements with such purchaser, as a result of which the same facilities and employes would be used in carrying on both the intrastate and interstate operations. It is a common practice for two or more companies to use the same rails. Express and sleeping car companies use the facilities of a railroad, as does also the United States mail service. Why could not a separate and distinct company handling only intrastate business, by contract, use the same rails, trains, cars and employes as the company handling only interstate business?

In such case, of course, there would be no duplication of either operating expenses or of equipment.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 573

GREAT NORTHERN RAILWAY COMPANY,
APPELLANT,

vs.

THE STATE OF WASHINGTON

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED NOVEMBER 7, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 573

GREAT NORTHERN RAILWAY COMPANY,
APPELLANT,

vs.

THE STATE OF WASHINGTON

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

	Original	Print
Record from Superior Court of Thurston County	1	1
Complaint	4	1
Answer	12	7
Exhibit "A"—First supplemental findings of fact and order of Department of Public Works, No. 6484	29	21
Exhibit "B"—Senate Bill No. 18	31	23
Defendant's supplemental answer, amending fourth affirmative defense	32	24
Exhibits "A" and "B"—Findings, order and bill (copies) (omitted in printing)	39	
Reply	42	29
Interrogatories propounded by plaintiff to the defendant	60	45
Defendant's answers to interrogatories	64	47
Defendant's amended answers to interrogatories	71	54
Findings of fact and conclusions of law	75	57
Judgment	99	77
Notice of appeal to the Supreme Court of the State of Washington	100	78

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 11, 1935.

—7220-C

	Original	Print
Proceedings in Supreme Court of Washington	101	70
Assignments of error	101	79
Opinion, per curiam	106	84
Opinion of court in Cause No. 25684	107	84
Dissenting opinion, Steinert, J.	118	93
Dissenting opinion, Holcomb, J.	122	96
Judgment	123	97
Petition for appeal	124	98
Assignments of error and prayer for reversal	127	100
Order allowing appeal	130	102
Cost and supersedeas bond (omitted in printing)	132	
Citation, with acknowledgment of service (omitted in printing)	135	
Præcipe for transcript on appeal	137	104
Supplemental præcipe as to "Summons" (omitted in printing)	139	
Supplemental præcipe as to pages "A" to "F" inclusive, and pages 1 to 11, inclusive, of Defendant's Exhibit "11"	140	105
Rules of Court:		
Rule VI—Abstracts	141	106
Rule VI (as amended)—Abstracts of records	142	106
Rule VII—Supplemental abstracts	143	107
Rule VIII—Contents and style of briefs	144	108
Rule XVI—Exceptions to findings and conclusions	145	108
Appellant's abstract of record from Superior Court of Thurston County	146	109
Caption	147	109
Complaint (omitted in printing)	150	
Answer (omitted in printing)	156	
Supplemental answer (omitted in printing)	171	
Reply (omitted in printing)	177	
Statement of evidence	187	109
Offers in evidence	188	109
Plaintiff's Exhibits 1 and 2—Interrogatories and answers of defendant thereto	189	110
Recital as to Plaintiff's Exhibits 3 to 7, inclusive	193	114
Motion for nonsuit	194	115
Testimony of W. M. Burn	194	115
C. A. Manthe	245	159
Frank V. Percival	247	161
Stipulation as to testimony of Mr. Cleary	257	168
Testimony of Edwin C. Matthias	257	168
Herbert H. Brown	265	175
Wm. P. Maloney	275	183
John A. Tower	278	185
H. O. Berger	279	186
Recital as to Plaintiff's Exhibit 8	289	193
Recital as to Defendant's Exhibit 9	290	195
Defendant's Exhibit 10—Amended answers to interrogatories	291	196
Defendant's Exhibit 11—Operating statistics (omitted in printing)	293	

	Original	Print
Appellant's abstract of record from Superior Court of Thurston County—Continued.		
Statements re Defendant's Exhibits 12 to 17, inclusive	312	198
Defendant's Exhibit 18:		
Testimony of C. R. Lonergan	315	199
Testimony of T. M. Jenner	317	200
Statements re Defendant's Exhibits 18 and 19	319	201
Defendants's Exhibit 20—Statement showing revenues eliminated, etc., 1933	320	202
Testimony of C. A. Manschreck	321	202
Motion to strike portions of Defendant's Exhibit 11	354	228
Stipulation re testimony of Wm. P. Maloney	355	230
Plaintiff's Exhibits:		
21—Restatement of expenses incidental to intrastate operations, etc.	356	230
22 to 31, inclusive—Computations of operating revenues, expenses, taxes, etc.	357	231
32—Comparison of aggregate taxes payable, etc., 1932 with 1933	368	241
33—Comparison of aggregate taxes payable, etc., 1932 with 1934	370	243
34 and 35—Computations of millages on 1933 and 1934 assessed valuation, etc.	372	245
36 and 37—Statements as to	374	246
Statement re Defendant's Exhibit 38	376	246
Statement re Plaintiff's Exhibit 39	377	246
Plaintiff's Exhibit 40—Testimony of A. S. Edmonds	378	247
Drawing	384	251
Findings and conclusinos (omitted in printing)	388	
Judgment (omitted in printing)	411	
Appeal	412	253
Defendant's Exhibit 11—Operating statistics	413	254
Docket entries	449	289
Appellee's præcipe for transcript	450	290
Clerk's certificate (omitted in printing)	452	
Statement of points to be relied upon and designation as to printing record	453	291
Appellee's designation of additional portions of record to be printed	458	293

[fols. 1-4]

IN SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 15417

STATE OF WASHINGTON, Plaintiff,

v.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant

COMPLAINT—Filed Feb. 28, 1934

Comes now the plaintiff, and for complaint alleges:

(1) That at all times herein mentioned defendant was and now is a corporation organized and existing under the laws of Minnesota and was and is engaged in and continuing in the business within the state of Washington of owning and operating steam railways as a common carrier for hire, and was and now is engaged in and continuing in the business in the state of Washington of a light and power, a telephone company, a telegraph company, and a public service company, all as defined in Session Laws of Washington for 1933, Chapter 191, section 2, subdivision (2), subdivision (c), sub-sub-divisions III, IV, VI and XII.

(2) That defendant, as such common carrier, is now, and for many years has been, subject to the Interstate Commerce Act, and as such has for a long number of years, and at all the times herein mentioned, kept its accounts and made its reports to the Interstate Commerce Commission, the Tax Commission of the State of Washington, and the Department of Public Works of the State of Washington, by the uniform system of accounts prescribed by the Interstate Commerce Commission for steam railway corporations. That in and by such method of accounting, defendant's receipts are now, and for many years last past have been, classified both by number and name according to the source of such receipts. That defendant's receipts from its said operations are now, and for many years last past have [fol. 5] been, classified in its income account as Account No.

501, denominated "railway operating revenues," and that said Account No. 501 is now, and for many years last past has been, sub-classified as to the particular character of such revenues according to the following account numbers and designations:

Rail-line transportation as follows:

Account number	Name of account
101	Freight
102	Passenger
103	Excess baggage
104	Sleeping car
105	Parlor and chair car
106	Mail
107	Express
108	Other passenger-train
109	Milk
110	Switching
111	Special service train
112	Other freight-train
113	Water transfers—Freight
114	Water transfers—Passenger
115	Water transfers — vehicles and live stock
116	Water transfers—Other

Water-line transportation revenue as follows:

Account number	Name of account
121	Freight
122	Passenger
123	Excess baggage
124	Other passenger service
125	Mail
126	Express
127	Special service
128	Other

[fol. 6] Incidental operative revenues as follows:

Account number	Name of account
131	Dining and buffet
132	Hotel and restaurant
133	Station, train and boat privileges
134	Parcel room

135	Storage—Freight
136	Storage—Baggage
137	Demurrage
138	Telegraph and telephone
139	Grain elevator
140	Stockyard
141	Power
142	Rents of buildings and other property
143	Miscellaneous

Joint facility operating revenues as follows:

Account number	Name of account
151	Joint facility—Cr.
152	Joint facility—Dr.

(3) That all of the railway operating revenues included in said accounts set forth in paragraph (2) hereof (except said account numbers 106 and 125, "Mail", said account number 138, "Telephone and Telegraph", and said account number 141, "Power") which were received by, or accrued to, defendant during the months of August, 1933, to December, 1933, inclusive, as a result of business transacted wholly within the state of Washington, constituted the gross income of defendant in the state of Washington as defined by Section one, of said chapter 191, and that defendant is taxable under the provisions of said chapter 191 in an amount equal to one and one-half per cent of such railway operating revenues. That the exact amount of such gross income for said months, or any of them, is un- [fol. 7] known to plaintiff, but that plaintiff is informed and believes, and therefore states the fact to be, that the amount thereof for said respective months and the several amounts of taxes payable by defendant by reason thereof under said chapter 191, are not less than as shown by the following table:

Column 1 Month	Column 2 Gross income	Column 3 Amount of tax
August, 1933	$295,284.98	$4,429.27
September, 1933	293,022.07	4,395.33
October, 1933	325,244.36	4,878.67
November, 1933	287,018.44	4,305.28
December, 1933	203,525.79	3,052.89
Total		$21,061.44

That amounts not less than the several respective sums set forth in said Column 3 became due and owing to plaintiff from defendant on the 15th day of the month next following the month named in said Column one set opposite said respective amounts; that no part of said taxes have been paid, and that the same are now due and owing to plaintiff from defendant, together with interest thereon at the rate of one per cent. per month from the several dates when the same became due, together with a penalty of ten per cent. on the amount of said unpaid taxes.

(4) That all of the railway operating revenues included in accounts numbers 138 and 141 which were received by, or accrued to, defendant during the months of August, 1933, to December, 1933, inclusive, as a result of business transacted wholly within the state of Washington, constituted gross income of defendant in the state of Washington as defined by Section one, said chapter 191, and that defendant is taxable under the provisions of said chapter 191, in an amount equal to three per cent. of such railway operating revenues. That the exact amount of such gross income for said months, or any of them, is unknown to plaintiff, but that plaintiff is informed and believes, and therefore states the fact to be that the amount thereof [fol. 8] is a substantial amount and greatly exceeds $200.00.

(5) That defendant has heretofore instituted a suit in the United States District Court for the Western District of Washington, Southern Division, the same being Equity Cause No. 512, against T. S. Hedges and T. M. Jenner, the same being all of the present members of the tax commission of the State of Washington, wherein defendant, as the plaintiff in said suit, alleges that said chapter 191 is unconstitutional and void as to the defendant herein, and praying that said Hedges and Jenner, and each of them, and their agents and employes, be restrained and enjoined from taking any action against the defendant herein, or its employes, for failure to make a return under said chapter 191, and from making any assessment against said defendant for any tax collectible thereunder, or any part thereof, and from issuing any warrant directed to the sheriff of any county in this state commanding him to levy upon and sell any real or personal property of said defendant within his county and directing him to levy upon and sell any real or

personal property of said defendant within his county and directing him to file said warrant with the clerk of the superior court, and taking any action whatever against said defendant for the collection of any tax imposed under said chapter 191; and from in any manner proceeding against said defendant under Section 23 of said chapter 191, or otherwise, for failure or refusal of said defendant to obtain any license to do business in this state, or for failing or refusing to make any return provided for in said Section 23, or for failure or refusal to pay such tax, or any part thereof, claimed to be due or payable under said chapter; and further praying that plaintiff have a temporary interlocutory and final injunction restraining said defendant and its agents and employes from doing any of said matters or things aforesaid pending the trial of said cause No. 512.

That no restraining order or interlocutory injunction or permanent injunction, or restraining order or decree of any kind has been entered in said cause No. 512 and that no final hearing of said defendant's application for said inter- [fol. 9] locutory injunction or application for said permanent injunction has as yet been had in said cause No. 512.

(6) That in said cause No. 512 defendant alleges in its verified complaint, among other things, (a) that the amount in controversy therein exceeds, exclusive of interest and costs the sum or value of $3,000; (b) that defendant owns and operates a system of steam railways in Washington and other states, as a common carrier, and as such, does both interstate and intrastate business, and for a long time has made no net income from its intrastate business but has lost money thereon, and if required to pay the tax imposed by said chapter 191, it will be compelled to pay the same from its receipts from interstate business; (c) that it is not permitted by law to retire from its intrastate without also retiring from its interstate business carried on in Washington, and cannot lawfully be taxed for the privilege of conducting a business from which it is not at liberty to retire; (d) that its interstate and intrastate freight and passenger traffic is carried on the same trains and over the same rails, and by means of the same equipment, and that should it surrender its intrastate business, its operating expenses would not be appreciably reduced

and would necessitate an increase of its interstate rates; and (e) that the definition of "gross income" as set forth in section one of said chapter 191 is too vague and indefinite to afford the basis for the computation of a valid tax for any amount whatever, for all of which reasons the tax attempted to be imposed on defendant by said chapter 191 is alleged by said defendant to be void and unconstitutional as against defendant, as an unlawful burden on interstate commerce, and violative of the commerce clause and 14th Amendment of the United States Constitution, and that defendant has no plain, speedy and adequate remedy at law.

Wherefore, plaintiff prays judgment against defendant (a) for $21,061.44, and such other and further amounts of [fol. 10] taxes as the court shall find upon the trial of this action to have become due and owing from defendant to plaintiff under the provisions of said chapter 191, by reason of gross income received by said defendant between August 1st, 1933 and December 31st, 1933, inclusive, (b) for ten per cent. of the amount of such unpaid taxes as and for a penalty for the non-payment thereof when due, (c) for interest at one (1) per cent. per month on the several amounts of such taxes from the dates when the same became due and payable, (d) for its costs of suit herein, and (e) for such other and further relief as to the court may seem meet and equitable in the premises.

Plaintiff further prays that an order be forthwith entered by this court staying any further proceedings by said Hedges and Jenner, or either of them, or their agents or employes, against said defendant or its agents or employes, under or by virtue of said chapter 191 pending the final determination of this action.

G. W. Hamilton, Attorney General; R. G. Sharpe, Assistant Attorney General, Attorneys for Plaintiff.

[fol. 11] *Duly sworn to by G. W. Hamilton. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 12] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ANSWER—Filed March 20, 1934

Now comes the Great Northern Railway Company, a corporation, defendant above named, and for its answer to the complaint herein admits, denies and alleges as follows:

I

It admits the allegations of Paragraph I thereof, except that it denies that it was, or now is, engaged in the business of a light and power, telephone or telegraph company as therein alleged, or otherwise.

II

It admits the allegations of Paragraph II thereof.

III

It denies each and every allegation, matter and thing contained in Paragraphs III and IV thereof, except that it admits that it has not paid any amount for or on account of taxes under said Chapter 191, and specifically denies that it is taxable in any amount whatever under said Chapter 191, and specifically denies that the amount set forth in said paragraphs, or any amounts whatever, are due and owing from it to plaintiff, and further specifically denies that any penalty, by way of interest or otherwise, is due and owing from it to plaintiff.

IV

It admits the allegations of Paragraphs V and VI thereof.

[fol. 13] First Affirmative Defense

Further answering said complaint, and as a first affirmative defense to the alleged cause of action therein contained, defendant alleges:

I

At all times herein mentioned defendant was, and now is, a railroad corporation, duly organized and existing

under and by virtue of the laws of the State of Minnesota, and prior to any of the times herein mentioned, complied with the laws of the State of Washington relating to foreign corporations doing business in said state, and appointed its Resident Agent in Washington, and has ever since maintained said agent in said state and paid all annual license fees from time to time becoming due from it to said state, including the annual license fees last due.

II

At all times herein mentioned the defendant was and now is a common carrier, engaged in and conducting the business of a steam railway. At all of said times the defendant owned and operated, and now owns and operates a transportation system of railway lines and branches, having its eastern termini at St. Paul and Duluth in the State of Minnesota, and Superior in the State of Wisconsin, and extending westerly from said termini through the States of Minnesota, North and South Dakota, Iowa, Montana, Idaho, Washington, Oregon, California and the Dominion of Canada, with its western termini at Seattle and Tacoma, in the State of Washington, Portland in the State of Oregon, and Vancouver in the Province of British Columbia, Dominion of Canada. Said line of railroad was constructed more than thirty-five years ago, and is now and for more than thirty-five years last past has been, a public utility devoted to and used for the transportation of passengers and freight, both intrastate and interstate, and for the transportation of the United States mails, and has been, and is now, an instrumentality of interstate commerce and of the [fol. 14] commerce of the government of the United States, and was and is subject to the act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce", and acts amendatory thereof and supplemental thereto; and was, and is also, in respect to intrastate transportation performed by it within the State of Washington, subject to the "Public Service Commission law" of said state, consisting of Chapter 117 of the Washington Session Laws of 1911 and acts amendatory thereof and supplemental thereto.

III

Chapter 191, Laws of 1933, is entitled as follows:

"Occupation Tax

An Act relating to taxation; imposing taxes upon the privilege of engaging in business activities and providing for the ascertainment, assessment, collection and distribution thereof; providing for the administration and enforcement of this act; providing penalties; making appropriations; and declaring that this act shall take effect immediately."

Section 1 (6) defines "gross income" as follows:

"(6) The term 'gross income' means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without any deduction on account of losses: Provided, The term 'gross income' shall not include any payments received on accounts or notes outstanding at the time this act goes into effect."

Section 1 (7) defines the word "business as follows:

"(7) The word 'business' shall include all activities engaged in with the object of gain, benefit or advantage either direct or indirect, and not excepting subactivities producing marketable commodities used or consumed in the main business activity, each of which subactivities shall be considered business engaged in, taxable in the class in which it falls."

Section 2 (2), pages 871 provides that from and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be col- [fol. 15] lected from every person (and corporation) an annual tax or excise for the privilege of engaging in business activities" in the State of Washington, measured by

a percentage of "gross income" of the business activities described in Section 2, and by said Section 2 (2) (e), page 873, a tax of 1½% of said gross income is imposed on steam railways "for the privilege of engaging" in business in this state. By Section 5, page 879 of said act, there is excepted from taxable gross income so much as is received from the United States, the State of Washington, "or from business which the State of Washington is prohibited from taxing under the Constitution of this state or the constitution or laws of the United States." Defendant is informed and believes and alleges that plaintiff construes said act as not applying to the gross income from interstate business, but pretends that the same applies to the gross income from defendant's business local to and within the State of Washington, and that defendant owes and must pay 1½% of said gross income from local business for the privilege of doing said local business in this state.

IV

Defendant's system of railway was constructed and equipped many years before the enactment of Chapter 191, Laws of 1933, and defendant has expended therefor more than One Hundred Million Dollars in order to provide adequate facilities for the transportation of both interstate and intrastate commerce and the United States mails. Long after said system of railway has been constructed and equipped there was enacted by the legislature of the State of Washington Chapter 81, Washington Session Laws of 1905, followed by the enactment of Chapter 117, Washington Session Laws of 1911, known as the "Public Service Commission Law", and under and by said law and by Article XII, Sections 13, 14 and 15 of the Constitution of the State of Washington, there is imposed on defendant an ineluctable obligation to devote its railroad to the service [fol. 16] of the people of the State of Washington in the transportation of passengers and property in local commerce between places wholly within the State of Washington, from which service it cannot withdraw while continuing to carry on its interstate commerce. Defendant's railroad system comprises approximately 10,541 miles of track, of which approximately 1450 miles are in the State of Washington. Defendant is taxed in the State of Washington under and by virtue of Chapter 130, Washington Special

Session Laws of 1925, on its fair market value, considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. Ad valorem taxes so levied for the year 1933, payable in the year 1934, are approximately $1,250,000. Defendant is also required by Chapter 107, Laws of 1929, to pay to the Department of Public Works of Washington one-tenth of 1% of its gross revenue as an inspection and supervision fee. Said inspection fee, payable for the year 1933, will be approximately $3100. Said tax of 1½% of gross income imposed by said Chapter 191, Laws of 1933, is not a property tax, nor in lieu of a property tax, nor an inspection or supervision tax, but is an excise tax imposed solely for the privilege of doing local business within the State of Washington, which tax it cannot escape by abandonment of said local business while continuing to carry on its interstate commerce in said state.

V

Defendant's local business is conducted at a loss, and said tax, if paid, will have to be paid out of the earnings from interstate commerce and from its property located outside the State of Washington. The definitions of "gross income" and "business" in said Chapter 191, Laws of 1933, are so vague, indefinite and uncertain as to render it impossible for defendant to compute, with certainty, the amount of the tax, if anything, due the State, and neither the State Tax Commission nor plaintiff, prior to the com- [fol. 17] mencement of this action, either determined or assessed the tax claimed to be due from defendant, or advised defendant the amount, if anything, which they claim defendant owes for the privilege of doing local business in this state.

VI

For all of said reasons the tax imposed upon defendant by said statute is a burden upon interstate commerce, is unreasonable, oppressive and confiscatory, takes defendant's property without due process of law, and denies to the defendant the equal protection of the laws, in violation of Article I, Sections 8 and 10 and Article VI, also of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Second Affirmative Defense

Further answering said complaint, and as a second and further affirmative defense to the alleged cause of action therein contained, defendant alleges:

I

It hereby adopts and realleges Paragraphs I, II, III and IV of its first affirmative defense as Paragraphs I to IV, inclusive, of this, its second affirmative defense.

V

By said Chapter 117, Session Laws of 1911, there was created an administrative tribunal, called the Public Service Commission, with the usual powers of regulation and supervision of public utilities, including common carriers by railroad, and the powers and duties of the Railroad Commission, which was created by said Chapter 81, Laws of 1905, were transferred to said Public Service Commission. Chapter 7, Session Laws 1921, known as the "Administrative Code" (Sections 10759 to 10898, inclusive, R. C. S.) created an administrative tribunal known as the Department of Public Works, under the general supervision of a Director of Public Works. The functions of the Public Service Commission with respect to common carriers by [fol. 18] rail were transferred by Section 25 of said Chapter 7, Laws of 1921 (Section 10735 R. C. S.) to the Director of Public Works. Defendant's investment in its line of railway was made to provide adequate facilities for the handling of both interstate and intrastate commerce, and a substantial part thereof was made by order of the Railway Commission of Washington and its successors, the Public Service Commission and the Department of Public Works, for the purpose of equipping its property to comply with said Public Service Commission law and acts amendatory thereof.

Since the Constitution of the State of Washington and said statutes and acts amendatory of said statutes and supplemental thereto, impose upon defendant an ineluctable obligation to devote its property to the service of the people of said state in intrastate transportation, from which is cannot withdraw and at the same time continue to carry on its business as a common carrier in interstate commerce,

any tax sought to be imposed upon it under and by virtue of said Chapter 191, Laws of 1933, and the tax sought to be recovered by plaintiff from defendant in the within entitled action, would and does constitute a burden upon, and an attempt to regulate, interstate commerce in violation of Article I, Sections 8 and 10, and Article VI of the Constitution of the United States and of the acts of Congress regulating interstate commerce, particularly Section 1 (18) (21), Section 13, Section 15A and Section 19A thereof, and of the Emergency Railway Transportation Act of 1933.

Third Affirmative Defense

Further answering said complaint, and as a Third and Further Affirmative Defense to the alleged cause of action therein contained, defendant alleges:

I

It hereby adopts and realleges Paragraphs I, II, III and IV of its First Affirmative Defense herein, and Paragraph [fol. 19] V of its second affirmative defense herein, as Paragraphs I to V, inclusive, of this, its third affirmative defense.

VI

At all times herein mentioned this defendant was, and now is engaged in and conducting interstate and intrastate commerce in the State of Washington, and was and is subject to the Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto. By said acts of Congress regulating interstate commerce, particularly Section 1 (18) to (21), Section 13, Section 15A and Section 19A thereof, and the Emergency Railway Transportation Act of 1933, there is imposed upon defendant an obligation to devote its property to the service of the people of said State of Washington and of the United States, in both interstate and intrastate transportation, from which it cannot withdraw and at the same time continue to carry on its business as a common carrier in interstate commerce, and for said reason said Chapter 191, Laws of 1933, and the tax purported to be imposed thereby on defendant imposes a burden upon, and constitutes an attempt to regulate interstate commerce, in violation of Article I, Sections 8 and 10,

and Article VI of the Constitution of the United States and of said acts of Congress regulating interstate commerce.

Fourth Affirmative Defense

Further answering said complaint, and as a further and Fourth Affirmative Defense to the cause of action therein alleged, defendant alleges:

I

It hereby adopts and realleges Paragraphs I, II, III and IV of its First Affirmative Defense herein, Paragraph V of its Second Affirmative Defense herein, and Paragraph VI of its Third Affirmative Defense herein, as Paragraphs I to VI of this, its Fourth Affirmative Defense.

[fol. 20] VII

Defendant, as an interstate carrier, subject to the acts of Congress regulating interstate commerce, keeps its accounts as required by the Interstate Commerce Commission.

Defendant's gross railway operating revenues and expenses within the State of Washington for both local and interstate business, ad valorem taxes in Washington, and the inspection fee paid to the Department of Public Works of Washington for the years 1932 and 1933, were as follows:

1932:

Revenues	$8,389,154.17
Expenses	7,682,590.35
Ad Valorem Taxes	1,569,161.71
Inspection Fee	3,338.97

1933:

Revenues	$8,114,350.47
Expenses	7,102,133.30
Ad Valorem Taxes	1,250,941.47
Inspection Fee	3,137.05

Defendant's gross railway operating revenues from local and interstate business in the State of Washington for the years 1932 and 1933, separately stated, were as follows:

1932:

Local	$3,338,973.43
Interstate	5,050,180.74

1933:

Local	$3,137,046.87
Interstate	4,977,303.60

The revenues assigned to the State of Washington, as aforesaid, comprise the entire revenue accruing from business local to said state, plus a mileage proportion of interstate revenue as is customary in apportioning revenues to a state by carriers subject to the Interstate Commerce Act, and includes also the entire revenue from switching and demurrage accruing in said state, whether from local or [fol. 21] interstate business. The aforesaid expenses, assigned to said state, are those incurred in the State of Washington which are wholly applicable to local business in said state, plus a mileage proportion of expenses which are applicable to all traffic, whether state or interstate, and which cannot be localized. This method of apportionment is also in accordance with the method prescribed by the Department of Public Works of the State of Washington; said method has been followed for more than twenty years, and is as accurate as is possible, in view of the inseparable nature of the two classes of business.

Expenses incurred in the State of Washington cannot be mathematically divided between local and interstate business, because of the inseparable nature of the two kinds of business, which are carried on the same lines of railroad, in the same trains and cars, operated by the same employes, but local business is relatively short haul, incurs two terminal expenses within the state, while interstate business incurs but one terminal expense; local business uses more expensive terminal facilities in its handling from large distributing centers; clerical and warehouse expense is greater; damage to freight is greater; an excess of equipment is used for loading and unloading; car and engine miles per day are less; local trains are lighter, and the wear and tear on the equipment is greater, because of frequent starting and stopping, there is more switching, resulting in increased cost and greater damage to equipment; local

trains are on the road more and consume more fuel per mile; local short hauls are irregular and the facilities are used to less capacity. While the revenue per ton mile of local business, as compared with the revenue per ton mile of interstate business, is about 2 to 1, the expense of doing local business per unit of freight is more than twice as much as the cost of doing interstate business, and the expense of [fol. 22] said local business is in excess of revenue received therefrom, and for all of these reasons local business is more than twice as expensive in proportion to revenue as interstate business.

The cost of maintaining and operating defendant's line of railroad in the State of Washington during the years 1932 and 1933 exceeded the gross operating revenues of defendant in said state (interstate and intrastate, both inclusive), and the tax payments, both ad valorem and inspection fee, by it heretofore made and currently made in said state, have been and will be paid from revenues obtained at least in part outside the State of Washington. During recent years, and at the present time, the railroads in said state, including this defendant, have been and must continue to be compelled to compete under existing laws for traffic and business with motor carrier operators, both passenger, freight and express, and the operations of said motor carriers have been and are subsidized by the State of Washington, in that said state affords said motor carriers the use of highways throughout said state that were constructed at costs aggregating tens of millions of dollars, and that no substantial charge by the state has been made in the past, or is imposed by existing law upon said motor carrier competitors for the use of said highways, and that in said circumstances it has been, and is impossible to increase the general schedule of rates for said railroad service to such extent as to result in any substantial net railway operating income; that grain constitutes a large part of the tonnage of said railway operations of said defendant in said state, both local and interstate, and that there is now pending before the Interstate Commerce Commission for decision, in a case wherein the Department of Public Works of Washington participated, an attack upon existing rates of defendant on grain, which, if it results in any substantial decrease in rates, will operate to reduce the gross operating income of this defendant in Washington from its

[fol. 23] railroad operations in Washington, and to increase the already large deficits that have been and are being incurred annually in said railroad operations in said state.

VIII

Defendant's interstate and local business is inseparably commingled and mutually dependent. For the year 1932 its gross freight revenue (Account 101 of the Uniform System of Accounts) for business done in the State of Washington was $6,351,791, of which $2,647,436 was from local and $3,704,355 from interstate business. For said year the intrastate revenue ton miles were 120,000,000 and the interstate revenue ton miles in said state were 402,000,000, in round numbers. For the seven day period ending March 9, 1932, a representative period, its local revenue net ton miles were 1,970,577 and interstate revenue net ton miles were 7,090,421, or 21.75% and 78.25%, respectively; and of the local revenue net ton miles 1,031,846 were eastbound and 938,731 were westbound; and of the interstate revenue net ton miles 4,913,165 were eastbound and 2,177,256 westbound.

Both classes of business, local and interstate, both eastbound and westbound, were transported by defendant over the same lines of railroad, in the same trains, operated by the same employes, and with the same facilities, and it is not possible, practically and economically, or at all, to transport local freight business separately from interstate freight business by different lines of railroad, in different trains, or by means of different instrumentalities or employes.

For the year 1932 defendant's gross income from the transportation of passengers in the State of Washington (Account 102 of the Uniform System of Accounts) was $1,008,523, of which $357,303 was from local, and $651,220 was from interstate business; the number of revenue passengers carried during the said year in said state was 253,988, of which 105,765 were carried locally, and 148,223 inter- [fols. 24 & 25] state. The number of revenue passenger revenue miles was 42,339,199, of which 12,467,660 were local and 29,871,539 interstate. Much the larger part of said passengers were carried in interstate through trains east and westbound, and on interstate through trains north and southbound. It is not possible to carry said local and inter-

state passengers on separate trains, and the facts with respect thereto are identical with the facts alleged in respect to defendant's freight traffic. Defendant does not now have statistics for the year 1933, but they are and will be approximately the same as those for the year 1932, as hereinabove stated.

If defendant could and should abandon its local freight business, it could and would reduce its train service, and would thereby reduce its direct expenses approximately $190,659 and reduce its car mileage and save approximately $58,046, a total reduction of direct expenses applicable to its local and interstate Washington freight business of approximately $248,705, but would lose its entire gross revenue from local freight business of $2,647,436. These figures are based upon operations for the year 1932, but will be and are approximately the same for the year 1933. Defendant estimates that some reduction in passenger train service could be effected if local business were to be discontinued, which would result in a further estimated saving in direct expenses of $218,652, based on 1932 operations, but it would lose its entire gross revenue from local passenger transportation, which for the year 1932, amounted to $357,303, all of which will be approximately the same for the year 1933. The net result of abandonment by defendant of its local passenger and freight business, in order to escape the tax imposed by said Chapter 191, Laws of 1933, would be as shown by the following tabulation:

[fol. 26] State of Washington

Operating Revenue—Local, 1932

Freight revenues—Account 101	$2,647,436.00
Passenger " " 102	357,303.00
Other Operating revenues	334,234.00
Total	$3,338,973.00
Estimated reduction in operating expenses	467,357.00
Net Loss of Income	2,871,616.00
Interstate gross income	5,050,181.00
Expenses (as reduced)	7,215,233.00
Washington taxes	1,569,161.71
Loss on interstate business	3,734,213.71

Therefore, if defendant could and should abandon its local freight and passenger business, the entire burden of maintaining and operating its interstate system of railroad, constructed and equipped to handle both interstate and local commerce, would fall entirely on interstate business, and would necessitate an increase of rates and fares greater than the same could bear, as a practical matter, or at all, and would result in the destruction of an essential instrument of interstate commerce, and of the transportation of the mails, troops and munitions of the United States, and of the value of its property, to the amount of more than One Hundred Million Dollars.

IX

The amount which would be payable by the defendant as a tax of 1½% of its gross income for the months of August to December, 1933, inclusive, under said Chapter 191, Laws of 1933, is approximately as shown in the figures set forth at the top of page 4 of plaintiff's complaint herein. Defendant's railroad is well located and economically managed. It serves the principal cities and towns of the state. [fol. 27] The operation of its railroad in local business is essential to the people of the State of Washington and of the United States. Most of defendant's local rates cannot be raised because of competition from other kinds of transportation. Under the law such rates cannot be raised without the consent of the Department of Public Works. Defendant has heretofore applied for an increase of certain local rates, and said application was denied by said Department of Public Works, as appears from a copy of its order hereto attached, marked Exhibit "A" and made a part hereof. Since defendant filed the suit in the District Court of the United States for the Western District of Washington, referred to in plaintiff's complaint, Senate Bill 18 was introduced at the Special 1933 Session of the legislature of said state, which bill was prepared and enactment urged by attorneys representing the State of Washington, for the purpose of relieving defendant from the obligation of doing local business, and to meet defendant's contention in said case and in this case that it is so obligated, but that bill was rejected by the legislature. A copy of said bill is hereto attached, marked Exhibit "B", and made a part hereof.

X

The tax imposed by said Chapter 191, Laws of 1933, on the pretext of a tax or fee for the privilege of doing local business in Washington, is in reality a tax and burden upon interstate commerce, and upon the gross revenues received by defendant therefrom, in that said tax, if paid, would have to be paid out of the earnings of defendant from its interstate business, and is a tax upon its business done and upon income earned in other states, and upon property of the defendant located outside the State of Washington, which tax it cannot avoid by withdrawing its property from use in local commerce within the State of Washington, either under said Public Service Commission law of the State of Washington, and the amendments thereof, under the Constitution of the State of Washington, under the acts of Congress regulating interstate commerce, or as a practical [fol. 28] matter, or at all, and said tax is in violation of the Constitution of the United States, in that it imposes a burden upon, and interferes with the exercise of governmental powers of the Federal Government, to-wit, the transportation of the United States mails, troops, and munitions of the United States, and is in violation of Article I, Sections 8 and 10, and Article VI, also the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and of the acts of Congress regulating interstate commerce, particularly Section 1 (18) (21), Section 13, Section 15A and Section 19A thereof, and of the Emergency Railway Transportation Act of 1933, approved June 16, 1933.

Wherefore, defendant prays judgment that plaintiff take nothing in this action, and that it be hence dismissed, with its costs and disbursements herein.

Thomas Balmer, Edwin C. Matthias, Attorneys for Defendant.

Duly sworn to by Edwin C. Matthias. Jurat omitted in printing.

[fol. 29] EXHIBIT "A" TO ANSWER

Before the Department of Public Works of Washington

No. 6484

In the Matter of the Application of Common Carrier Railroads for Fifteen Per Cent Increase in Freight Rates in the State of Washington

First Supplemental Findings of Fact and Order

On December 17, 1931 the department entered an order providing for emergency increases in intrastate freight rates and charges in Washington to expire March 31, 1933. The increases ordered were in conformity with increased rates and charges authorized by the Interstate Commerce Commission, hereinafter called the Commission, in Ex Parte 103, 178 I. C. C. 539, and 179 I. C. C. 215, for the same period. On January 13, 1933, the applicants filed with us a supplemental petition requesting authority to continue in effect the emergency rates and charges so authorized until September 30, 1933. The Commission on March 7, 1933 issued a mimeographed report authorizing extension to September 30, 1933 of the emergency interstate rates and charges. A hearing was held by the department in Seattle April 12 and 13, 1933.

Testimony and exhibits were presented by the applicants showing that their financial condition has not improved since the emergency charges were given effect and that for the calendar year 1932 their income decreased substantially compared with the previous year. The applicants while turning over the proceeds of the so-called surcharge to the Railroad Credit Corporation have received no assistance from nor availed themselves of the credit facilities afforded by that corporation.

Since January 4, 1932, the basic rates covering innumerable individual point to point items of traffic, many of which move in volume, such as iron and steel articles, canned goods, sugar, petroleum and its products, cement, lumber, pulpwood, paper, etc., have been substantially reduced and in a great many instances the surcharge has been eliminated for the purpose of meeting the competition of highway carriers and other modes of transportation. Applicants have

by no means uniformly adopted this practice. In other words, the surcharge has been removed upon the movement of a particular commodity between specific points, but it has been retained upon the same commodity between other points. Applicants have declined to remove the surcharge on certain commodities moving freely over the highways. The record shows a considerable and ever increasing movement of coal produced in King and Pierce Counties by truck, but producers interested in maintaining the rail movement from western Washington mines have been unable to induce applicants to waive the surcharge on their traffic to retain it for rail movement.

We are of the opinion and find that this rate adjustment policy generally indulged in by the applicants between January 4, 1932 and March 31, 1933 resulted in undue preference and advantage to certain persons and localities and subjected other persons and localities to undue prejudice and disadvantage prohibited by section 21 of the public [fol. 30] service laws of Washington. Protests were made by witnesses as to the continuance of the surcharge on coal, lumber and other commodities. The record before the Commission and the decision of that body were made a part of the record in the instant proceeding. That record shows that vigorous opposition was offered by the witnesses representing basic commodities as well as many other lines of traffic. We are entirely in accord with the attitude of the four dissenting members of the Commission and are of the opinion that continuance of the surcharge even for a few months longer will be burdensome and irritating to the public, of no real benefit to applicants as to revenue results therefrom and will tend to deflect more traffic from the applicants' facilities to other modes of transportation. It is a matter of common knowledge that the present level of rail rates is too high to permit freedom of movement by rail. Pursuant to petitions from shippers of basic commodities throughout the United States, the Commission has recently ordered under its Docket 26000 a general investigation in the matter of rates and charges of carriers by railroad, subject to its jurisdiction, to determine what reductions may be made in them.

The surcharge authorized does not apply on any of the important agricultural products carried in Washington. Its voluntary removal by the applicants on many other com-

modities which move in volume indicates that the preponderance of Washington intrastate traffic will be either unaffected by, or not susceptible to its application.

We find that a continuance of the effectiveness of the emergency freight rates and charges authorized by our order dated December 17, 1931, to expire March 31, 1933, is not necessary to prevent injury to the interests of the public or to the applicants under existing conditions.

Order

Wherefore it is ordered that the application herein be and the same is hereby denied.

Witness the Department of Public Works of Washington, this 27th day of April, 1933.

Department of Public Works of Washington, E. K. Murray, Director; W. D. Lane, Supervisor of Transportation; Frank Purse, Supervisor of Public Utilities.

[fol. 31] EXHIBIT "B" TO ANSWER

In the Senate—By Senator Mehner

Senate Bill No. 18

State of Washington, Extraordinary Session, 1933

December 8, 1933, read first and second time, ordered printed, and referred to Committee on Public Utilities.

An Act permitting public service companies engaged in interstate commerce to withdraw from certain kinds of business, and providing that this act shall take effect immediately

Be it enacted by the Legislature of the State of Washington:

Section 1. That any public service company engaged in interstate commerce, including any steam railway company, electric railway company, light company, power company, telephone company, telegraph company, express company, car company, or company engaged in transporting freight

or passengers for hire upon the public highways of this state, is hereby permitted to renounce and withdraw from the whole (but not a part only) of that part of its business carried on in the state of Washington which does not constitute interstate commerce. The word "company" as used in this act shall mean any individual, firm, copartnership, joint venture, association, corporation, trust or any other group or company acting as a unit, whether mutual, cooperative or otherwise.

Sec. 2. The renunciation provided for in section one hereof shall be in writing, signed and acknowledged by such company or its duly authorized agents and filed with the department of public works of the state of Washington, and shall declare that the said company elects to renounce all local business in the state of Washington after the date set forth therein. After the date so fixed, it shall be unlawful for said company to carry on any business whatsoever in the state of Washington other than interstate business, without the consent of the officers of the state of Washington and of the United States having power to authorize the same.

Sec. 3. This act is necessary for the immediate support of the state government and its existing public institutions and shall take effect immediately.

[File endorsement omitted.]

[fol. 32] [File endorsements omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

DEFENDANT'S SUPPLEMENTAL ANSWER AMENDING FOURTH AFFIRMATIVE DEFENSE—Filed Oct. 16, 1934

Comes now the defendant, and by leave of court first had and obtained, files this its Supplemental Answer amending and superseding the Fourth Affirmative Defense contained in its original Answer herein, and as its Fourth Affirmative Defense to the so-called cause of action contained in plaintiff's complaint alleges:

I

It hereby adopts and realleges Paragraphs I, II, III and IV of its First Affirmative Defense herein, Paragraph V of its Second Affirmative Defense herein, and Paragraph VI of its Third Affirmative Defense herein, as Paragraphs I to VI of this, its Fourth Affirmative Defense.

VII

Defendant as an interstate carrier subject to the acts of Congress regulating interstate commerce keeps its accounts of system revenues and expenses as required by the Interstate Commerce Commission. Since the filing of its original answer herein the defendant has made a study to determine the revenues earned from intrastate business conducted by it in the State of Washington, and the expenses of conducting said business in the year 1933, and defendant alleges that said intrastate business in Washington is conducted at a loss and that the tax imposed by Chapter 191, Laws 1933, if paid, will have to be paid out of its earnings from interstate commerce and from its earnings from property located outside the State of Washington. [fol. 33] Defendant's total operating revenues and expenses from intrastate business in the State of Washington for the year 1933, were as follows:

Revenues	$1,890,533
Expenses	2,008,316
Deficit	117,783

Defendant's gross railway operating revenues and expenses within the State of Washington for both local and interstate business, ad valorem taxes in Washington and the inspection fee paid to the Department of Public Works of Washington for the year 1933, were as follows:

1933:	
Revenues	$8,114,350.47
Expenses	7,102,133.30
Ad valorem taxes	1,250,941.47
Inspection fee	3,137.05

The cost of maintaining and operating defendant's line of railroad in the State of Washington during the years 1932 and 1933 exceeded the gross operating revenues of

defendant in said state (interstate and intrastate, both inclusive), and the tax payments, both ad valorem and inspection fee, by it heretofore made and currently made in said state, have been and will be paid from revenues obtained at least in part outside the State of Washington. During recent years, and at the present time, the railroads in said state, including this defendant, have been and must continue to be compelled to compete under existing laws for traffic and business with motor carrier operators, both passenger, freight and express, and the operations of said motor carriers have been and are subsidized by the State of Washington, in that said state affords said motor carriers the use of highways throughout said state that were constructed at costs aggregating tens of millions of dollars, and that no substantial charge by the state has been made in the past, or is imposed by existing law upon said motor carrier competitors for the use of said highways, and that in said circumstances it has been, and is impossible [fol. 34] to increase the general schedule of rates for said railroad service to such extent as to result in any substantial net railway operating income; that grain constitutes a large part of the tonnage of said railway operations of said defendant in said state, both local and interstate, and that there is now pending before the Interstate Commerce Commission for decision, in a case wherein the Department of Public Works of Washington participated, an attack upon existing rates of defendant on grain, which, if it results in any substantial decrease in rates, will operate to reduce the gross operating income of this defendant in Washington from its railroad operations in Washington, and to increase the already large deficits that have been and are being incurred annually in said railroad operations in said state.

VIII

Defendant's interstate and local (or intrastate) business is inseparably commingled and mutually dependent. Both classes of business, local and interstate, both eastbound and westbound, were transported by defendant over the same lines of railroad, in the same trains, operated by the same employes, and with the same facilities, and it is not possible, practically and economically, or at all, to transport local freight business separately from intrastate

freight business by different lines of railroad, in different trains, or by means of different instrumentalities or employes. Much the larger part of the passengers on defendant's trains were carried in interstate through trains east and westbound, and on interstate through trains north and southbound. It is not possible to carry said local and interstate passengers on separate trains, and the facts with respect thereto are identical with the facts alleged in respect to defendant's freight traffic.

If defendant could and should abandon its local freight business, it could and would somewhat reduce its train service and its car mileage and save some direct expense applicable to its local and interstate Washington freight business, but would lose its entire gross revenue from local [fol. 35] freight business of $1,525,109. These figures are based upon operations for the year 1933, the latest available. Defendant estimates that some reduction in passenger train service could be effected if local business were to be discontinued, which would result in a further saving in direct expenses, but it would thereby lose its entire gross revenue from local passenger transportation, which for the year 1933 amounted to $365,424. The net result of abandonment by defendant of its local passenger and freight business, in order to escape the tax imposed by said Chapter 191, Laws of 1933, would be the loss of $1,890,533, and the saving of not more than fourteen per cent of that amount.

Therefore, if defendant could and should abandon its local freight and passenger business, the entire burden of maintaining and operating its interstate system of railroad, constructed and equipped to handle both interstate and local commerce, would fall entirely on interstate business, and would necessitate an increase of rates and fares greater than the same could bear, as a practical matter, or at all, and would result in the destruction of an essential instrument of interstate commerce, and of the transportation of the mails, troops and munitions of the United States, and of the value of its property to the amount of more than One Hundred Million Dollars.

IX

Defendant's railroad is well located and economically managed. It serves the principal cities and towns of the

state. The operation of its railroad in local business is essential to the people of the State of Washington and of the United States. Most of defendant's local rates cannot be raised because of competition from other kinds of transportation. Under the law such rates cannot be raised without the consent of the Department of Public Works. Defendant has heretofore applied for an increase of certain local rates, and said application was denied by said Department of Public Works, as appears from a copy of its order hereto attached, marked Exhibit "A" and made a part hereof. Since defendant filed the suit in the District [fol. 36] Court of the United States for the Eastern District of Washington, referred to in plaintiff's complaint, Senate Bill 18 was introduced at the Special 1933 Session of the legislature of said state, which bill was prepared and enactment urged by attorneys representing the State of Washington, for the purpose of relieving defendant from the obligation of doing local business, and to meet defendant's contention in said case and in this case that it is so obligated, but that bill was rejected by the legislature. A copy of said bill is hereto attached, marked Exhibit "B", and made a part hereof.

X

The tax imposed by said Chapter 191, Laws of 1933, on the pretext of a tax or fee for the privilege of doing local business in Washington, is in reality a tax and burden upon interstate commerce, and upon the gross revenues received by defendant therefrom, in that said tax, if paid, would have to be paid out of the earnings of defendant from its interstate business, and is a tax upon its business done and upon income earned in other states, and upon property of the defendant located outside the State of Washington, which tax it cannot avoid by withdrawing its property from use in local commerce within the State of Washington, either under said Public Service Commission law of the State of Washington, and the amendments thereof, under the Constitution of the State of Washington, under the Acts of Congress regulating interstate commerce, or as a practical matter, or at all, and said tax is in violation of the Constitution of the United States, in that it imposes a burden upon, and interferes with the exercise of governmental powers of the Federal Government, to-wit, the transporta-

tion of the United States mails, troops, and munitions of the United States, and is in violation of Article I, Sections 8 and 10, and Article VI, also the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and of the acts of Congress regulating interstate commerce, particularly Section 1 (18) (21), Section 13, Section 15A and Section 19A [fol. 37] thereof, and of the Emergency Railway Transportation Act of 1933, approved June 16, 1933.

Wherefore, defendant prays judgment that plaintiff take nothing in this action, and that it be hence dismissed, with its costs and disbursements herein.

Thomas Balmer, Edwin C. Matthias, Attorneys for Defendant.

[fol. 38] *Duly sworn to by Edwin C. Matthias. Jurat omitted in printing.*

[fols. 39 & 40] Exhibit "A" to supplemental answer omitted. Printed side page 29, ante.

[fol. 41] Exhibit "B" to supplemental answer omitted. Printed side page 31, ante.

[fol. 42] In Superior Court of Thurston County

[Title omitted]

Reply—Filed May 5, 1934

Comes now the plaintiff and replying to the allegations of defendant's answer—

(1) As to Paragraph III of defendant's first affirmative defense, plaintiff admits the enactment of said chapter 191, Laws of Washington of 1933, and the allegations of said paragraph as to the contents thereof, in so far, and only in so far, as the same correctly set forth the title and provisions of said chapter 191. Plaintiff admits that plaintiff

construes said act as not applying to the gross income from interstate business and that defendant owes and must pay 1½% of its gross income from defendant's intrastate business for the privilege of doing local business in Washington. Plaintiff denies each and every other allegation, matter and thing contained in said Paragraph III.

(2) As to Paragraph IV of defendant's first affirmative defense, plaintiff admits that defendant's system of railway was constructed and equipped many years before the enactment of said Chapter 191, and that defendant has expended more than $100,000,000 in its construction and equipment. Plaintiff admits the enactment of Chapter 81, Washington Session Laws of 1905, and Chapter 117, Washington Session Laws of 1911; admits that defendant is taxed in Washington under chapter 130, Washington Special Session Laws of 1925, on its fair market value and that the ad valorem taxes so levied for 1933 are approximately $1,250,000; admits that defendant is required by chapter [fol. 43] 107, Laws of 1929, to pay to the department of public works of Washington 1/10th of 1% of its gross intrastate revenues as an inspection and supervision fee and that said inspection fee, payable for 1933, will be approximately $3,100; and admits that the tax imposed by chapter 191, Laws of 1933, is not a property tax. Plaintiff denies each and every other allegation, matter and thing contained in said paragraph IV.

(3) As to paragraphs V and VI of defendant's first affirmative defense, plaintiff denies each and every allegation, matter and thing therein contained.

(4) As to paragraph V of defendant's second affirmative defense, plaintiff admits the enactment of the several statutes therein alleged but denies any knowledge or information sufficient to form a belief as to whether any part, substantial or otherwise, of defendant's investment in its line of railway was made by order of the Railroad Commission of Washington and/or its successors, or for the purpose of equipping its property to comply with said public service commission law and the acts amendatory thereof. Except as hereinabove admitted and denied on information and belief, plaintiff denies each and every allegation, matter and thing contained in said paragraph V.

(5) As to paragraph VI of defendant's third affirmative defense, plaintiff admits that at all times therein mentioned defendant was and now is engaged in and conducting interstate and intrastate commerce in Washington, and was and is subject to the acts of Congress therein referred to, but denies each and every other allegation, matter and thing therein contained.

(6) As to Paragraph VII of defendant's third affirmative defense, plaintiff denies any knowledge or information sufficient to form a belief as to any of the items of statistical data therein contained, or as to whether defendant keeps its accounts as required by the interstate commerce commission; or as to how the defendant assigns or apportions revenues and expenses to the state of Washington. Plain-
[fol. 44] tiff admits that expenses cannot be divided between local and interstate business, and that the revenue per ton mile of local business, is at least 100% greater than the revenue per ton mile of defendant's interstate business apportioned on a mileage prorate. Except as hereinabove admitted and denied on information and belief, plaintiff denies each and every other allegation, matter and thing contained in said paragraph VII.

That for the reasons hereinafter alleged plaintiff avers that defendant's method of apportioning railway operating revenues and expenses to defendant's properties in Washington as alleged in said paragraph is unfair, unjust and inequitable to said Washington properties, and does not show the true revenues and expenses apportionable to said properties.

(7) As to Paragraph VIII of defendant's third affirmative defense, plaintiff denies any knowledge or information sufficient to form a belief as to any of the items of statistical data therein contained. Plaintiff denies that defendant's interstate and intrastate business is either inseparably commingled or mutually dependent; denies that the seven-day period ending March 9, 1932, was a representative period for comparing defendant's local revenue net ton miles with its interstate revenue net ton miles, or making any other comparisons between defendant's interstate and local business; denies that it is not possible or practicable to transport local freight business separately from interstate freight business either by different trains or by

means of different instrumentalities or employes; denies that it is not possible to carry local and interstate passengers on separate trains. Plaintiff denies any knowledge or information sufficient to form a belief as to any of the following allegations: that the statistics for 1933 will be approximately the same as set forth in said paragraph for 1932; the amount in which defendant's operating expenses incident to its freight business would be reduced were defendant to abandon its intrastate business in Washington either for 1932 or for 1933; the amount which defendants [fol. 45] would lose in case of such abandonment, in gross revenue from local freight business, either for 1932 or for 1933; the amount which defendant would save in operating expenses incident to its passenger business in case of such abandonment, either for 1932 or for 1933; the amount which defendant would lose in case of such abandonment, in gross revenues incident to passenger business, either for 1932 or for 1933. Except as hereinbefore admitted or denied on information and belief, plaintiff denies each and every allegation, matter and thing contained in said paragraph VIII.

(8) As to Paragraph IX of defendant's third affirmative defense, plaintiff admits the first three sentences thereof but denies that the operation of defendant's railroad in local business is essential to the people of the state of Washington and of the United States; denies that there are any of defendant's local rates which defendant cannot raise sufficient to cover the amount of said occupation tax either because of competition of other kinds of transportation or for any other reason; admits that Senate Bill 18 was introduced at the Special 1933 Session of the legislature of Washington. Except as hereinabove admitted, plaintiff denies each and every allegation, matter and thing contained in said paragraph IX.

(9) As to Paragraph X of defendant's third affirmative defense, plaintiff denies each and every allegation, matter and thing therein contained.

As and for a first affirmative reply to the matters set forth in defendant's answer, plaintiff alleges:

(1) That the defendant has never applied to the department of public works of the state of Washington for per-

mission to renounce its interstate business in the state of Washington.

As and for a second affirmative reply to the matters set forth in defendant's answer, plaintiff alleges:

(1) That the defendant has never applied to the department of public works of the state of Washington for per- [fol. 46] mission to increase any of its rates or tariffs on the transportation of either freight or passengers between points within the state of Washington, or any of its other rates or tariffs, on the ground that its operating expenses would be or have been increased by reason of the occupation tax imposed on defendant by the provisions of chapter 191, Session Laws of the state of Washington for 1933.

As and for a third affirmative reply to the matters set forth in defendant's answer, plaintiff alleges:

That the total value of all the taxable property in the state as found by the state board of equalization for 1933 was the sum of $2,259,852,124, and the total assessed valuation of such property as fixed by the county assessors was $993,248,450, and total assessed valuation was found by said board to be 43.9519223 per cent of said total actual value of said taxable property.

That the total assessed valuation of said taxable property as fixed by the state board of equalization for the purpose of levying taxes for state purposes was $1,129,926,062, or 50 per cent of its actual value.

That in Table "A" are set forth in column (a) the various "funds" or divisions of expense incident to the support of government of the state of Washington for which, under the laws of the state of Washington, revenues are required to be raised by ad valorem taxes levied by the state board of equalization on the taxable property within the state of Washington.

That in column (b) of said table are set forth the several sums required to be raised for each of said "funds" for the support of state government as listed in said column (a), together with the total thereof, as found and determined by the state board of equalization meeting in September, 1933, plus the seventh year delinquencies as found by the state auditor.

That in column (c) of said table are set forth the number of mills in taxes which it would have been necessary to levy upon the assessed valuation of all of the taxable prop-
[fol. 47] erty in the state of Washington for the year 1933 in order to raise the several sums set forth in said column (b) together with the total thereof, had the total amount of such expense been raised by ad valorem taxes imposed on the taxable property of the state.

Table A

Name of Fund:	Amounts necessary to be raised for support of state government:	Millage necessary to raise sums listed in Col. (b)
(a)	(b)	(c)
Current School Fund	7,520,572	6.656 mills
University of Washington	1,702,265	1.506 mills
Washington State College	1,012,900	0.896 mills
Bellingham Normal School	301,333	0.267 mills
Cheney Normal School	254,811	0.226 mills
Ellensburg Normal School	185,028	0.164 mills
General Fund	3,178,395	2.813 mills
Veterans' Compensation	1,129,926	1.000 mills
Bond Retirement	.....	.....
Total of above funds	$15,285,230	13.528 mills
Plus Seventh Year Delinquencies	464,873	0.411
Total	$15,750,103	13.939 mills

That the total amount of taxes actually levied by the said state board of equalization for the year 1933 upon the assessed valuation of the taxable property within the state of Washington for the support of the state government at the meeting of said board in September, 1933, was the sum of $6,779,556, or a total levy of six mills only upon the assessed valuation for state tax purposes of said taxable property, and that the additional levy necessary to cover the said $464,873.13 of seventh year delinquencies would be 0.411 mills or a total levy of 6.411 mills, or 7.528 mills less than the total millage which would have been actually levied for said year on said property had the entire expense of state government plus such seventh year delin-
[fol. 48] quencies, been raised by the imposition of ad valorem taxes upon the taxable property of the state.

That the Northern Pacific Railway Company is hereinafter referred to as the "N. P."; the Great Northern Railway Company, as the "G. N."; the Oregon-Washington Railroad & Navigation Company, as the "O-W".; and the

Chicago, Milwaukee, St. Paul & Pacific Railroad Company, as the "Milwaukee";

That approximately all of the railroads located in Washington handling interstate commerce are now and for many years last past have been owned and operated by said companies.

That the tax commission of the state of Washington is hereinafter referred to as the "Tax Commission", the state board of equalization of the state of Washington as the "state board of equalization", and the state of Washington, as the "state".

That in column (a) of table "B" are set forth the names of said railway companies as above set forth; in column (b) of said table are set forth the value of the operating real and personal property of the companies named in column (a) as found by the state board of equalization for the year 1932; in column (c) of said table is set forth the value of the operating real and personal property of the said companies named in column (a) as found by the state board of equalization for the year 1933; and in column (d) of said table is set forth the several percentages which the several amounts set forth in said column (c) are of the respective amounts set forth in said column (b).

The valuation shown in said column (b) as to the "N. P." is that found by the court in litigation between said company and the counties in the federal court.

The valuation shown in said column (b) as to the "Milwaukee" is that fixed by the tax commission in a reassessment proceeding in 1933 as to the operating property of said company for 1932 and prior years.

[fol. 49]

Table B

Name of Company (a)	Valuation found for 1932 (b)	Valuation found for 1933 (c)	Percentages which 1933 valuation is of 1932 Valuation: (d)
N. P.	**$105,000,000	$100,450,000	95.666667%
G. N.	69,574,000	66,100,000	95.006755%
O. W.	43,070,000	39,100,000	90.782447%
Milwaukee	*38,439,000	34,250,000	89.102213%

* As fixed by tax commission in reassessment proceedings in 1933.
** As fixed by decree of U. S. district court.

That in column (a) of Table "C" are shown the names of said railroad companies; in column (b) are shown the

equalized assessed valuations of the operating real and personal property of the companies named in column (a) as fixed by the state board of equalization for the year 1933 for the purpose of levying taxes thereon for state purposes; in column (c) is shown the total amount of taxes for state purposes which would have been levied against said operating properties had the total amount of the expense of state government been raised by ad valorem taxation of the taxable property of the state, said amounts being computed by multiplying the assessed valuations shown in column (b) by .013939 representing the total millage heretofore shown in the last line of column (c), Table A; in column (d) are shown the total amounts of taxes for state purposes actually levied against said operating properties for the year 1933, said amounts being computed by multiplying the assessed valuation shown in column (b) by .006411, representing the maximum millage which can be levied for state purposes under chapter 4, Laws of 1933; and in column (e) is shown the several amounts by which the taxes which would have been levied against each said company's operating property for the year 1933 except for [fol. 50] the limitations of said chapter 4, Laws of 1933, exceeds the taxes actually levied on said property for state purposes for the year 1933, the same being computed by deducting the figures in column (d) from the figures in column (c)

Table C

Name of Company	1933 Equalized value of company's operating property for state tax purposes	Total tax which would have been levied except for Ch. 4, L. '33 (.013939 x Col. "B")	Total tax actually levied (.96411 x Col. "B")	Amount of reduction in state tax by reason of Ch. 4, L. '33 (Col. "c"–Col. "D")
(a)	(b)	(c)	(d)	(e)
N. P.....	$50,225,000	$700,086	$321,992	$378,094
G. N.....	33,050,000	460,684	211,884	248,800
O–W.....	19,550,000	272,507	125,335	147,172
Milwaukee.	17,125,000	238,705	109,788	128,917

That plaintiff is informed and believes, and therefore states the fact to be that the total amount of the occupation tax which would have been levied against said companies computed at 1½% of the total gross railway operating revenues of said companies for intrastate business for the whole of the year 1933 would have been not greater than the following amounts: By the N. P.: $90,000; by the G. N.:

$46,500; by the O-W.: $11,250; and by the Milwaukee $19,-350.

That at the head of columns (a), (b), (c) and (d) of Table "D" hereinafter appearing, is set forth the names of said companies hereinbefore mentioned.

That in line (1) of said table is set forth the total ad valorem taxes payable on each such company's operating property in the state for the year 1932, computed as hereinbefore described.

In line (2) of said table is set forth the percentage of each of said company's operating property's assessed valuation for 1933 of the assessed valuation of said property for the year 1932 computed as hereinbefore described and as set forth in column (d) of Table "B" herein.

[fol. 51] In line (3) is shown what each said company's total taxes for the year 1932 would have been had such taxes been based on the 1933 assessed valuation of said company's operating property. Said amounts are computed by multiplying the figures in line (1) by the decimal fractions in line (2) of said Table "D".

In line (4) of said table is shown the maximum total amount of ad valorem taxes which would be payable on each of said company's operating property for the year 1933 determined as hereinabove set forth.

In line (5) of said table are shown the total amount of occupation tax payable by each computed at 1½% of each of said company's gross railway operating revenues from intrastate business for the entire year 1933, had chapter 191, Laws of 1933, been effective for said entire year.

In line (6) of said table are shown as to each of such company the sum of such company's occupation tax if imposed for the whole of the year 1933, and the ad valorem tax payable on such company's operating property for the year 1933. These amounts are computed by adding the figures in line (4) to the figures in line (5).

In line (7) of said table is shown the minimum amount saved in taxes by each such company (including both ad valorem taxes and occupation taxes) for the year 1933 as compared with the ad valorem taxes payable by each such company (adjusted to 1933 assessed valuations) for the year 1932. These amounts are computed by subtracting the figures in line (6) from the figures in line (3).

In line (8) of said table is shown the ad valorem taxes

which would have been levied on the operating property of each said company for the year 1933 for state purposes only had it not been for the limitations of the 40-mill limit law (chapter 4, Laws 1933). These figures are set forth in column (c) of Table "C".

In line (9) of said table are shown the actual ad valorem taxes which will be levied on the operating property of each said company for the year 1933 for state purposes only by reason of the limitations of said chapter 4, Laws 1933. These figures are set forth in column (d) of Table [fol. 52] "C".

In line (10) of said table are again shown the amount of occupation tax as to each such company as theretofore shown in line (5) of said table.

In line (11) of said table are shown the sum of such occupation tax if imposed for the whole of the year 1933, and the ad valorem state tax payable on such company's operating property for the year 1933. These figures are computed by adding the figures in lines (9) and (10).

And in line (12) of said table are shown as to each such company the amount actually saved in state taxes alone (including both ad valorem taxes and occupational taxes) for the year 1933 as compared with the ad valorem state taxes which would have been levied on such company's operating property for 1933 except for the limitations of said chapter 191, Laws of 1933. (Assuming said occupation tax had been collectible for the whole of the year 1933).

Table D

Line No.	Item	N.P. (a)	G.N. (b)	O.W. (c)	Milwaukee (d)	Total
(1)	Total ad valorem taxes payable on said companies' operating property for 1932	$2,474,397	$1,556,512	$771,847	$825,895	$5,628,651
(2)	Percentage of said companies' operating properties' assessed valuation for 1933 of the same for the year 1932	95.666667%	95.006755%	90.782447%	89.102213%	93.85120%
(3)	Total ad valorem taxes payable on said companies' operating property for 1932 had such properties' assessed valuation been the same for 1932 as for 1933 (Line 2 x Line 1)	$2,367,173	$1,478,791	$700,702	$735,890	$5,282,556
[fol. 53]						
(4)	Maximum total ad valorem taxes which will be payable on said companies' operating property for the year 1933 under new tax plan	$2,011,875	$1,252,960	$609,924	$654,770	$4,529,529
(5)	Total amount of occupation tax payable by them had the same been imposed for the whole of the year 1933	90,000	46,500	11,250	19,350	167,100
(6)	Ad valorem taxes plus occupation taxes payable by said companies for 1933 (Line 5+Line 4)	2,101,875	$1,299,460	$621,174	$674,120	$4,696,599
(7)	Minimum net savings in total taxes ad valorem and occupation, which said companies will realize in 1933 by new tax plan (Line 3–Line 6)	265,298	179,331	79,528	61,770	$585,927
(8)	Ad valorem state taxes which would have been levied on said companies' operating property for 1933 under revenue laws in force prior to 1933 (unlimited mileage)	700,086	460,684	272,507	238,705	1,671,982
(9)	Ad valorem state taxes actually levied on said companies' operating property for 1933 under 40-mill tax limit act of 1933	321,992	211,884	125,335	109,788	768,999
(10)	Occupation tax (see line 5 above)	90,000	46,500	11,250	19,350	167,100

Table D—Continued

Line No.	Item	N.P. (a)	G.N. (b)	O.W. (c)	Milwaukee (d)	Total
(11)	Sum of said occupation taxes and said ad valorem state taxes levied on said companies' operating property for 1933 (Line 10 plus Line 9).....	$411,992	$258,384	$136,585	$129,138	$936,099
[fol. 54] (12)	Net savings in the total state taxes ad valorem and occupation, which said companies will realize as compared with ad valorem state taxes alone which would have been levied on their operating property under old law (Line 8–Line 11)...	$288,094	$202,300	$135,922	$109,567	$735,883

That the net railway operating income of railroad companies as computed by the Interstate Commerce Commission, and as adopted and acquiesced in and reported to the state regulatory body by all railroad companies operating in this state including plaintiff, is computed by deducting revenues from expenses, which revenues and expenses consist of the following items:

Said revenues are computed by adding the following items: Railway operating revenues; hire of freight cars, rent from locomotives, passenger-train cars; floating equipment; work equipment; and joint facility rent income;

Said expenses are computed by adding the following items: Railway operating expenses; railway tax accruals; uncollectible railway revenues; hire of freight cars; rent for locomotives, passenger train cars, floating equipment, and work equipment; and joint facility rents.

Replying to the allegations in defendant's answer that the apportionment to Washington of a mileage prorate of said defendant's revenues received on interstate shipments is the method usually and customarily followed in assigning revenues to the states and is as accurate as is possible in view of the inseparable nature of the business, and is in accordance with the method prescribed by the department of public works of the state, plaintiff avers that this method of apportionment is prescribed by said department of public [fol. 55] works only as a basis upon which railroad companies are to make reports to said department, and not for the purpose of determining the true amount of such interstate revenues which should properly be apportioned to Washington in a proceeding in which the true net earnings of defendant's operating properties in Washington are involved. That for the purpose of such a proceeding, the said department would be compelled to, and would, make an exhaustive study of defendant's interstate and intrastate traffic and expenses for the purpose of determining the true and equitable proportion of such interstate revenues and expenses which should properly be apportioned to Washington.

That the apportionment of revenues from interstate shipments to Washington on the basis of a mileage prorate does not apportion to defendant's Washington operating properties their fair and equitable proportion of such interstate revenues for the following, among other reasons:

That the operating properties of both the N. P., the G. N., the O-W., and the Milwaukee located in Washington constitute in each case the western terminal properties of transcontinental systems with their western termini at Puget Sound and other parts of the Pacific Coast, and their principal eastern termini are in the case of the O-W., at Omaha, Nebraska, in the case of the Milwaukee, at St. Paul and Minneapolis, Minnesota, Milwaukee, Wisconsin, and Chicago, Illinois, and in the case of the G. N. and N. P., at said St. Paul and Minneapolis, and via the lines of the Chicago, Burlington & Quincy Railroad Company (of which company said N. P. and G. N each own approximately one-half of the capital stock) Denver, Colorado, Kansas City, Missouri, St. Louis, Missouri, and Chicago, Illinois. That the principal western termini of said railroads are: As to the N. P., Spokane, Tacoma and Seattle, Washington and Portland, Oregon, as to the G. N., the same cities and in addition: Everett, and Bellingham, Washington; as to the O-W.: Seattle, Tacoma and Spokane, Washington, and Portland, Oregon; and as to the Milwaukee: Spokane, Seattle, Tacoma, Bellingham, and Grays [fol. 56] Harbor and Willapa Harbor points. That in terminal states such as Washington the expenses of each of said railroads are far greater per car mile, per ton mile and per passenger mile than in the intermediate or bridge states between their principal eastern and western termini by reason ~~of~~ the necessity in the state of Washington, of maintaining numerous branch lines where the density of traffic is comparatively light and of maintaining expensive terminal facilities in the large cities such as depots, docks, warehouses, industrial tracks, etc., for which branches and terminal facilities must be and are used by said companies for the assembling and distributing of long-haul traffic moving over said companies' transcontinental lines between their respective eastern and western termini. That by the apportionment of revenue from said companies' interstate shipments with exclusive reference to the relative miles of haul within and without the state, the contribution of the track mileage to the earnings of such revenue is alone considered and the important contribution of such terminal facilities to such earnings is wholly ignored and the contribution by the branch lines is largely ignored. That in recognition of the facts set forth in this paragraph

it is customary for the railroads in the western and other portions of the United States, in apportioning the revenues from interline shipments between companies with connecting lines, to apportion to the terminal lines far more than a mileage prorate of such revenues.

That for the reasons aforesaid, in computing the net earnings of defendant's Washington properties, defendant's railroad in Washington is entitled to a greater proportion of the revenues from interstate shipments than a relative mileage of haul prorate thereof.

In response to the allegations of said answer that the figures set forth therein as being the expenses within the state from both intrastate and interstate business, are those incurred in the state of Washington, which are wholly applicable to that state, plus a proportion of such expenses which cannot be localized, plaintiff avers that for the same reasons it is inequitable and unfair to Washington to ap- [fol. 57] portion to defendant's Washington operating property no more than a mileage prorate of the revenues from interstate business, it is likewise inequitable and unfair to apportion to such Washington properties all of those operating expenses which are incurred in such state, and for the further reason that Washington being a terminal state, all of the operating expenses incident to the assembling and distributing of long-haul traffic moving to or from Washington are incurred in that state and by defendant's method, are charged to defendant's operating property in said state, whereas such terminal expenses should rightfully and equitably be apportioned over the entire mileage which said traffic, both freight and passenger, is hauled. That in a terminal state such as Washington to and from which commodities and passengers are hauled in interstate commerce, the operating expenses per car mile, per ton mile and per passenger mile greatly exceed the operating expenses per car mile, per ton mile and per passenger mile in the intermediate states through which such traffic is hauled between the points of origin and destination, because of the operating expenses incident to loading and unloading, assembling the same into train loads, the maintenance of branch lines on which the traffic is comparatively light, and the maintenance and operation of expensive terminal facilities such as docks, wharves, warehouses, industrial tracks, depots, freight yards, etc., and

switching as to the carrier's own traffic. For that reason such terminal expense should be distributed evenly over the entire mileage of haul and not assigned alone to the state in which such expenses are incurred. But that in computing the operating expenses within the state of Washington as to interstate traffic as set forth in said complaint, defendant has assigned all of such terminal expenses to Washington. That such assignment, and the assignment to Washington of only a mileage prorate proportion of defendant's revenues from interstate traffic, for the reasons hereinabove set forth, makes the defendant's statements in its answer as to its revenues and expenses in the state of Washington for the years 1932 and 1933, and other [fol. 58] periods both false, misleading and valueless for any purpose.

In response to the allegations in defendant's answer that defendant's intrastate business is relatively short haul and local and is not less expensive in proportion to revenues than the interstate business affiant avers that such allegation is false and misleading in this: that the revenues received by defendant from its intrastate freight traffic per ton mile are, and were during the periods set forth in said complaint, far greater than those received by defendant on its interstate business, and, consequently, that the volume of freight handled per dollar of revenue received is far less as to such intrastate business than as to such interstate business.

Wherefore, plaintiff prays judgment against defendant as prayed in its complaint herein.

G. W. Hamilton, Attorney General; R. G. Sharpe, Assistant Attorney General, Attorneys for Plaintiff.

[fol. 59] *Duly sworn to by G. W. Hamilton. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 60] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

INTERROGATORIES PROPOUNDED BY PLAINTIFF TO THE DEFENDANT—Filed Feb. 28, 1934

Comes now the plaintiff and propounds the following interrogatories to be answered under oath by the defendant:

(1) State whether or not your books of account showing your revenues and expenses incident to the various kinds of business carried on by you in the state of Washington since and prior to August 1st, 1934, are kept in accordance with the uniform system of accounting prescribed by the Interstate Commerce Commission.

(2) If your answer to Interrogatory No. (1) is "yes," state how long your books of account have been kept in accordance with such system.

(3) State whether or not, in reporting your revenues and expenses to the tax commission of the state of Washington and to the department of public works of the state of Washington for 1932 and prior years you reported such revenues and expenses in accordance with the uniform system of accounting prescribed by the Interstate Commerce Commission, and for what years your revenues and expenses were so reported to said commission and department, by such method of accounting.

(4) State the total amount of railway operating revenues, Account No. 501, received by you, or which have accrued, as a result of business transacted by you wholly within the state of Washington (a) during each of the months, August, 1933, to December, 1933, inclusive; and (b) from August 1st, 1933, to December 31st, 1933, in-
[fol. 61] clusive.

(5) State by the following accounts and account numbers (or by such accounts and account numbers as the same appear upon your books of account) the total amount of the railway operating revenues received by you, or which have accrued, as a result of business transacted by you wholly within the state of Washington (a) during each of the months, August, 1933, to December, 1933, inclusive;

and (b) from August 1st, 1933, to December 31st, 1933, inclusive:

Rail-line transportation revenue:

Account number	Name of account
101	Freight
102	Passenger
103	Excess baggage
104	Sleeping car
105	Parlor and chair car
106	Mail
107	Express
108	Other passenger-train
109	Milk
110	Switching
111	Special service train
112	Other freight-train
113	Water transfers—Freight
114	Water transfers—Passenger
115	Water transfers—Vehicles and live stock
116	Waters transfers—Other

Total Accts. 101–116.

Water-line transportation revenue:

Account number	Name of account
121	Freight

[fol. 62]

122	Passenger
123	Excess baggage
124	Other passenger service
125	Mail
126	Express
127	Special service
128	Other

Total Accts. 121–128.

Incidental operating revenues:

Account number	Name of account
131	Dining and buffet
132	Hotel and restaurant

Account number	Name of account
133	Station, train and boat privileges
134	Parcel room
135	Storage—Freight
136	Storage—Baggage
137	Demurrage
138	Telegraph and telephone
139	Grain elevator
140	Stockyard
141	Power
142	Rents of buildings and other property
143	Miscellaneous

Total Accts. 131–143.

Account number	Name of account
151	Joint facility—Cr.
152	Joint facility—Dr.

Total Accts. 151–152.

[fol. 63]. Total Railway operating revenue:

(6) State in what city and state your books of account showing the data requested in Interrogatories (4) and (5) are kept.

G. W. Hamilton, Attorney General; R. G. Sharpe, Assistant Attorney General, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 64] In Superior Court of Thurston County

[Title omitted]

Defendant's Answers to Interrogatories—Filed March 17, 1934

Comes now the defendant and makes the following answers to the interrogatories submitted in this cause February 28, 1934, to-wit:

(1) Yes.

(2) Since on or about July 1, 1914.

(3) In reporting revenues and expenses to the Tax Commission and Department of Public Works of the State of Washington the method prescribed by the Interstate Commerce Commission for making reports to it has been followed. The Interstate Commerce Commission has prescribed no rules or method for reporting to the State of Washington the revenues and expenses within that state.

(4) This question cannot be answered for the reason that accounts have not been kept in form necessary to make answer.

(5) The railway operating revenues received or accrued from business transacted wholly within the State of Washington during the month of August, 1933, to December, 1933, inclusive, by accounts stated in Interrogatory (5), so far as shown by the accounts kept by the Great Northern Railway Company are as follows:

August, 1933

Account number	Name of account	Amount
101	Freight	$269,455.17
102	Passenger	26,509.89
103	Excess baggage	194.83
104	Sleeping car	.....
105	Parlor and chair car	360.68
[fol. 65]		
106	Mail	.....
107	Express	.....
108	Other passenger train	130.61
109	Milk	1,076.74
110	Switching	3,739.91
111	Special service train	.....
112	Other freight train	.....
	Total	$301,467.83
131	Dining and buffet	2,721,37
132	Hotels and restaurants	1,362.87
133	Station, train and boat privileges	37.25

August, 1933 (Cont'd)

Account number	Name of account	Amount
134	Parcel room	291.15
135	Storage—Freight	201.66
136	Storage—Baggage	52.29
137	Demurrage	343.00
138	Telegraph and telephone	524.92
142	Rent of buildings and other property	4,991.55
143	Miscellaneous	5,381.12
151	Joint facility—Cr.	686.61
152	Joint facility—Dr.	3,820.02†
	Total	12,773.77
	*Grand total	$314,241.60

† Red in copy.

* Includes revenues received from U. S. Government and State of Washington.

September, 1933

Account number	Name of account	Amount
101	Freight	$264,034.13
102	Passenger	27,063.03
103	Excess baggage	277.10
104	Sleeping car	.....
105	Parlor and chair car	268.50
106	Mail	.....
107	Express	.....
108	Other passenger train	114.91
109	Milk	777.42
110	Switching	3,511.81
111	Special service train	.....
112	Other freight train	.....
	Total	$296,046.90
131	Dining and buffet	$2,432.83
132	Hotels and restaurants	1,465.35
133	Station, train and boat privileges	30.15

September, 1933 (Cont'd)

Account number	Name of account	Amount
134	Parcel room	318.25
135	Storage—Freight	333.42
136	Storage—Baggage	65.93
137	Demurrage	129.00
138	Telegraph and telephone	414.00
142	Rent of buildings and other property	6,047.65
[fol. 66]		
143	Miscellaneous	$5,703.05
151	Joint facility—Cr.	28.33
152	Joint facility—Dr.	1,185.59†
	Total	$15,782.37
	*Grand total	$311,829.27

† Red in copy.

* Includes revenues received from U. S. Government and State of Washington.

October, 1933

Account number	Name of account	Amount
101	Freight	$298,743.63
102	Passenger	23,016.41
103	Excess baggage	160.48
104	Sleeping car	.....
105	Parlor and chair car	265.45
106	Mail	.....
107	Express	.....
108	Other passenger train	105.39
109	Milk	813.08
110	Switching	5,868.34
111	Special service train	.....
112	Other freight train	.....
	Total	$328,972.78
131	Dining and buffet	$2,291.53
132	Hotels and restaurants	1,381.47
133	Station, train and boat privileges	31.06

October, 1933 (Cont'd)

Account number	Name of account	Amount
134	Parcel room	257.80
135	Storage—Freight	64.08
136	Storage—Baggage	49.54
137	Demurrage	240.00
138	Telegraph and telephone	440.90
142	Rent of buildings and other property	4,165.58
143	Miscellaneous	7,289.78
151	Joint facility—Cr.	107.32
152	Joint facility—Dr.	419.74†
	Total	$15,839.32
	*Grand total	$344,812.10

† Red in copy.

* Includes revenues received from U. S. Government and State of Washington.

[fol. 67]

November, 1933

Account number	Name of account	Amount
101	Freight	$257,344.55
102	Passenger	27,241.20
103	Excess baggage	165.74
104	Sleeping car	.....
105	Parlor and chair car	219.00
106	Mail	.....
107	Express	.....
108	Other passenger train	210.99
109	Milk	498.68
110	Switching	5,214.68
111	Special service train	.....
112	Other freight train	108.36
	Total	$291,003.20
131	Dining and buffet	$1,828.15
132	Hotels and restaurants	1,328.73
133	Station, train and boat privileges	16.56
134	Parcel room	190.70
135	Storage—Freight	233.83

November, 1933 (Cont'd)

Account number	Name of account	Amount
136	Storage—Baggage	41.06
137	Demurrage	559.00
138	Telegraph and telephone	349.23
142	Rent of buildings and other property	5,125.39
143	Miscellaneous	7,356.75
151	Joint Facility—Cr.	412.11
152	Joint facility—Dr.	.56†
	Total	$17,440.95
	*Grand total	$308,444.15

† Red in copy.

* Includes revenue received from U. S. Government and from State of Washington.

[fol. 68] December, 1933

Account number	Name of account	Amount
101	Freight	$168,788.99
102	Passenger	31,767.78
103	Excess Baggage	111.63
104	Sleeping car	.....
105	Parlor and chair car	313.35
106	Mail	.....
107	Express	.....
108	Other passenger train	174.24
109	Milk	6,869.45
110	Switching	2,823.96
111	Special service train	.....
112	Other freight train	.....
	Total	$210,849.40
131	Dining and buffet	$2,435.91
132	Hotels and restaurants	1,254.20
133	Station, train and boat privileges	37.00
134	Parcel room	225.10
135	Storage—Freight	28.92
136	Storage—Baggage	39.13

December, 1933 (Cont'd)

Account number	Name of account	Amount
137	Demurrage	93.00
138	Telegraph and telephone	463.77
142	Rent of buildings and other property	7,392.86
143	Miscellaneous	8,057.60
151	Joint facility—Cr.	3,756.48
152	Joint Facility—Dr.	7.57†
	Total	$23,776.40
	*Grand Total	$234,625.80

† Red in copy.

* Includes revenues from U. S. Government and from State of Washington.

[fol. 69] The following explanation is necessary with respect to certain of the above accounts:

132. Hotels and Restaurants: The amount shown in this account is for income received from the operation of station restaurants at which employees, the public and passengers are served.

133. Station, Train and Boat Privileges: This account includes revenues from weighing, vending and automatic machines and from advertising in stations and on trains, and includes the privilege of operating newspaper stands, selling papers and the amount received from telephone companies for the privilege of operating pay telephones in the depots. The details of the items in this account are not kept.

135 and 136. Storage of Freight and Baggage: This account represents amount collected from storage of freight and baggage, and it is not known whether the proceeds are collected from the storage of interstate or of intrastate business.

137. Demurrage: This account represents all demurrage paid in the state. No accounts are kept segregating the amount collected as between intrastate and interstate freight.

142. Rents of Buildings and Other Property: This account includes revenue received from other companies for

the exclusive use by them of certain operating properties owned by defendant.

143. Miscellaneous: This includes revenue from weighing cars for other companies and individuals, revenue from sale of cinders and other miscellaneous revenue.

151 and 152. Joint Facilities—Credit and Debit: These two accounts are applicable to operation of pool trains between Seattle and Portland. Some months defendant collects more than its proportion of the revenue and has to make payment to the other companies and, in other months, the other companies collect more than their proportion and have to make payment to defendant.

Edwin C. Matthias, Attorney for Defendant.

[fol. 70] *Duly sworn to by Geo. H. Hess, Jr. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 71] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

DEFENDANT'S AMENDED ANSWERS TO INTERROGATORIES—Filed Aug. 10, 1934

Comes now the defendant and makes the following amended answers to the interrogatories submitted in this cause February 28, 1934, to-wit:

(1) Yes.

(2) Since on or about July 1, 1914.

(3) In reporting revenues and expenses to the Tax Commission and Department of Public Works of the State of Washington the method prescribed by the Interstate Commerce Commission for making reports to it has been followed for many years.

(4) This question cannot be answered for the reason that accounts have not been kept in form necessary to make answer.

(5) The railway operating revenues received or accrued from business transacted wholly within the State of Wash-

ington during the month of August, 1933 to December, 1933, inclusive, by accounts stated in interrogatory (5), as developed by a recheck of the accounts kept by the Great Northern Railway Company are as follows:

August, 1933

Account number	Name of account	Amount
101	Freight	$136,779.16
102	Passenger	26,188.61
103	Excess Baggage	172.61
104	Sleeping car	
105	Parlor and chair car	356.58
106	Mail	
107	Express	

[fol. 72]

108	Other passenger train	130.61
109	Milk	1,076.74
110	Switching	3,552.29
111	Special train service	
112	Other freight train	
	Total	$168,256.60

September, 1933

Account number	Name of account	Amount
101	Freight	$158,573.46
102	Passenger	26,644.50
103	Excess baggage	259.85
104	Sleeping car	
105	Parlor and chair car	262.20
106	Mail	
107	Express	
108	Other passenger train	114.91
109	Milk	777.42
110	Switching	2,993.73
111	Special service train	
112	Other freight train	
	Total	$189,626.07

October, 1933

Account number	Name of account	Amount
101	Freight	$167,738.40
102	Passenger	21,237.88
103	Excess baggage	150.22
104	Sleeping car	
105	Parlor and chair car	261.45
106	Mail	
107	Express	
108	Other passenger train	105.89
109	Milk	813.08
110	Switching	5,614.34
111	Special service train	
112	Other freight train	
	Total	$195,920.76

[fol. 73]

November, 1933

Account number	Name of account	Amount
101	Freight	$162,928.28
102	Passenger	25,506.58
103	Excess baggage	215.21
104	Sleeping car	
105	Parlor and chair car	215.40
106	Mail	
107	Express	
108	Other passenger train	210.99
109	Milk	498.68
110	Switching	5,040.59
111	Special service train	
112	Other freight train	
	Total	$194,615.73

December, 1933

Account number	Name of account	Amount
101	Freight	$82,020.24
102	Passenger	31,423.63
103	Excess baggage	140.06
104	Sleeping car	

December, 1933 (Cont'd)

Account number	Name of account	Amount
105	Parlor and chair car	311.75
106	Mail	
107	Express	
108	Other passenger train	174.24
109	Milk	487.20
110	Switching	2,913.54
111	Special service train	
112	Other freight train	
	Total	$117,470.66

The corrected figures are largely the result of an analysis and examination of Account 101 and the elimination of revenues received from interstate and foreign commerce and from transactions with the United States and the State of Washington. The revenues received and reported to the Interstate Commerce Commission under the other account numbers set forth in this interrogatory, but under which no revenue is shown in this answer, are unsegregated revenues received either partially or entirely from interstate commerce.

(6) The City of St. Paul in the State of Minnesota.

Edwin C. Matthias, Attorney for Defendant.

[fol. 74] *Duly sworn to by Geo. H. Hess, Jr. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 75] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed April 1, 1935

This cause came on regularly for trial on the 22nd day of October, 1934, before the Honorable D. F. Wright, Judge of the above entitled court, trial by jury having been waived in the manner prescribed by the laws of the State of Washington. The plaintiff appeared by its Assistant Attorney

General, Mr. R. G. Sharpe, and the defendant appeared by its Attorneys, Mr. Thomas Balmer and Mr. Edwin C. Matthias. Evidence was introduced at length by both parties, and thereafter when both parties had rested the court took the case under advisement, and now, having duly considered all the evidence and the arguments and briefs of counsel, makes the following

Findings of Fact

I

This is an action by the State to recover from the Great Northern Railway Company a tax of 1½% of gross intrastate revenues imposed by Chapter 191, Section 2 (2) (e), Laws of 1933, for the months August to December, 1933, inclusive.

II

Defendant is a Minnesota corporation. It owns and operates a system of steam railway having its eastern termini at St. Paul and Duluth in the State of Minnesota, and Superior in the State of Wisconsin, and extending westerly from said termini through the States of Minnesota, North and South Dakota, Iowa, Montana, Idaho, Washington, [fol. 76] Oregon, California and the Dominion of Canada, with its western termini at Seattle and Tacoma in the State of Washington, Portland in the State of Oregon, Bieber in the State of California, and Vancouver in the Province of British Columbia, Dominion of Canada. Said line of railroad was constructed and equipped in the State of Washington more than thirty-five years ago, long prior to the enactment of Chapter 81, Laws of 1905, and Chapter 191, Laws of 1933, and is now and for more than thirty-five years last past has been a public utility devoted to and used for the transportation of passengers and freight, both intrastate and interstate, and for the transportation of the United States mails, and has been and is now an instrumentality of interstate commerce and of the commerce of the Government of the United States, subject to the Act of Congress approved February 4th, 1897, entitled "An Act to Regulate Commerce", and the acts amendatory thereof and supplemental thereto, including the Emergency Transportation Act of 1933, and also, in respect to intrastate transportation performed by it within the State of Washington, subject to the Constitution of said state and to the

"Public Service Commission Law" of said state, consisting of Chapter 117 of the Washington Session Laws of 1911 and the acts amendatory thereof and supplemental thereto. Long prior to the enactment of Chapter 191, Laws of 1933, defendant had expended and now has invested in its said railway line in the State of Washington more than one hundred million dollars, in order to provide adequate facilities for the transportation of both interstate and intrastate commerce and the commerce of the Government of the United States, including the United States mails.

III

Defendant's railroad system comprises approximately 10,541 miles of track, of which approximately 1,450 miles are and were in the State of Washington at the time said Chapter 191, Laws of 1933, became effective. Defendant's [fol. 77] railroad is taxed in the State of Washington under and by virtue of Chapter 130, Washington Special Session Laws of 1925, on its fair market value considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. Ad valorem taxes have long been levied and paid thereon and for 1933 were $1,250,860.49. The tax of 1½% of gross revenue imposed by said Chapter 191, Laws of 1933, is not a property tax nor in lieu, either in whole or in part, of a property tax, nor is it a supervision tax, but it is an excise tax imposed on defendant solely for the privilege of doing a "steam railway business" in the State of Washington.

IV

Defendant's gross revenue from intrastate "steam railway business" (on which the tax of 1½% is computed) for August to December, 1933, and the amount of the tax, are as follows:

Month	Gross revenue	Tax
August	$168,256.60	$2,523.85
September	189,626.07	2,844.39
October	195,920.76	2,938.81
November	194,615.73	2,919.24
December	117,470.66	1,762.06
Total		$12,988.35

These are the amounts shown in defendant's amended answers to plaintiff's interrogatories.

It was stipulated in open court that if plaintiff be entitled to recover anything the judgment should be without prejudice to the right of either party to the adjustment and correction provided for by the Act. Subject to this stipulation the court finds that if plaintiff were entitled to recover anything in this cause, the amount would be the said sum of $12,988.35.

V

It has long been known and universally recognized that intrastate transportation in the State of Washington is much more expensive per unit of freight than interstate. [fol. 78] Some of the reasons are the much shorter average haul of the intrastate business, the lesser traffic density, especially on branch lines most largely used locally, much less tonnage per train, more frequent stops, double terminal expense, due to the fact that intrastate freight is both originated and terminated in the state, whereas interstate freight incurs at most but one of these handlings in the state. These and other peculiarities of intrastate business make it greatly more expensive per unit than interstate business. It is unnecessary to find the exact percentage of additional cost of intrastate business over interstate, but the court finds that such cost is greater in proportion to revenue than the cost of the interstate.

VI

Defendant as a carrier subject to the Acts of Congress regulating interstate commerce keeps its system accounts as required by the Interstate Commerce Commission, but these accounts do not segregate or show the results of operations in individual states, nor do they divide revenues and expenses between interstate and intrastate business. Defendant also files annual reports with the Department of Public Works of Washington, showing certain statistics of its operations within the state, but such reports do not segregate interstate from intrastate expenses, and while they purport to segregate interstate from intrastate revenues, the court finds that such segregation has never been accurately made, for the reason that it was never a matter of importance either to the state or to the Railway Company prior to the imposition of the state occupational tax. For

these reasons and because no accounts are kept currently of the expenses of intrastate business separately from interstate business within the State of Washintgon, a special study was required to determine the financial result of operating the defendant's railway line in intrastate commerce in the State of Washington for the year 1933. This study was made by defendant's witness, W. M. Burn, a railroad statistician and accountant of ability and experi- [fol. 79] ence. No original study of the subject was made by or in behalf of the plaintiff, but its witness, C. A. Manschreck, Statistician for the State Tax Commission, undertook to point out certain alleged errors in Mr. Burn's study and to restate the defendant's exhibit based upon his (Mr. Manschreck's) correction of these alleged errors. Based upon the evidence of Mr. Burn and Mr. Manschreck and the other evidence in the record, the court finds that the operating revenues, operating expenses, net railway operating deficit and other results of the defendant's intrastate operations in Washington for the year 1933, are as follows:

Great Northern Railway Company—Washington—
Calendar Year 1933

Intrastate Operations

1. Gross Operating Revenues	$2,179,760
2. Operating Expenses	1,730,361
3. Net Revenue from Railway Operations	449,399
4. Railway Tax Accruals	335,247
5. Railway Operating Income	114,152
6. Equipment Rents—Net Debit	19,966
7. Joint Facility Rent—Net Debit	193,455
8. Total Rentals—Net Debit	213,421
9. Net Railway Operating Deficit	99,269
10. Cost of Reproduction New, Less Depreciation, as of I. C. C. Valuation Date (June 30, 1915) plus Additions and Betterments to December 31, 1933, of Railway Property and Equipment in Washington—Intrastate Proportion	29,733,312
11. Annual Rate of Return Earned on above Reproduction Cost	Deficit
12. Interest on above Reproduction Cost at 5.75% per annum	1,709,665
13. Amount short of Earning a Return of 5.75% per Annum	1,808,934

VII

Gross operating revenues shown in the foregoing finding (No. VI) are those actually earned by the defendant in intrastate commerce during the year 1933. The operating expenses and other charges shown are those actually incurred by the defendant in such commerce during the year 1933, as nearly as such expenses and other charges can be determined, and the court finds that they are substantially correct as shown. These expenses and other charges rep- [fol. 80] resent the direct cost incurred by the defendant in intrastate commerce in the state during the year 1933 plus an apportionment of certain expenses and charges commonly incurred in both interstate and intrastate commerce within the state, which apportionment has been made on the basis of various use units. The use units so employed the court finds are in all cases suitable and comparable for the purpose of obtaining a reasonable division of expenses and charges with respect to property used in common. In further explanation of Finding No. VI the court finds and states that the results there shown were reached by the following methods:

(a) Terminal Costs.—The expense of switching in terminal and freight division points was ascertained by a special study made in a test week. The week used was that ending June 15th, 1934, after determining that that period was fair to the State and representative of conditions during the year 1933. The test week was, in fact, too favorable to plaintiff, in that the volume of traffic moving during that week was greater than that moving during an average week of 1933, being approximately 1/49th, instead of 1/52nd of the year's traffic, resulting in a lower cost per unit of traffic than the average of 1933, and therefore resulting, when applied to defendant's intrastate freight business for the entire year, in understating the cost. This study of terminal expense was made by an accepted and widely used method known as the "Toverston-Sauer Formula". This formula has often been used in important cases before the Interstate Commerce Commission and has the approval of that body. It has been used and accepted in a number of court cases in this state. The basis is the engine-hour cost of switching in the several classes of switching work, as, for example, breaking up and assembling cars into trains,

moving cars between breakup yards and industrial tracks, etc. The total cost of the work includes wages, supplies, maintenance of tracks and locomotives, and all applicable costs ascertained in detail and segregated by appropriate [fol. 81] account numbers in accordance with the uniform system of accounts prescribed by the Interstate Commerce Commission. The details are too voluminous to be set out in these findings, but they are fully described in the testimony and explained in Great Northern Exhibit 11, pages 16 to 27, inclusive.

(b) Road Haul Costs.—A special study was made of each train run on the defendant's line in the state during the test week ending November 21st, 1933, which was fairly representative of conditions during the entire year. This study was made to ascertain the car-miles, gross and net ton-miles and kind of freight, whether intrastate or interstate. The direct operating expense for wages, fuel, water and lubricants of the various trains during this period was ascertained. Indirect expenses, such as maintenance of way and structures, and maintenance of equipment, were applied to the intrastate business in proportion to the use made of the property by that business, different appropriate use units being used for the various services. The details are shown on pages 12 and 13 of Exhibit 11.

(c) Capital Charges.—The cost of reproduction new, less depreciation, of the defendant's railroad property in the state as of the Interstate Commerce Commission valuation date (June 30th, 1915), plus additions and betterments to December 31st, 1933, is $122,038,008. Of this the court finds that $29,733,312 is applicable to the defendant's intrastate traffic. This figure was obtained by finding the relationship of intrastate operating expenses to total operating expenses in the state for the year 1933, and represents as nearly as may be found the value of the defendant's property devoted to intrastate commerce in the State of Washington at the time of the hearing of this cause.

(d) Joint Facility Rents.—The defendant incurred a net debit of $794,018 for joint facility rents in the State of Washington in the year 1933. This expense the court finds [fol. 82] is assignable to the defendant's intrastate business upon the basis of the relationship of intrastate operating

expenses to total operating expenses within the state for the year 1933. The plaintiff's witness criticized this allocation, upon the ground that the major part of the defendant's joint facility rental is paid for the joint use of the Northern Pacific Railway Company's railway line between Seattle and Vancouver, Washington, and that because the ratio of interstate to intrastate car-miles of the defendant on this line is higher than the ratio of defendant's interstate operating expenses to intrastate operating expenses in the state, the joint facility rentals incurred on this line should have been divided between the defendant's interstate and intrastate business on the basis of the car-miles made in the two classes of service on the line. No effort was made by the plaintiff to localize any other line of the defendant in the state, either as to joint facility rentals, operating expenses or charges of any kind. On the contrary, state-wide averages were used by the plaintiff's witness in the computation of all other costs. The court finds that for the purpose of properly allocating joint facility rentals the defendant's property in the state must be treated as a whole, because the traffic contributed by the Seattle-Portland line to the defendant's other lines in the state increases the volume of its business more than it increases the expense of handling, and thus operates to reduce the unit cost of its entire operations throughout the state. In addition the court finds that the defendant has several lines in the state on which low-grade intrastate traffic predominates, and that if the expense of operating such lines were assigned to intrastate business on a car-mile basis the total expense assigned to the defendant's intrastate traffic would be greater than the amount assigned thereto by the court's finding No. VI.

The court further finds that by having joint use of said Seattle-Portland line through the payment of said joint facility rentals the defendant is enabled to secure additional [fol. 83] traffic for its lines in the state as a whole and thus to reduce its cost of operation per unit of traffic below the cost that would be incurred in the absence of said joint arrangement.

(e) Taxes.—Ad valorem taxes paid by the defendant on its property in Washington for the year 1933, after deducting a small amount charged to other railway tenants of its property, were $1,238,385. The Federal taxes charge-

able to Washington on the basis of the relation of Washington operating revenue to system operating revenue for the year 1933 amounted to $9,593, making total state and Federal taxes chargeable to the state of $1,247,978. This amounts to 15.38% of the defendant's gross operating revenues—intrastate and interstate—earned in the State of Washington in the year 1933. The court further finds that this amount should be charged to the intrastate and interstate business, respectively, upon the basis of the gross revenues earned in the two classes of service in the state, and that the sum of $335,247 should thus be charged for state and Federal taxes to the defendant's intrastate business in the year 1933.

Apportionment of taxes to intrastate business on the relation of gross interstate and intrastate revenue is a generally used basis, has been used in rate litigation heretofore occurring in this state, and is correct. The alternative method suggested by plaintiff, namely, the relation of freight car-miles plus passenger car-miles—intrastate to interstate—is without precedent, and is incorrect. It attempts to make a common denominator of the freight car-mile and the passenger car-mile, which are two entirely different things. The plaintiff further criticizes the gross revenue basis of apportionment, upon the ground that it assigns to the State of Washington only a mileage proportion of interstate revenues and that because Washington is a terminal state it is entitled to more than a mileage prorate of interstate revenues. Increasing the assignment of [fol. 84] interstate revenue to the state proportionately reduces the assignment of taxes to the intrastate business.

The court finds, however, that the mileage prorate method is correct, for the following reasons:

(1) It is the method long prescribed by the Department of Public Works of Washington for railroad reports to that Department.

(2) It is the method used in reporting to the Railroad Commissions of all other states through which the defendant operates.

(3) While other methods have been suggested, none has ever been agreed upon, and the Interstate Commerce Com-

mission, after holding extended hearings on the subject, failed to make any decision.

(4) Any different method would have to be agreed upon by all the states and the Interstate Commerce Commission, and no such agreement is obtainable, as demonstrated by the proceedings before the Interstate Commerce Commission in the case just mentioned.

(5) On the defendant's line the interstate bridge traffic—meaning traffic that neither originates nor terminates in Washington, but moves through the state—is practically equal to the interstate traffic that originates or terminates in the state. In 1933 the total amount of bridge traffic handled by the Great Northern in the State of Washington amounted to 927,498 tons, which was almost equal to the total interstate traffic originated or terminated in the state, 1,069,903 tons. Thus, as against every ton which incurs a terminal handling in Washington, there is practically a corresponding ton whose terminal handling is entirely in other states. The average interstate shipment handled over the defendant's line in Washington is thus found to incur substantially one-half of one terminal handling in the state, as compared to two terminal handlings incurred by each intrastate shipment—a ratio of one to four. The assignment of interstate revenues to Washington upon a mileage basis gives Washington credit for all the revenue covering terminal costs to which the state is entitled and is fair to the intrastate traffic.

[fol. 85] (6) One of the reasons advanced by the plaintiff for augmenting Washington mileage proportion of interstate revenues is the contention that expense disproportionate to mileage is incurred at the terminals in Washington. It is true that the operation of terminals is expensive, but the court also finds that operating expense disproportionate to mileage is incurred in other states. Examples of this are (a) operation through the Rocky Mountains in Montana, while the difficulties of mountain operation in Washington have been very much reduced by the Cascade Tunnel, which very much lessens operating expenses; (b) the reduction of both mechanical and personal efficiency by extremely cold weather on the central and eastern part of the defendant's line, a condition which does not exist in Wash-

ington; (c) the necessity of using treated water for locomotives on the plains, no similar expense being required in Washington.

(7) The defendant's large Washington terminals are at Seattle, Tacoma and Spokane. Its large eastern terminals are at the Twin Cities in Minnesota, and at the head of the Great Lakes. The valuation placed by the Interstate Commerce Commission upon said western terminals is but 42.86% of the valuation found for its said eastern terminals, and the mileage of tracks in its said western terminals is but 30.20% of the mileage of tracks in its said eastern terminals. Therefore, if it be assumed that operating expense is increased in proportion to the extent and value of terminals and that revenues should be allocated to states in the same proportion, there would be more revenue assigned from Washington to Minnesota than there would be to assign from Minnesota to Washington on a car moving from Washington to Minnesota, or vice versa.

All things considered, the court finds that if the mileage proration method were to be modified on the theory that Washington is a terminal state, it would be necessary to apportion as much interstate revenue from other states to Washington as would be apportioned from Washington to other states. The court therefore finds that the mileage [fol. 86] prorate method of assigning interstate revenues to Washington is correct and fair to the intrastate traffic.

(f) Equipment Rentals.—Equipment rentals applicable to Washington intrastate traffic were determined upon the relation of intrastate car-miles to total car-miles in the state during 1933 in the passenger and freight services, respectively. The evidence shows that the assignment is in substantial accordance with the actual use in the state of the equipment on which the expense was incurred.

[fol. 87] (g) Intrastate Gross Operating Revenues, Freight and Passenger.—Defendant's total intrastate gross operating revenues in Washington for the year 1933 were as follows:

Account	Freight	Passenger	Total
(101) Freight	$1,502,153	.....	$1,502,153
(102) Passenger	.....	$306,621	306,621
(103) Excess Baggage	.....	2,163	2,163
(105) Parlor and Chair Car	.....	3,292	3,292
(106) Mail	.....	131,721	131,721
(107) Express	.....	36,780	36,780
(108) Other Passenger Train	.....	1,746	1,746
(109) Milk	.....	12,495	12,495
(110) Switching	38,367	.....	38,367
(111) Special Service Train	14	.....	14
(112) Other Freight Train	434	.....	434
(131) Dining and Buffet	.....	26,971	26,971
(132) Hotel and Restaurant	.....	15,654	15,654
(133) Station, Train and Boat Privileges	.....	318	318
(134) Parcel Room	.....	2,611	3,611
(135) Storage—Freight	2,010	.....	2,010
(136) Storage—Baggage	.....	494	494
(137) Demurrage	1,016	.....	1,016
(138) Telegraph and Telephone	3,653	1,279	4,932
(142) Rents of Buildings and other property	46,570	16,312	62,882
(143) Miscellaneous	28,427	9,957	38,384
(151)			
(152) Joint Facility—Net Debit	.....	(11,298)	(11,298)
Total	$1,622,644	$557,116	$2,179,760

(h) Intrastate Passenger Expense.—Total passenger operating expenses applicable to Washington intrastate traffic in the year 1933 were $897,458, determined in the following manner: First, in dividing expenses between the freight and passenger business, those expenses incurred separately in the two services are assigned separately to them; second, common expenses are divided between the freight and passenger services on the relation of the cost of fuel consumed in the two services, respectively. This is the method prescribed by the Interstate Commerce Commission and long prescribed by the Department of Public Works of Washington. Third, total passenger expense is divided between the interstate and the intrastate passenger business in proportion to the revenues earned in the two classes of service. The court finds that this was a correct [fol. 88] method of determining the expense of the intrastate passenger service on the defendant's line.

(i) Period Used in Determining Certain Expenses.—In figuring expense of maintenance of way and freight car repairs the preceding findings of the court are based upon the average cost for three years, rather than upon costs incurred in the year 1933. The method used is correct, for the following reasons: Maintenance is not an evenly recur-

ring annual item. It is in part due to use, but in greater part due to wear and wastage of the property. The necessity for maintenance accrues regardless of whether money is available to provide it. For this reason the maintenance expense actually incurred in any given year is unlikely to be representative of the normal. It is customary in railroad accounting to use a longer period than one year, either five years or three years, in computing normal maintenance. The court finds that the three years' maintenance figures used are correct. Plaintiff's witness offered an exhibit in which maintenance was figured on the basis of but one year, namely, the year 1933. This witness did not state that one year was a proper period for computing maintenance. The court finds that it is too short and cannot be used.

(j) Pensions.—Plaintiff criticizes the inclusion of a relatively small item for pensions in the operating expenses assigned by defendant to its Washington intrastate traffic. The court finds that these pensions were paid to superannuated employes of the defendant and were in the nature of deferred compensation for services performed during their active years and that the payment of these pensions was made by the defendant's management in the exercise of proper discretion and business judgment and that they were properly chargeable to operating expenses.

(k) Other Details of Cost Study.—The court finds that in addition to the details herein noticed the defendant's [fol. 89] Exhibit 11, introduced by its witness Burn, and the methods therein used, are substantially correct and follow approved methods of accounting and shows the results of its intrastate operations in the State of Washington during the year 1933 with substantial accuracy. The court further finds that financial results of operation of defendant's railway system and of the portion thereof within the State of Washington for years prior to the year 1933, because of difference in revenues and operating costs and for other reasons, are not representative of financial results of operation for the year 1933 and at the date of the trial of this cause.

VIII

The court finds and concludes that defendant's local or intrastate business as a steam railway company in the State

of Washington is conducted at a loss and was conducted at a loss during the entire year 1933, and that the tax imposed [fol. 90] by Chapter 191, Laws of 1933, if paid, will have to be paid out of defendant's earnings from interstate and foreign commerce and from the income of its property located outside the State of Washington.

IX

By Chapter 117, Washington Session Laws of 1911, there was created an administrative tribunal called the Public Service Commission (later called the Department of Public Works and now called the Department of Public Service), with the usual powers of regulation and supervision of public utilities, including common carriers by railroad, and the powers and duties of the Railroad Commission, which was created by Chapter 81, Washington Session Laws of 1905, were transferred to said Public Service Commission. Defendant's investment in its line of railway was made to provide adequate facilities for the handling of both interstate and intrastate commerce and a substantial part thereof was made by order of the Railroad Commission of Washington and its successors, the Public Service Commission and the Department of Public Works, for the purpose of equipping the defendant's property to comply with said Public Service Commission law and the acts amendatory thereof and the orders made pursuant thereto.

Said Railroad Commission and Public Service Commission, and their successors, were established and have been maintained pursuant to Article XII, Section 18, of the Constitution of the State of Washington, providing that "A railroad and transportation commission may be established, and its powers and duties fully defined by law." It is also provided by the Constitution of the State of Washington (Article XII, Section 15) as follows:

"15. Prohibition Against Discriminating Charges.—No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state. Persons and property transported over any railroad, or by any other transportation company, or indi-

[fol. 91] vidual, shall be delivered at any station, landing, or port at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing. Excursion and commutation tickets may be issued at special rates."

By the provisions of the Constitution of the State of Washington and said statutes there is imposed upon the defendant an ineluctable obligation to devote its property to the service of the people of the State of Washington in intrastate transportation, from which it cannot withdraw and at the same time continue to carry on its business as a common carrier in interstate commerce, and therefore any tax imposed upon the defendant by said Chapter 191, Laws of 1933, would, and does constitute a burden upon and an attempt to regulate interstate commerce, in violation of Article I, Sections 8 to 10, and Article VI of the Constitution of the United States, and of the Acts of Congress regulating interstate commerce, particularly Section 1 (18) (21), Section 13, Section 15A and Section 19A thereof, and of the Emergency Railway Transportation Act of 1933.

X

The court finds that suit involving the issues of this case was originally filed by the defendant in the District Court of the United States, for the Western District of Washington, to enjoin the collection of the occupation tax herein sued for by the plaintiff. The plaintiff herein obtained a stay of proceedings in said Federal Court suit by filing this action in the state court. After said Federal Court suit was filed Senate Bill No. 18 was introduced at the special session of the 1933 Legislature of the State of Washington, and copy of said Senate Bill No. 18, marked Exhibit "B", is attached to the defendant's answer on file herein and hereby made a part of these findings. This bill was prepared and its enactment was urged by attorneys for the State of Washington and by a member of the Tax Commission of the State of Washington, for the stated purpose of defeating defendant's contention in this case, [fol. 92] that it is obligated by the laws of the State of Washington to do intrastate business and cannot withdraw therefrom. Said bill failed to pass.

XI

The court finds that defendant's interstate and intrastate business in the State of Washington is inseparably commingled and mutually dependent. For one of the test periods used in the cost studies—the seven days ending November 21st, 1933, intrastate revenue net ton-miles were 4,155,692, or 32.35%, and interstate revenue net ton-miles were 8,691,505, or 67.65%. For the month of November, 1933, intrastate revenue net ton-miles were 14,547,465, or 24.80%, and interstate revenue net ton-miles were 44,121,835, or 75.20%. For the entire year 1933 intrastate revenue net ton-miles were 138,265,617, or 23.10%, and interstate revenue net ton-miles were 460,335,442, or 76.90%.

Both interstate and intrastate business, eastbound and westbound, were largely transported by defendant over the same lines of railroad, in the same trains, by means of the same employes, and with the same facilities. It is not possible, practically and economically, or at all, to carry intrastate freight separately from interstate freight by different lines of railroad in different trains or by means of different facilities and employes.

During the year 1933 defendant's gross passenger operating revenues in the State of Washington amounted to $1,540,264, of which $551,845 was from intrastate business. Most of defendant's passengers were carried on interstate through trains, east and westbound and north and southbound. Passengers carried on local trains operating in local service are relatively few and those trains also carry some interstate passengers. The court finds that it is not possible to carry said intrastate and interstate passengers on separate lines of railroad or by separate trains, economically and efficiently, or at all, and defendant's intrastate and interstate passenger traffic is inseparably commingled with and mutually dependent to the same extent [fol. 93] and in the same manner as the freight traffic.

XII

If defendant could and should abandon its intrastate freight business, it could and would somewhat reduce its train service and its car mileage, and save some direct expense applicable to its Washington freight business, but it would thereby lose its entire gross revenue from intrastate freight business of $1,622,644. These figures are based

upon operations for the year 1933, the latest available at the time of the trial of this cause. Also some reduction in pasenger train service could be effected if intrastate passenger business were to be discontinued, which would result in a further saving in direct expense, but the result would be the loss by defendant of its entire gross revenue from the intrastate passenger business, which for the year 1933 amounted to $557,116. The net result of abandonment by defendant of its intrastate passenger and freight business in order to escape the tax imposed by said Chapter 191, Laws of 1933, would be the loss of $2,179,760, and the saving of not more than 14% of that amount.

Therefore, if defendant could and should abandon its intrastate freight and passenger business, the entire burden of maintaining and operating its interstate system of railroad in Washington, constructed and equipped to handle both interstate and local commerce, would fall entirely on interstate commerce and would necessitate an increase of rates and fares greater than the same could bear as a practical matter, or at all, and would result in the destruction of an essential instrument of interstate commerce and of the transportation of the mails, troops and munitions of the United States, and of the value of its property in the State of Washington to the amount of more than one hundred million dollars.

XIII

Defendant's railroad is well located and economically managed. It serves the principal cities and towns of the [fol. 94] State of Washington. The operation of its railroad in local business is essential to the people of the State of Washington and of the United States. Most of defendant's local rates cannot be raised, because of competition from other kinds of transportation. Under the law such rates cannot be raised without the consent of the Department of Public Works. Defendant has heretofore applied for an increase of certain local rates and said application was denied by the Department of Public Works, as appears from a copy of its order, marked Exhibit "A", attached to the defendant's supplemental answer herein and hereby made a part of these findings. The court further finds that defendant as a practical matter has been unable to increase its revenues from local business and

further fiinds that whether it can do so in the future is a matter attended with great uncertainty and could be accomplished only after long and expensive litigation, and such increases, if obtained, would have no bearing upon defendant's income in the year 1933, or for many years subsequent thereto. There is at this time an application before the Interstate Commerce Commission known as Ex Parte 115, for increased rates, and a similar application before the Department of Public Works. No decision has been made and it is not known what increases, if any, will be allowed by said Commission nor what the attitude of the Department will be in the similar state case pending before it. The court finds that defendant has done all it can do to increase its revenue, but is unable to do so.

Pursuant to the foregoing findings of fact, the court makes the following

Conclusions of Law

I

The tax imposed by Chapter 191, Laws of 1933, is an excise or occupational tax, as distinguished from a property or other kind of tax. It is imposed for the "privilege of [fol. 95] engaging in business activities". As applied to defendant a tax of 1½% is imposed for the privilege of engaged in the business of a "steam railway". In view of the language found in Section 5 the prescribed percentage of gross income must be computed only upon the gross income received from intrastate "steam railway business". But, although this is the measure of the tax, the privilege or occupation upon which the tax is laid is that of engaging in railroad business, which includes the transaction of both intrastate and interstate business. The penalty for failure to pay is liability to injunction proceedings and seizure and sale of the physical property of the railway, which would make it impossible to engage in either intrastate or interstate commerce. Income from other business activities in which defendant may be engaged are taxable, if taxable at all, at other rates. This case is not concerned with them.

II

A state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce.

But a state cannot tax interstate commerce or the privilege of engaging in it. Where conditions are prescribed and license required and a tax is imposed on one engaged in both interstate and intrastate commerce, certain conditions must be met. One is that the party taxed must be free in law and in fact to withdraw from its intrastate business, while continuing to transact its interstate business free of the tax. Chapter 191, Laws of 1933, does not meet this condition.

III

Defendant was not, and is not free, under the Constitution and laws of this state to withdraw from its intrastate business while continuing to transact its interstate and foreign business. It performs an indispensable service for the people of the State of Washington, from which it cannot withdraw. Its continued performance of this service is compellable at the suit of the state and of the citizens of the state having an interest in such performance.

[fol. 96]

IV

Defendant is an interstate carrier by railroad subject to the Acts of Congress regulating interstate commerce. Under several provisions of the Interstate Commerce Act, especially Section 1 (18) to (21) defendant is not permitted to abandon its lines in this state, or any of them, or the operation of said lines, or any of them, in either interstate or intrastate business, unless it shall first have obtained a certificate from the Interstate Commerce Commission that the present or future public convenience and necessity permit of such abandonment. Obtaining such a certificate is a precedent and indispensable condition of the right of abandonment of operation of any line or part of line of a carrier subject to the Acts of Congress. The prohibition applies to the strictly intrastate business of an interstate carrier by railroad and to every part of its line operated in connection with or as a part of its interstate system. The Interstate Commerce Act, as well by Sections 13 (4), 15A, 19A and others, as by Section 1 (18) to (21), has forceful application and is an inseparable obstacle to abandonment by the defendant of intrastate business while attempting to continue to transact interstate and foreign business.

V

Nor can defendant, as a matter of fact, or as a practical matter, withdraw from its intrastate business while continuing to transact its interstate and foreign business. Defendant's railroad was constructed to handle both classes of business. To abandon its intrastate business would throw the entire burden of operating and maintaining the interstate system on interstate commerce and would create operating losses greater than such interstate commerce could bear. Defendant's interstate business would necessarily be destroyed and its property would be confiscated.

[fol. 97]

VI

The court concludes, therefore, that Chapter 191, Laws of 1933, in its requirement of a license (section 3), the making of reports (Section 6) and the payment of a tax of 1½% of gross income from intrastate railway business as a condition of the right to engage in steam railway business, violates Article I, Section 8, and the Fourteenth Amendment to the Constitution of the United States, and as well Sections 1 (18) to (21), 13 (4), 15A and 19A of the Interstate Commerce Act, and the Emergency Transportation Act of 1933, and is void as applied to defendant.

VII

The court further finds that the tax imposed by said Chapter 191, Laws of 1933, on the pretext of a tax or fee for the privilege of doing local business in Washington, is in reality a tax and burden upon interstate commerce, and upon the gross revenues received by defendant therefrom, in that said tax, if paid, would have to be paid out of the earnings of defendant from its interstate business, and is a tax upon its business done and upon income earned in other states, and upon property of the defendant located outside the State of Washington, which tax it cannot avoid by withdrawing its property from use in local commerce within the State of Washington, either under said Public Service Commission law of the State of Washington, and the amendments thereof, under the Constitution of the State of Washington, under the acts of Congress regulating interstate commerce, or as a practical matter, or at all, and said tax is in violation of the Constitution of the

United States, in that it imposes a burden upon, and interferes with the exercise of governmental powers of the Federal Government, towit, the transportation of the United States mails, troops, and munitions of the United States, and is in violation of Article I, Sections 8 and 10, and Article VI, also the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and of the acts of Congress regulating [fol. 98] interstate commerce, particularly Section 1 (18) (21), Section 13, Section 15A and Section 19A thereof, and of the Emergency Railway Transportation Act of 1933, approved June 16, 1933.

VIII

Let judgment be entered dismissing plaintiff's action with prejudice and costs to defendant.

Done in open court this 1st day of April, 1935.

D. F. Wright, Judge.

I acknowledge due service of a copy of the foregoing proposed Findings of Fact and Conclusions of Law this 28th day of March, 1935.

G. W. Hamilton & R. G. Sharpe, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 99] In Superior Court of Thurston County

No. 15417

State of Washington, Plaintiff,

vs.

Great Northern Railway Company, a Corporation, Defendant

Judgment—Filed April 1, 1935

This cause came on regularly for trial on the 22nd day of October, 1934, before the Honorable D. F. Wright, Judge of the above entitled court, trial by jury having been waived in the manner prescribed by the laws of the State of Wash-

ington. Plaintiff appeared by its Assistant Attorney General, Mr. R. G. Sharpe, and the defendant appeared by its Attorneys, Mr. Thomas Balmer and Mr. Edwin C. Matthias. Evidence was introduced at length by both parties, and thereafter when both parties had rested the court took the case under advisement and subsequently made and entered its Findings of Fact and Conclusions of Law, directing the entry of judgment in favor of the defendant.

It is now therefore ordered, adjudged and decreed that the plaintiff take nothing by this action against the defendant, that said action be, and it is hereby dismissed with prejudice to the maintenance of any other action upon or on account of the subject matter of this action, and that the defendant recover from the plaintiff its costs and disbursements herein.

Done in open court this 1st day of April, 1935.

D. F. Wright, Judge.

[File endorsement omitted.]

[fol. 100] In Superior Court of Thurston County

[Title omitted]

Notice of Appeal—April 1, 1935

This matter came on for hearing on signing of findings of fact, conclusions of law and judgment. R. H. Sharpe appeared for the State of Washington and Thomas Balmer appeared for the Deefendant. The findings of fact, conclusions of law and judgment presented by Mr. Balmer were signed by the Court. Mr. Sharpe, on behalf of the plaintiff, then made the following notice of appeal in open court:

"At this time, the plaintiff, State of Washington in the case of State of Washington vs. Great Northern Railway Company, Number 15417, gives notice of appeal that it appeals to the Supreme Court of the State of Washington from the judgment entered by the Court and from the whole thereof."

[fol. 101] IN SUPREME COURT OF WASHINGTON

No. 25,683

STATE OF WASHINGTON, Plaintiff and Appellant,

v.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Respondent

No. 25,684

STATE OF WASHINGTON, Plaintiff and Appellant,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant and Respondent

Appeals from the Superior Court for Thurston County

Hon. D. F. Wright, Judge

Brief of Appellant

ASSIGNMENTS OF ERROR IN APPELLANT'S BRIEF IN WASHINGTON SUPREME COURT—Filed May 24, 1935

Abbreviations:

For convenience and brevity, the defendant, Great Northern Railway Company, will be herein referred to as the "G. N."

Assignments of Error

Great Northern Case:

(G. N. 1) The court ererd in finding that under the State statutes and constitution, the G. N. is not permitted to renounce its local business in Washington without also withdrawing from its interstate business conducted therein. (Finding IX, G. N. Ab. 256-7; Conclusions 2 and 3, G. N. Ab. 261-2.)

(G. N. 2) The court erred in concluding that under Chapter 191, Laws of 1933, the G. N.'s right to conduct its in-

[fol. 102] terstate business is conditioned upon the payment of the Occupational Tax. (Conclusion "1", G. N. Ab. 260-1.)

(G. N. 3) The court erred in finding that it is not possible for the G. N. to carry its intrastate freight and passengers and interstate freight and passengers in different trains or by means of different facilities and employes. (Finding XI, G. N. Ab. 257-8.)

(G. N. 4) The court erred in finding that the making of accurate reports to the D. P. W. of the G. N.'s intrastate revenues was never a matter of importance prior to the imposition of the Occupational Tax Act of 1933. (Finding VI, G. N. Ab. 245.)

(G. N. 5) The court erred in finding that the G. N. has never accurately reported its intrastate revenues to the D. P. W. (Finding VI, G. N. Ab. 244-5.)

(G. N. 6) The court erred in permitting various of the G. N.'s witnesses to testify over plaintiff's objection that the same was hearsay and not the best evidence, that certain railway operating revenues for 1933 entered in the G. N.'s books of account and reported under oath to the D. P. W. as revenues from intrastate business, were in fact revenues from interstate business, and in refusing to strike such testimony after the same was so received. (G. N. Ab. 120-124; 129-142.)

(G. N. 7) The court erred in refusing to strike pages "A" to "F" of G. N.'s Exhibit "11," on the ground that the same was hearsay and based on records available but neither produced nor offered in evidence. (G. N. Ab. 208-9.)

(G. N. 8) The court ererd in finding with respect to the G. N.'s 1933 intrastate operating revenues,—

(G. N. 8-2) That the total thereof was only $2,179,760, or any sum less than $3,305,548 as reported under oath to the D. P. W. (G. N. Ab. 164);

(G. N. 8-b) That the amount of such revenues assignable to "Freight," Account 101, were only $1,502,153, or any sum less than $2,599,331;

[fol. 103] (G. N. 8-c) That the amount of such revenues assignable to "Switching," Account 110, were only $38,367, or any sum less than $41,977;

(G. N. 8-d) That the amount of such freight revenues assignable to "Rents of Buildings and Other Property," Account 142, were only $46,570, or any sum less than $52,-205; and

(G. N. 8-e) That the amount of such freight revenues assignable to "Miscellaneous" were only $28,427, or any sum less than $52,621;

All as shown by the G. N.'s books of account and sworn report to the D. P. W. for 1933. (Findings VI and VII-g, Ab. 245-6, 253, compared with G. N. Ex. "11," p. 11, Ab. 164.)

(G. N. 9) Having found that an amount of the G. N.'s traffic reported to the D. P. W. for 1933 as intrastate, was in fact interstate traffic to the extent that such 1933 intrastate operating revenues were in fact only $2,179,760 instead of $3,305,348, as reported under oath to said D. P. W., the court erred in finding with respect to G. N.'s intrastate operations for 1933,—

(G. N. 9-a) That its operating expenses were $1,730,361, or any sum in excess of $1,675,206 (Finding VI, G. N. Ab. 245);

(G. N. 9-b) That its net revenues from railway operations were only $449,399, or any sum less than $504,554 (Finding VI, G. N. Ab. 246);

(G. N. 9-c) That its railway tax accruals were $335,247, or any sum in excess of $211,532 (Findings VI and VII-e, G. N. Ab. 246, 249-350);

(G. N. 9-d) That its Joint Facility rent—net debit, was $193,455, or any sum greater than $140,800 (Findings VI, G. N. Ab. 246);

(G. N. 9-e) That its net railway operating income was a deficit of $99,269, or any sum less than $132,256 (Finding VI, G. N. Ab. 246.)

(G. N. 10) The court erred in finding that in the apportionment of operating revenues received from interstate freight business to the G. N.'s Washington operating properties, such properties were not entitled to more than a

mileage prorate of such interstate freight revenues. (Find-
[fol. 104] ing VII-e, G. N. Ab. 250-252.)

(G. N. 11) The court erred in finding that the 1933 ad valorem taxes paid on the G. N.'s Washington operating properties should be apportioned as between intrastate and interstate service on the basis of the relative revenues derived therefrom (with only a mileage prorate of interstate revenues apportioned to Washington), or on any basis other than the relative use made by the G. N. of its Washington operating properties as reflected by the only available factors shown by the record, to-wit: relative car and locomotive miles (as between freight and passenger), and relative freight car miles as between intrastate and interstate freight service. (Finding VII-e, G. N. Ab. 249-250.)

(G. N. 12) The court erred in finding that the G. N.'s net debit of $794,018 for joint facility rents in Washington for 1933 were assignable to its intrastate business on the basis of relative operating expenses intrastate and interstate, or on any basis other than the G. N.'s relative use of such jointly used properties in its intra and interstate operations as reflected by the only available factors shown by the record, to-wit: relative car miles (as between freight and passenger), and relative net ton miles as between intrastate and interstate freight service. (Finding VII-d, G. N. Ab. 248-9.)

(G. N. 13) The court erred in finding that pensions paid were properly chargeable as part of the G. N.'s operating expenses for the purpose of determining its railway operating income for 1933. (Finding VII-j, G. N. Ab. 254-5.)

(G. N. 14) The court erred in finding that the G. N.'s operating expenses incident to maintenance of way and structures and freight car repairs should be determined by taking the annual average for three years instead of for 1933 alone. (Finding VII-i, G. N. Ab. 254.)

(G. N. 15) The court erred in finding that G. N.'s Exhibit "11" showed the results of the G. N.'s intrastate op-
[fol. 105] erations in Washington during 1933 with substantial accuracy. (Finding VII-k, G. N. Ab. 255.)

(G. N. 16) The court erred in finding that the G. N.'s intrastate business as a steam railway company was con-

ducted at a loss during 1933. (Finding VIII, G. N. Ab. 255.)

(G. N. 17) The court erred in finding that in proportion to revenue, the G. N.'s cost per unit of doing intrastate business is greater than its cost per unit of doing interstate business. (Finding V, G. N. Ab. 244.)

(G. N. 18) The court erred in finding that the G. N. cannot increase its local rates in Washington sufficiently to meet the occupational tax. (Finding XIII, G. N. Ab. 259-260.)

(G. N. 19) The court erred in finding that a substantial part of the G. N.'s investment in its railways in Washington was made by order of the Washington regulatory bodies. (Finding IX, G. N. Ab. 255-6.)

(G. N. 20) The court erred in permitting the G. N.'s witness, Burn, to testify over objection, as to the operating ratio in switching seven specified cars at different terminals. (G. N. Ab. 97-8, 209.)

(G. N. 21) The court erred in finding that the G. N.'s gross revenue from intrastate steam railway business for the last five months of 1933, and the amount of the occupational tax payable thereon were the several sums set set forth in Finding of Fact No. 4 (G. N. Ab. 243-4), or were any less than the several sums set forth in the G. N.'s returns made under said occupational tax act (See G. N. Ab. 47), showing a total taxable amount for said period of $1,404,095.64 and the total amount of taxes payable thereon to be $21,059.46.

(G. N. 22) The court erred in entering judgment in favor of the G. N. (G. N. Ab. 265.)

G. W. Hamilton, Attorney General; R. G. Sharpe, Assistant Attorney General, Attorneys for Appellants.

[fol. 106] IN SUPREME COURT OF WASHINGTON

No. 25683. En Banc

THE STATE OF WASHINGTON, Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, Respondent

OPINION—Filed Aug. 13, 1935

Per CURIAM:

This is an action by the state to recover from the defendant the tax of one and one-half percent of the gross revenue imposed by chapter 191, Laws of 1933, for the months of August to December, 1933. The cause was tried to the court without a jury, and resulted in findings from which the conclusion was drawn that the plaintiff, the state of Washington, was not entitled to recover. Judgment was entered dismissing the action, from which the plaintiff appeals.

This is a companion case to that of State of Washington v. Northern Pacific Railway Co., — Wash. Dec. —, just decided. The two cases were argued at the same time and involved the same questions. In this case, the amount which the appellant is entitled to recover appears in Finding No. 4.

Upon the authority of the case above cited, the judgment will be reversed and the cause remanded, with directions to enter a judgment as herein indicated.

[fol. 107] IN SUPREME COURT OF WASHINGTON

No. 25684. En Banc

THE STATE OF WASHINGTON, Appellant,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent

OPINION—Filed August 13, 1935

This action was brought to recover the tax on the gross income of the defendant, imposed by chapter 191, Laws of

1933, for the months of August to December, 1933. The cause was tried to the court without a jury, and resulted in findings of fact from which the court concluded that the plaintiff was not entitled to recover. Judgment was entered dismissing the action, from which the plaintiff, the state of Washington, appeals.

The respondent owns and operates a system of railroad extending from a point on Lake Superior, Wisconsin, through Minnesota, North Dakota, Montana and Idaho, into and through a number of counties in this state, with branch lines into the state of Oregon and British Columbia. It is engaged in both intrastate and interstate commerce, carrying freight and passengers. As found by the trial court, the interstate and intrastate business in this state is inextricably commingled, and the intrastate business is conducted at a loss, and it is necessary to make up this loss from the income from interstate business.

Chapter 191 of the Laws of 1933 is entitled an act relating to taxation, and imposes taxes upon the privilege of engaging in business activities in this state. The amount of the tax is based upon the gross income. In section 2 of the act, it is provided that:

[fol. 108] "From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows: * * * (e) Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business, as follows: * * * III. Steam railways: one and one-half per cent. * * *"

It is under this act that the tax in question was sought to be collected by the state and which was resisted by the respondent railway company, as above indicated.

The first question is whether the legislature intended to levy the tax upon the gross income of the respondent, derived from both interstate and intrastate commerce. In the portion of the act quoted, it will be observed that it is

provided that the tax is levied upon every person "engaging or continuing within this state in the following businesses." This quoted expression is used, not only in referring to the tax upon steam railways, but upon the other businesses mentioned in the act which are purely of a local nature. If it was the legislative intent to levy the tax upon the gross income from interstate commerce, it would necessarily, to that extent, be unconstitutional as being repugnant to the commerce clause of the federal constitution. About this there can be no question, as it has been many times so held by the federal supreme court.

In State v. Northern Express Co., 80 Wash. 309, 141 Pac. 757, there was involved an act of the legislature which imposed upon express companies a privilege tax of five per [fol. 109] cent, based upon the gross receipts of such companies. In that case, the expression used was that the tax was imposed for the privilege of "doing business in this state" or on "business done within the state of Washington." It was there held that the expressions used had reference to business begun and ended within this state, and that the tax, being upon intrastate commerce only, did not place a burden upon interstate commerce. It was there said:

"The phrase 'gross receipts of such express company for business done within the state of Washington,' to which the tax is alone applicable, is an expression of the legislative intent to limit this tax to business wholly within this state; that is, business begun and ended within this state."

It will be observed that, there, the expression was business done within this state or within the state of Washington. In the case we are now considering, the expression is "engaging or continuing within this state" in business. It is probably true that the expression used, which was involved in the case cited, more clearly indicates a legislative intent not to impose the tax upon interstate commerce than does the expression used in chapter 191, Laws of 1933. However this may be, when we read the expression used in that chapter, not only as applied to a business which is both interstate and intrastate, but its repeated application to businesses which are purely local, it would seem that the legislative intent was reasonably plain, and that the purpose was not to impose the tax upon interstate business,

but upon intrastate or local business only. If it be that the expression used leaves the matter in the zone of doubt, then that doubt should be resolved in favor of the constitutionality of the law. In such a case, the construction will be adopted which will harmonize the statute with the constitution and avoid a conflict therewith. Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327.

[fol. 110] That a state, through its legislature, has no power to levy a tax which would be a direct burden upon interstate commerce is well known and understood by all lawyers and many laymen. For the court to hold that the legislature, in enacting chapter 191, intended to impose the excise tax therein provided for for the privilege of doing interstate business in this state, would be too great a reflection upon the intelligence of the members of a coordinate branch of the state government. The act, as we view it, was only intended to apply to local or intrastate business.

The next and, as we view it, the important and difficult question is whether the tax may be collected, even though the railway company, the respondent, may not be able to retire from its intrastate business without also discontinuing its interstate. In this connection, it will be assumed (a) that the respondent cannot, as a matter of law, retire from its intrastate business; (b) that it is impractical, as a matter of fact, for it to retire from its intrastate business without also retiring from its interstate; and (c) that the intrastate or local business is conducted at a loss which is taken care of by the receipts from the interstate business. Giving effect to these assumptions, inquiry must be directed then to whether the tax is valid, even though the railway company may not be able to retire from its intrastate business without retiring from its interstate, and that the intrastate business is conducted at a loss.

In the case of Sprout v. City of South Bend, 277 U. S. 163, the court had before it an ordinance of the city, in the state of Indiana, which prescribed license fees varying in amount depending upon the seating capacity of a bus, the bus company being engaged in both intrastate and inter-[fol. 111] state business and it was there held that "the ordinance is void because of the imposition of the license fee." In the course of the opinion, it was said that a state may, by appropriate legislation, require the payment of an

occupation tax from one engaged in both intrastate and interstate commerce, but, in order that the fee or tax may be valid,

"* * * it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

It will be observed that one of the conditions there placed upon the right of a state to impose the tax is that the person or corporation taxed "could discontinue the intrastate business without withdrawing also from the interstate business." This last quoted expression, so far as we are informed, was first used in the case of Pullman v. Adams, 189 U. S. 420, where the tax involved was in a specific amount, levied upon "each sleeping and palace-car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad-track over which the company runs its cars."

In the case of Cooney v. Mountain States Telephone & Telegraph Co., Vol. 79, No. 9, United States Supreme Court Law ed. Advance Opinions, page 498, there was involved a statute of the state of Montana prescribing a tax "for each telephone instrument used in the conduct of the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana." There, the telephone company, as is the railroad company here, engaged in both intrastate and interstate business, and it was [fol. 112] held that a privilege or occupation tax which a state imposes with reference to both kinds of business, through an indiscriminate "application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid."

It will be observed that in none of the three cases mentioned was the tax based upon the gross income of the intrastate business. There is a difference between a tax imposed as a license to do business or upon the instrumentality and a tax based upon the gross income. If a tax be a license tax or one upon the instrumentality, it neces-

sarily inheres in the interstate as well as the intrastate business. Where the tax is upon the gross income, the income from the interstate business may be segregated from the intrastate and be held valid.

In the case of Bowman v. Continental Oil Co., 256 U. S. 642, the state of New Mexico had imposed an excise tax of two cents for each gallon of gasoline sold or used, and an annual license tax of fifty dollars for each distributing station or place of business. The oil company was engaged in both interstate and intrastate business. It was held that the two cents tax per gallon could be sustained because the income from the intrastate business could be segregated from the interstate, but that the fifty dollar tax was void because no such segregation could be made. It was there said:

"The applicable rule is that laid down in Ratterman v. Western Union Telegraph Co., 127 U. S. 411, where, in response to a question whether a single tax, assessed by a state upon the receipts of a telegraph company derived partly from interstate commerce and partly from commerce within the State, but returned and assessed in gross and without separation or apportionment, was wholly invalid or invalid only in proportion and to the extent that the receipts were derived from interstate commerce, this court unanimously answered that so far as levied upon receipts derived from interstate commerce the tax was void, but so [fol. 113] far as levied upon receipts from commerce wholly within the State it was valid. This case has been cited repeatedly with approval and its principle accepted. Western Union Telegraph v. Alabama, 132 U. S. 472, 476-477; Lehigh Valley R. R. Co. v. Pennsylvania, 145 U. S. 192, 200-201; Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 697; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 31.

"But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void under the authority of Leloup v. Port of Mobile, 127 U. S. 640, 647; Crutcher v. Kentucky, 141 U. S. 47, 58-59; Williams v. Talladega, 226 U. S. 404, 419; and other cases of that character."

In the case of Cooney v. Mountain States Telephone & Telegraph Co., supra, it was distinctly pointed out that the tax there involved was "not laid on revenue derived from monthly rates as distinguished from toll charges. It is not imposed with respect either to the nature of the revenue, or to the character of the service from which the revenue is derived, or to the manner in which the charges for the service are fixed." From what is there said it would appear to be a reasonable inference that, if the tax were of the character described in the quotation just made from the opinion, the result might be different.

In East Ohio Gas Co. v. Tax Commission, 283, U. S. 465, the state of Ohio imposed upon every corporation engaged in the business of supplying consumers within the state with natural gas for light, heat or power a tax based upon the gross receipts, and the law was sustained. The East Ohio Gas Company which resisted the tax was engaged both in interstate and intrastate business. It brought gas from the states of West Virginia and Pennsylvania over high pressure pipes, and, as stated in the opinion, this was interstate commerce until it reached the distributing pipes which supplied the consumers, and after that it became intrastate and was subject to the tax. In the course of [fol. 114] the opinion in that case, we find the same statement with reference to the conditions precedent to the right of a state to impose a tax upon a person or corporation engaged in both intrastate and interstate business, as appears in the quotation from the case of Sprout v. City of South Bend, supra. In the Ohio Gas Company case, however, the court did not apply the provision that the gas company could not retire from its intrastate business without withdrawing from its interstate business. The facts, as they appear in the opinion, make it plain that, if the gas company had withdrawn from its intrastate business, it would have completely destroyed its interstate business. The tax there involved was not one upon the instrumentality or a license tax, but was an excise or a tax upon the privilege of doing business. The result of the holding in that case, as we view it, would sustain a holding in the case now before us that the tax upon the gross income of the intrastate business was valid, even though the railway company could not withdraw from that business without also withdrawing from its interstate business. We do not look upon cases

which involve either a tax upon instrumentalities or a license tax as applicable to the law now in question which imposes, as already indicated, an excise or tax on the privilege of engaging or continuing in business.

It must be remembered that chapter 191 of the Laws of 1933 applies to every person engaging or continuing in business within this state, with a comparatively few exceptions. The law may be said to be a general one and applies to all businesses within the state. In this respect, it is somewhat analogous to a property tax which all persons, with comparatively few exceptions provided for in the statute, are required to pay upon the property owned [fol. 115] by them. The state has the authority to tax property which is used in interstate commerce and which is regularly and permanently located within its limits, where the ascertainment of the amount assessed is dependent upon the value of the property within the state, as the property of other citizens is taxed. Leloup v. Port of Mobile, 127 U. S. 640; Western Union Telegraph Co. v. Kansas, 216 U. S. 1.

Even though the respondent in this case cannot retire from its intrastate business without also retiring from its interstate business, we think that the excise tax imposed upon the gross income from the intrastate business is not such a direct burden upon interstate commerce as to require that the tax be held void.

Attention at this point should be called to chapter 4 of the Laws of 1933, which was Initiative Measure 64, and generally referred to as the "40-mill tax limit for taxation" law. In that act, it was provided that the aggregate of all taxes upon real and personal property in the state should not exceed in any one year forty mills on the dollar of assessment valuation, which should be based upon fifty per cent of the true and fair value of the property in money, with some exceptions which are not here material. The respondent, by reason of this law, has been relieved from paying a very large sum of money as taxes upon the property which it owns in this state and which was subject to taxation, even though devoted to interstate commerce. It is a matter of common knowledge that under the 40-mill tax limit law property is now paying about half of what it paid for general taxes prior to the passage of that law; in other words, that by reason of the law limiting the

amount to forty mills, the tax burden upon both real and personal property of the state has been reduced approxi-
[fol. 116] mately one-half. Having thus provided for a reduction of taxes upon real and personal property, it was necessary for the legislature to find other sources of revenue, and chapter 191 was undoubtedly passed for this reason.

So far as we are informed, the federal supreme court has at no time distinctly held that an excise tax, such as that of this state, which is imposed upon all businesses, is such a direct burden upon interstate commerce as to render the act of the legislature unconstitutional.

But it is said that the intrastate business is being conducted at a loss, and this loss must be borne by the interstate business and therefore is a burden upon interstate commerce. There is an expression in the case of Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252, that would appear to support this contention, even though the question was not necessarily involved in that case; and further, in that case there was not involved an excise tax based upon gross income, as here.

In this state, if the respondent's intrastate business is conducted at a loss, the legislature has provided a remedy, first, by application to the department of public service, with the right of review by the superior court and an appeal to this court. From the findings, it appears that an application has been made and denied by the department and that another application is pending. It does not appear, however, that the respondent has exhausted the relief granted by the statute and until it does so, it cannot be said that, even though the intrastate business is being conducted at a loss, it is such a burden upon interstate commerce as would justify holding the law unconstitutional.

The facts in the case of Postal Telegraph-Cable Co. v.
[fol. 117] Fremont, 255 U. S. 124, presented a similar question, and it was there held that, where the state law affords a means to prevent the tax from burdening interstate commerce, through an application to increase intrastate rates, the tax will not be held void, in the absence of a showing that the company had exhausted the remedy afforded by an increase of the rates on intrastate business. We see no just or legal reason why the respondent should not comply

with chapter 191, as all other businesses in this state are required to do.

So far as the opinion in the case of Great Northern Railway Co. v. State, 147 Wash. 630, 267 Pac. 506, is out of harmony with the holding in this case, it will be disapproved.

The trial court in Finding No. 4 specifically found the gross revenue from the respondents' intrastate business and the tax thereon for the period covered by this action. The appellant is entitled to a judgment for the amount as indicated in the finding.

The judgment appealed from will be reversed and the cause remanded, with directions to the superior court to enter a judgment as herein indicated.

Main, J. Beals, J. Geraghty, J.

We concur: Mitchell, J. Tolman, J. Blake, J.

[fol. 118] IN SUPREME COURT OF WASHINGTON

No. 25684

DISSENTING OPINION

STEINERT, J., dissenting:

I do not agree with the majority upon what is said to be the principal question in the case. Having conceded (a) that the respondent cannot, as a matter of law, retire from its intrastate business, (b) that it is impracticable, as a matter of fact, to so retire without also retiring from its interstate business, and (c) that the intrastate, or local, business is conducted at a loss which is taken care of by the receipts from the interstate business, the majority arrives at a conclusion which I think is incorrect and untenable.

The authorities cited in the prevailing opinion establish beyond question, as I view it, that the state may not impose a tax, no matter what its nature or variety may be, that has the effect of burdening or interfering with interstate commerce.

In Bowman v. Continental Oil Co., 256 U. S. 642, the court said:

"No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute, that is to say, without authority of law. Hence, it cannot be enforced at all."

In East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, the court said:

[fol. 119] "And, while a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business."

In Cooney v. Mountain States Tel. & Tel. Co., — U. S. —, 55 S. Ct. Rep. 477, 482, the court through Chief Justice Hughes, said:

"Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. Sprout v. South Bend, Ind., 277 U. S. 163, 171, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45; East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 470, 51 S. Ct. 499; 75 L. Ed. 1171."

The other cases cited in the prevailing opinion are either directly, or argumentatively, to the same effect. Under these cases, one of the essentials to the validity of a tax is that the one who is taxed could discontinue its intrastate business without also withdrawing from its interstate business.

The majority seek to make a distinction between a tax imposed as a license to do business or one upon the instrumentalities used, and a tax on gross income. They concede that a license tax to do business or a tax upon the instrumentality inheres in the interstate as well as in the intrastate business, but they hold that "where the tax is upon the gross income, the income from the interstate business may be segregated from the intrastate and be held valid." The distinction is without substance when the result in a given instance is to burden or interfere with interstate commerce. The federal government having created a field within its exclusive regulatory jurisdiction, the state may [fol. 120] not invade it, nor by any act, direct or indirect, interfere with it.

We have before us four cases, including the instant one, involving the same question. The other three are State v. Great Northern Ry. Co., post p. —, —, P. (2d) —, Pacific Tel. & Tel. Co. v. Tax Commission, post p. —, — P. 2d) —, and Home Tel. & Tel. Co. v. Tax Commission, post p. —, —, P. (2d) —. The questions being identical in all four, the same barrier exists in each against the state's right to tax. That the action of the state will interfere with interstate commerce is, to me, very apparent. If the railroad companies or the telephone companies should be permitted or be compelled to withdraw from their intrastate business, how many trains would continue to run, and how many telephones would remain in place, in this state, merely for the purpose of enabling their users to do an interstate business? Not only would all local service be discontinued, but, with the exception, possibly, of one or two large cities, the people of the state would be without interstate service as well.

If, as a matter of law, the companies may not withdraw from intrastate business, or if, as a matter of fact, it is wholly impracticable for them to do so, then such intrastate business must continue to be operated at the expense of

their interstate business. If one state be permitted to impose burdens upon interstate commerce through the medium of taxation, then all states in which the companies operate may do likewise, and the accumulated burdens thus imposed would in the end result in complete strangulation of all their interstate commerce. The sum and substance of it all is that the tax imposed on intrastate business must be borne by the proceeds from interstate business. It is, [fol. 121] therefore, a burden upon, and interferes with, interstate commerce, and for that reason is invalid.

I therefore dissent.

Steinert, J.

[fol. 122] IN SUPREME COURT OF WASHINGTON

No. 25684

DISSENTING OPINION

HOLCOMB, J., dissenting:

I concur in the views stated by Judge Steinert in the above entitled case and as to all the other like cases now pending in this court.

I wish to add, however, that I particularly deplore the indefinite, unnecessary and summary disposition of the case of Great Northern Railway Co. v. State, 147 Wash. 630, 267 Pac. 506. It leaves that case like Mahomet's coffin, suspended midway between Heaven and earth; and, as Mr. Justice Holmes once said in one of his famous dissenting opinions, henceforth, neither bench nor bar can tell whether certain cases alluded to in the majority opinion therein, in much the same way as is the above cited case in the prevailing opinion in these cases, "are to be listed in the *index expurgatorius*" or, are in the category of cases to be used in the future at pleasure.

The above cited case was the deliberate judgment of this court en banc and concurred in by all but two of the then judges of this bench, including the writer of the opinion in the instant case. It followed the decisions of the Federal Supreme Court therein cited. It was based upon the sound principle that a public utility, such as the railway company, the telephone company and the like, is compelled by law

to serve and cannot withdraw. To the same effect is Northern Pacific Railway Co. v. State, 84 Wash. 510, 147 Pac. 45.

It is manifest that these utilities cannot separate the receipts of their intrastate from their interstate business. If that be true, then it is indubitably true that the taxes in question are burdens upon interstate commerce, contravening the commerce clause and the Fourteenth Amendment of the Federal Constitution to which we are fully bound by oath to conform.

Holcomb, J.

[fol. 123] IN SUPREME COURT OF WASHINGTON

No. 25683

Thurston County No. 15417

THE STATE OF WASHINGTON, Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Respondent

JUDGMENT—September 13, 1935

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 13th day of September, A. D. 1935, on motion of G. W. Hamilton Esquire, of counsel for Appellant considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby reversed with costs; and remanded with directions to the Superior Court to enter judgment in favor of The State of Washington and against the Great Northern Railway Company, a corporation, for Twelve Thousand Nine Hundred Eighty-eight Dollars Thirty-five Cents ($12,988.35).

And that the said State of Washington have and recover of and from the said Great Northern Railway Company, a corporation, the costs of this action taxed and allowed at Seven Hundred Thirty-two Dollars Eighty-five Cents

($732.85) and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings in accordance herewith.

[fol. 124] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed Sept. 13, 1935

To the Chief Justice of the Supreme Court of the State of Washington:

Your petitioner, Great Northern Railway Company, a corporation, respectfully shows:

Your petitioner is the appellant in the above entitled cause.

On February 28, 1934, the State of Washington, as plaintiff, brought suit against your petitioner as defendant in the Superior Court of the State of Washington in and for Thurston County, to recover a money judgment for $21,061.44 alleged to be the amount due plaintiff as an occupation tax due under the provisions of Chapter 191, Laws of Washington 1933.

It was the contention of appellant in the trial court and the Supreme Court of the State that as a matter of fact and of law it could not withdraw from its intrastate business in the State of Washington, that its interstate business and intrastate business in Washington was and is inextricably commingled, that the intrastate business in Washington is conducted at a loss, and that the tax levied by said Chapter 191 of the Laws of 1933 would have to be paid from interstate revenues, and therefore the tax levied by said Chapter 191, Laws of 1933, was a burden on interstate commerce in violation of Article I., Section 8 of the Constitution of the United States and in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

[fol. 125] Afer hearing upon the merits the trial court on April 1, 1935, entered findings of fact, conclusions of law and judgment, dismissing the action and concluding that said Chapter 191 of the Laws of 1933 violates Article I., Sec-

tion 8, and the due process clause of the 14th Amendment to the Constitution of the United States. Thereafter an appeal was taken by the State of Washington to the Supreme Court of the State of Washington, which court, on August 13, 1935, reversed the judgment of the trial court, and upheld the validity of said act as not being in violation of any of said provisions of the Constitution of the United States, and remanded said cause to the Superior Court with directions to enter a money judgment against appellant and in favor of appellee for $12,988.35 and final judgment of the Supreme Court was so entered on the 13th day of September, 1935.

The Supreme Court of the State of Washington is the highest court of said state in which a decision in this suit can be had.

That in said cause there is drawn in question the validity of a statute of the State of Washington on the ground that said statute is repugnant to the Constitution of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates Article I, Section 8, and the due process clause of the 14th Amendment to the Constitution of the United States.

Therefore, in accordance with Sec. 237 (a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit, under Sec. 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment [fol. 126] of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of Washington, the highest court of said state in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the

said Supreme Court of the State of Washington may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Washington, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the cost and supersedeas bond tendered by the petitioner be approved, and that the said appeal may operate as a supersedeas.

Dated this 13th day of September, 1935.

F. G. Dorety, Thomas Balmer, Edwin C. Matthias,
Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 127] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Sept. 13, 1935

Statement

The Supreme Court of the State of Washington found that petitioner owns and operates a system of railroad from the cities of St. Paul and Duluth in Minnesota, and Superior in Wisconsin, through the intermediate states into and through the State of Washington, and is engaged in both intrastate and interstate commerce by means of said railroad. It held that petitioner could not as a matter of law, retire from its intrastate business while continuing its interstate business. It found that it is impracticable, as a matter of fact, for petitioner to retire from its intrastate business wihout also retiring from its interstate business; and further found that "the intrastate business is conducted at a loss which is taken care of by the receipts from the interstate business."

Assignment of Errors

Petitioner, Great Northern Railway Company, a corporation, assigns the following errors in the record and proceedings in this cause:

(1) The Supreme Court of the State of Washington having found that appellant is engaged in both intrastate commerce and interstate commerce, and having held that as a [fol. 128] matter of law it cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(2) The Supreme Court of the State of Washington having found that appellant's interstate business and intrastate business in Washington is inextricably commingled, and that as a matter of fact and as a practical matter appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(3) The Supreme Court of the State of Washington having found that appellant's intrastate business is conducted at a loss which must be borne by the income from its interstate business, erred in deciding that the tax imposed by Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(4) The Supreme Court of the State of Washington having found that appellant's intrastate business is conducted at a loss which must be borne by income from its interstate business or income earned or received in other states, erred in refusing to hold that Chapter 191, Laws of 1933, violates the due process clause of the 14th Amendment to the Constitution of the United States.

(5) The Supreme Court of the State of Washington having found that appellant's intrastate business is conducted at a loss which must be borne by income from its interstate business, erred in holding Chapter 191, Laws of 1933, and the tax imposed thereby, does not violate Article I, Section 8 of the Constitution of the United States, for the stated reason that appellant has not exhausted its

remedy (by writ of review) to obtain intrastate rate increases and because that circumstance is immaterial, not [fol. 129] supported by and is contrary to the facts found in Finding 18.

(6) The Supreme Court of the State of Washington for each of the reasons contained in the preceding assignments erred in reversing the judgment of the Superior Court of Thurston County and in rendering judgment in favor of the State of Washington against appellant for the tax imposed by Chapter 191, Laws of 1933, in the sum of $12,988.35.

Prayer for Reversal

Wherefore, on account of the errors specified herein appellant prays that the judgment of the Supreme Court of the State of Washington in this cause dated the 13th day of September, 1935, be reversed and judgment here entered or directed in favor of appellant.

Dated this 13th day of September, 1935.

F. G. Dorety, Thomas Balmer, Edwin G. Matthias,
Attorneys for Appellant.

[File endorsement omitted.]

[fol. 130] [File endorsement omitted]

In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—Filed Sept. 13, 1935

The petition of the Great Northern Railway Company, a corporation, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated the 13th day of September, 1935, of the Supreme Court of the State of Washington as prayed in said petition, and that the Clerk of the Supreme Court of the State of Washington shall within sixty days from this date make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that said appellant shall have a good and sufficient cost and supersedeas bond in the sum of [fol. 131] $25,000.00, that said appellant shall prosecute said appeal to effect and answer all damages and costs if it fails to make its plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceedings in this cause and the enforcement of said Chapter 191, Laws of 1933, against appellant until the final disposition of this cause by the Supreme Court of the United States.

It is further ordered that appellee, the State of Washington, shall have the right to move for increase of said bond if, at any time, it shall deem itself insecure.

Dated this 13th day of September, 1935.

John F. Main, Acting Chief Justice of the Supreme Court of the State of Washington.

[fols. 132–134] Supersedeas bond on appeal for $25,000, approved and filed Sept. 13, 1935, omitted in printing.

[fols. 135 & 136] Citation, in usual form, showing service on G. W. Hamilton et al., filed Sept. 13, 1935, omitted in printing.

[fol. 137] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD ON APPEAL TO THE UNITED STATES SUPREME COURT—Filed Oct. 16, 1935

To the Clerk of the Supreme Court of the State of Washington:

You will please make and transmit to the United States Supreme Court under your hand and the seal of the Supreme Court of the State of Washington a true copy of the following material parts of the record in the above entitled cause:

1. Summons.
2. Complaint.
3. Answer.
4. Defendant's Supplemental Answer Amending Fourth Affirmative Defense.
5. Reply.
6. Interrogatories Propounded by Plaintiff to Defendant.
7. Defendant's Answers to Interrogatories.
8. Defendant's Amended Answers to Interrogatories.
9. Findings of Fact and Conclusions of Law of the Superior Court of the State of Washington for Thurston County.
10. Judgment of the Superior Court of the State of Washington for Thurston County.
11. Notice of Appeal to Washington Supreme Court.
12. Assignment of Errors in Brief of the State of Washington, Appellant in the Washington Supreme Court.

[fols. 138 & 139] 13. Opinion of Washington Supreme Court in Cause No. 25683.

14. Opinion of Washington Supreme Court in Cause No. 25684.
15. Judgment of Washington Supreme Court.
16. Petition for Appeal to United States Supreme Court.
17. Assignment of Errors and Prayer for Reversal.
18. Statement as to Jurisdiction on Appeal.
19. Order Allowing Appeal.
20. Cost and Supersedeas Bond.

21. Acknowledgment of Service of Petition for Appeal, Order Allowing Appeal, Assignment of Errors and Prayer for Reversal, and Statement as to Jurisdiction.
22. Citation, with Acknowledgment of Service.
23. This Præcipe.

Dated at Seattle, Washington, this 15th day of October, 1935.

F. G. Dorety, Thomas Balmer, Edwin C. Matthias, Attorneys for Appellant. Address: 404 Union Street, Seattle, Washington.

Service of a copy of the foregoing Præcipe acknowledged this 16th day of October, 1935.

G. W. Hamilton, & R. G. Sharpe, Attorneys for Appellee. Address: Temple of Justice, Olympia, Washington.

[File endorsement omitted.]

[fol. 140] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

APPELLANT'S SUPPLEMENTAL PRÆCIPE FOR TRANSCRIPT OF RECORD ON APPEAL TO THE UNITED STATES SUPREME COURT —Filed Oct. 22, 1935

To the Clerk of the Supreme Court of the State of Washington:

In addition to the portions of the record designated in the Appellant's præcipe of October 15th, 1935, you will please incorporate in the transcript of the appeal of this case to the United States Supreme Court the following:

(a) Pages "A" to "F" inclusive, and pages 1 to 11, inclusive, of Defendant's Exhibit 11;
(b) This supplemental præcipe.

Dated at Seattle, Washington, this 21st day of October, 1935.

F. G. Dorety, Thomas Balmer, Edwin C. Matthias, Attorneys for Appellant. Address: 404 Union Street, Seattle, Washington.

Service of a copy of the foregoing Supplemental Præcipe acknowledged this 22nd day of October, 1935.

G. W. Hamilton, R. G. Sharpe, Attorneys for Appellee. Address: Temple of Justice, Olympia, Washington.

[File endorsement omitted]

[fol. 141] IN SUPREME COURT OF WASHINGTON

In the Matter of the Adoption of Rules of Pleading, Procedure and Practice

RULE VI

Abstracts

In every case in which the statement of facts contains over 100 pages, an original and two legible copies of a typewritten abstract of the record shall be filed with the Clerk of the Supreme Court along with the briefs of the party preparing the same. The typewritten abstract shall be in the same form as the transcript in the cause, shall be indexed, and shall contain appropriate references by pages to the transcript or statement of facts. Printed abstracts, bound separately from the printed briefs, but of the same size, type and form as the printed briefs, will be given the same effect by the court as typewritten abstracts. The abstract shall be substantially in the following form.

(Suggested forms omitted.)

[fol. 142] IN SUPREME COURT OF WASHINGTON

In the Matter of the Adoption of Rules of Pleading, Procedure and Practice

ABSTRACTS OF RECORDS

(Amended Rule VI)

Rule VI of the Rules of the Supreme Court, found on page XXXV of volume 159 of the Washington Reports, be

and the same is hereby amended by eliminating therefrom all requirements relating to the abstracting of pleadings.

[fol. 143] IN SUPREME COURT OF WASHINGTON

In the Matter of the Adoption of Rules of Pleading, Procedure and Practice

RULE VII

Supplemental Abstracts

1. If the respondent is not satisfied with the appellant's abstract, he may cause to be typewritten, or printed, a supplemental abstract of the matter omitted which he deems essential to an understanding of the questions presented on the appeal. The supplemental abstract shall follow the form of the original abstract, shall refer to the page of the original abstract where the omitted matter is to be inserted, and shall contain appropriate references to the transcript, or statement of facts, and shall be served on the adverse party; Provided, That if, in the opinion of this Court, the respondent's supplemental abstract was necessary to the consideration of the questions presented, and was made thus necessary by reason of the fact that the appellant's abstract did not fairly state the record or the evidence, the costs of such supplemental abstract shall be charged to the appellant regardless of the termination of the case.

2. The appellant may supplement his original abstract without leave of court at any time before the respondent has filed his brief. Such supplemental abstract shall follow the form of the original abstract, shall contain appropriate references to the pages of the transcript or statement of facts where the matter abstracted can be found, and shall show at what pages of the original abstract the new matter is to be inserted. The supplemental abstract shall be served on the adverse party. After the respondent has filed his brief, supplemental abstracts may be filed therein only by leave of the Chief Justice.

[fol. 144] IN SUPREME COURT OF WASHINGTON

In the Matter of the Adoption of Rules of Pleading, Procedure and Practice

RULE VIII

Contents and Style of Briefs

1. Briefs shall be printed throughout in plain, clear type, not smaller in size than eleven point, on unglazed white paper, and shall contain a clear statement of the case so far as deemed material by the party, with reference to the pages of the abstract for verification in all instances where an abstract is required. In other instances the reference shall be to the original record.

2. Each error relief on shall be clearly pointed out and separately discussed under appropriate designated headings. Where there are several assignments presenting the same general questions, they may be discussed together.

[fol. 145] IN SUPREME COURT OF WASHINGTON

In the Matter of the Adoption of Rules of Pleading, Procedure and Practice

RULE XVI

Exceptions to Findings of Fact and Conclusions of Law

1. It shall not be necessary or proper, in order to obtain appellate review thereof, to take or enter an exception to findings of fact or conclusions of law of a court or judge upon a case or part of a case, either legal or equitable, tried without a jury, nor shall it be necessary to take exceptions to the refusal of the court to make proposed findings or proposed conclusions of law.

2. This rule shall apply and be applicable to cases now pending as well as to those which may be hereafter instituted.

[fol. 146] [File endorsement omitted]

[fols. 147-186] IN SUPREME COURT OF WASHINGTON

No. 25683

STATE OF WASHINGTON, Plaintiff and Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Respondent

Appellant's Abstract of Record—Filed May 24, 1935

Appeal from the Judgment of the superior court of Thurston County. Hon. D. F. Wright, Judge.

[fol. 187] **Statement of Evidence**

On the 22nd day of October, 1934 (St. 2), the cause was tried by the court sitting without a jury, wherein the following proceedings were had:

[fol. 188] Supplemental Answer

Defendant's counsel asked and was granted leave to file a supplemental answer amending Defendant's fourth affirmative defense, with the understanding that if plaintiff did not reply thereto, its original reply would be deemed to stand to the supplemental answer (St. 3-4).

Plaintiff's Evidence

OFFERS IN EVIDENCE

Plaintiff's counsel offered in evidence Plff's Ex. "1", the interrogatories propounded to defendant, and Plff's Ex. "2", defendant's answers to such interrogatories (St. 5).

Plff's Ex. "2" was received in evidence over defendant's objection that the original answers were not admissible unless the amended answers were also offered (St. 6, 12).

Plff's Exs. "3" to "7", being the defendant's returns to the Tax Commission under the Occupation Tax Act for the months of August to December, 1933, were then received in

evidence (St. 13-14) over defendant's objection that defendant's amended returns had not also been offered in evidence (St. 14-15). Whereupon plaintiff rested.

[fol. 189] PLAINTIFF'S EXHIBITS "1" AND "2"

Exhibit "1" are the interrogatories propounded by plaintiff to defendant, and Exhibit "2" are the answers of defendant thereto, verified by Geo. H. Hess, Jr., defendant's Comptroller, who deposes as follows:

"That the foregoing answers to the interrogatories propounded by plaintiff were prepared under his supervision for and in behalf of said Great Northern Railway Company; that said answers are to affiant's knowledge true and correct."

Said interrogatories and the answers thereto are as follows:

Interrogatory One. State whether or not your books of account showing your revenues and expenses incident to the various kinds of business carried on by you in the state of Washington since and prior to August 1st, 1934, are kept in accordance with the uniform system of accounting prescribed by the Interstate Commerce Commission. (Plff's Ex. "1".)

Answer. Yes. (Plff's Ex. "2".)

Interrogatory Two. * * * State how long your books of account have been kept in accordance with such system.

Answer. Since on or about July 1, 1914. (Plff's Ex. "2".)

Answer to Interrogatory Three. In reporting revenues and expenses to the Tax Commission and Department of Public Works of the State of Washington the method prescribed by the Interstate Commerce Commission for making reports to it has been followed. The Interstate Commerce Commission has prescribed no rules or method for reporting to the State of Washington the revenues and expenses within that state.

Interrogatory Five. State by the following accounts and account numbers (or by such accounts and account numbers as the same appear upon your books of account) the total

amount of the railway operating revenues received by you, or which have accrued, as a result of business transacted by you wholly within the state of Washington (a) during each of the months, August, 1933, to December, 1933, inclusive, and (b) from August 1st, 1933, to December 31st, 1933, inclusive.

Answer. The railway operating revenues received or accrued from business transacted wholly within the State of [fol. 190] Washington during the month of August, 1933, to December, 1933, inclusive, by accounts stated in Interrogatory (5), so far as shown by the accounts kept by the Great Northern Railway Company are as follows:

(Here follows a statement of said revenues for said months as shown by the tabulation set forth on the following page. Plff's Ex. "2".)

[fol. 191]

Acct. No.	Name of Account:	August to December, 1933, inclusive				
		August 1933	September 1933	October 1933	November 1933	December 1933
101	Freight	$269,455.17	$264,034.13	$298,743.63	$257,344.55	$168,788.99
102	Passenger	26,509.89	27,063.03	23,016.41	27,241.20	31,767.78
103	Excess Baggage	194.83	277.10	160.48	165.74	111.63
104	Sleeping car	.....	.....	.....	.....	.....
105	Parlor and chair car	360.68	268.50	265.45	219.00	313.35
106	Mail	.....	.....	.....	.....	.....
107	Express	.....	.....	.....	.....	.....
108	Other passenger train	130.61	114.91	105.39	210.99	174.25
109	Milk	1,076.74	777.42	813.08	498.68	6,869.45
110	Switching	3,739.91	3,511.81	5,868.34	5,214.68	2,823.96
111	Special service train	.....	.....	.....	.....	.....
112	Other freight train	.....	.....	.....	108.36	.....
	Total	301,467.83	296,046.90	328,972.78	291,003.20	210,849.40
131	Dining and buffet	2,721.37	2,432.83	2,291.53	1,828.15	2,435.91
132	Hotels and restaurants	1,362.87	1,465.35	1,381.47	1,328.73	1,254.20
133	Station, train and boat privileges	37.25	30.15	31.06	16.56	37.00
134	Parcel room	291.15	318.25	257.80	190.70	225.10
135	Storage—Freight	201.66	333.42	64.08	233.83	28.92
136	Storage—Baggage	52.29	65.93	49.54	41.06	39.13
137	Demurrage	343.00	129.00	240.00	559.00	93.00
138	Telegraph and telephone	524.92	414.00	440.90	349.23	463.77
142	Rent of buildings and other property	4,991.55	6,047.65	4,105.58	5,125.39	7,392.86
143	Miscellaneous	5,381.12	5,703.05	7,289.78	7,356.75	8,057.60
151	Joint facility—Cr	686.61	28.33	107.32	412.11	3,756.48
152	Joint facility—Dr	3,820.02R	1,185.59R	419.74R	.56R	7.57R
	Total	12,773.77	15,782.37	15,839.32	17,440.95	23,776.40
	*Grand Total	314,241.60	311,829.27	344,812.10	308,444.15	*234,625.80

* Includes revenues from U. S. Government and from State of Washington.
"R" indicates red figure.

[fol. 192] Following the foregoing figures, appears the following as part of the answer to Interrogatory Five:

"The following explanation is necessary with respect to certain of the above accounts:

"132—Hotels and Restaurants: The amount shown in this account is for income received from the operation of station restaurants at which employees, the public and passengers are served.

"133—Station, Train and Boat Privileges: This account includes revenues from weighing, vending and automatic machines and from advertising in stations and on trains, and includes the privilege of operating newspaper stands, selling papers and the amount received from telephone companies for the privilege of operating pay telephones in the depots. The details of the items in this account are not kept.

"135 and 136—Storage of Freight and Baggage: This account represents amount collected from storage of freight and baggage, and it is not known whether the proceeds are collected from the storage of interstate or of intrastate business.

"137—Demurrage: This account represents all demurrage paid in the state. No accounts are kept segregating the amount collected as between intrastate and interstate freight.

"142—Rents of Buildings and Other Property: This account includes revenue received from other companies for the exclusive use by them of certain operating properties owned by defendant.

"143—Miscellaneous: This includes revenue from weighing cars for other companies and individuals, revenue from sale of cinders and other miscellaneous revenue.

"151 and 152—Joint Facilities—Credit and Debit: These two accounts are applicable to operation of pool trains between Seattle and Portland. Some months defendant collects more than its proportion of the revenue and has to make payment to the other companies and, in other months, the other companies collect more than their proportion and have to make payment to defendant."

[fol. 193] PLAINTIFF'S EXHIBITS "3" TO "7" INCLUSIVE

Are certified copies of Business Tax Returns made by the Great Northern Railway Company (by Geo. H. Hess, Jr., Comptroller), for each of the months of August to December, 1933, inclusive, and contain the following data:

	August to December, 1933, inclusive					
	August 1933	September 1933	October 1933	November 1933	December 1933	August 1933 to December1933
Gross Amount	$295,284.98	$293,022.07	$325,244.36	$287,018.44	$203,525.79	$1,404,095.64
Proceeds of sales or income derived wholly in interstate or foreign commerce						
Proceeds of sales to the United States Government, its departments or institutions						
Proceeds of sales to the State of Washington, its departments or institutions						
Total amount of deductions						
Taxable amount	295,284.98	293,022.07	325,244.36	287,018.44	203,525.79	$1,404,095.64
Amount of tax	4,427.29	4,395.33	4,878.67	4,305.28	3,052.89	21,059.46

PLAINTIFF'S EXHIBITS "3" TO "7" INCLUSIVE

Are certified copies of Business Tax Returns made by the Great Northern Railway Company (by Geo. H. Hess, Jr., Comptroller), for each of the months of August to December, 1933, inclusive, and contain the following data:

[fol. 194] MOTION FOR NONSUIT

Defendant's counsel thereupon moved for a dismissal for lack of proof, in that the amended answers to interrogatories and amended returns under the Occupation Tax Act had not been offered in evidence (St. 15). The court reserved its ruling on such motion (St. 23).

Defendant's Evidence

Def's. Exs. "8" and "9" and Def's. Exs. "10", being defendant's so-called amended answers to interrogatories, were thereupon received in evidence (St. 23-24, 26). Defendant's counsel then read into the record a purported letter addressed to plaintiff's counsel under date of August 8, 1934, as follows:

"I am enclosing herewith copy of amended answers to interrogatories in the above case. I am filing amended returns with the Tax Commission in accordance with the interrogatories. I am sending the original copy of the amended answers to the clerk for filing. Will you kindly acknowledge receipt to me."

W. M. BURN, called and sworn as a witness on behalf of defendant, testified as follows:

I reside at St. Paul, Minnesota, and am statistician for the G. N. My experience commences in railroad work with the Pennsylvania Railroad Company. I was employed by them for about ten years in Eastern Pennsylvania, at Harrisburg, Pennsylvania, and I was employed in the capacity of a stenographer and an accountant. Later I went with the State Water Supply Commission of Pennsylvania, as an accountant, and at the time of the World War I was in Washington with the United States Railroad Administration, with the operating statistical section where I had charge of a squad of men in preparing operating statistics relating to the United States. The operating statistics I was then handling dealt with the performance of all the railroads in the United States subject to the U. S. Railroad Administration (St. 28). At the time of the return of the roads to private control, I then went to the Great Northern in St. Paul as Assistant Statistician. I was employed in that capacity for about five years, from April 1, 1920, at

[fol. 195] which time I was made statistician of the company, which position I now hold.

As statistician my duties consist principally of working up studies for rate hearings and also preparing information for our executive Department in connection with various matters that they wish information on. In general, these are studies to determine the cost of performing various services on the railroad, and to measure one method of operating against another. As statistician I have access to all the company's original books and records. I am familiar with the reports made by the G. N. to the Washington Tax Commission and the D. P. W.

I have prepared a study to determine the revenues and expenses of the G. N. in handling its intrastate business in the State of Washington. I have been engaged in that study since about June 15, 1934 (St. 29). You ask what sources of information I have used. I have used the records and documents in our general office, the annual reports to the D. P. W., and also some special studies. You ask if, in the case of the special study that I used, I have brought with me all of the underlying data to which I referred. Yes, sir, the basic data is in the court room. G. N. Ex. "11" is an exhibit prepared as a result of my study. The results shown therein are correct to my best knowledge and belief. You ask me to explain Exhibit "11".

The most logical way, I think, to explain the exhibit would be to start from the final page and work through the exhibit to the first page, because it is built up on that principle. And from pages 16 to 27 I have included on those pages the data relating to yard (St. 30) switching costs, that is the yards where we have regularly assigned switch engines, our major terminals. So I will start with pages 25, 27 and 27, which are similar in character, and reflect what is ordinarily known as the engin--hour breakdown. These pages are the result of an actual field study conducted during the seven days ended June 15, 1934. In [fol. 196] making these studies we instructed the switch foreman—those are the men in charge of yard switching crews, to keep a daily record of every movement they actually made during their shift, each shift, consisting of eight hours. And they tabulated this information on cards in a manner similar to the information shown here. The original reports made by the switch foremen are in the

court room. These terminal studies were conducted under the supervision of certain operating officials.

The information shown on pages 25, 26 and 27 will be used later in the study, and they are really the basic information for determining switching costs per car (St. 31). Pages 23 and 24 relate to the cost of maintenance and operation of the major terminals in the state of Washington for the seven-day test period. And maintenance of way and structures is a matter of record—the cost of maintenance of way and structures is a matter of record in our general office as far as the yard switching costs are concerned. And the costs were based on the annual average of the three years ended December 31, 1933. Under maintenance of equipment we obtained the cost of steam locomotive repairs, depreciation and retirements on the basis of the average cost per locomotive mile of those items for each class of engine used in these terminals. In other words, we have many different classes of engines. Some of them are, in accordance with their weight, more expensive to maintain, and by using the engine class we were able to develop a definite figure as to the maintenance cost. Those were accounts 308 to 310—Transportation expenses. In the case of both maintenance of way and structures and maintenance of equipment, I used three-year average cost figures for the three years ended December 31, 1933 (St. 32).

(The witness was then asked what he had to say of the propriety of using a three-year period instead of the figures for 1933. Plaintiff's counsel objected on the ground that the witness was an accountant, not an operating man, and [fol. 197] was not shown to have knowledge of the condition of the road either at the beginning or end of 1933, and whether or not there was any deferred maintenance. The objection was overruled (St. 32-33). Whereupon the witness testified:)

I may answer in this way, that in my experience as an accountant and statistician I have never seen maintenance of way and structures and maintenance of equipment expenses based on one year alone. I have never seen any statistics to that effect. And by using only one year, especially for maintenance of way and structures, I don't think you get a complete picture of the situation. For example, I would take for an example if a road has some large washout or a bridge destroyed, it may cost a large sum to re-

store it, and they may elect, instead of putting all of that cost into the year in which it happened, to spread it over three or four years. And you can readily conceive of some yards whose business was so poor they spend little or no money for maintenance. And if you would take that year, your maintenance costs, of course, would not reflect the true condition. And another thing that I might mention, the G. N. during this present year has borrowed between five and six million dollars from the U. S. government under the PWA fund to use for maintenance, which should have been done prior to this time, but owing to the depression and so on we did not have the money. And this money that we borrow must all be spent in the year 1934. In other words, you cannot carry any of that expense over into the next year. So if you were to use the year 1934 alone, if this study was based on the year 1934 alone, then your maintenance costs (St. 33) would be quite high in accordance with the plaintiff's theory.

(Plaintiff's counsel thereupon moved to strike the testimony contained in the last paragraph for the reason that the witness was not qualified to testify, and that the portion relating to the Federal Loan and the conclusions the Federal officers may have arrived at was not material, and was pure hearsay. The motion was overruled (St. 34). Whereupon the witness continued:)

[fol. 198] You ask if the money actually spent on the maintenance of the railroad in a given year measures the deterioration of its property during that year, necessarily. No, sir, the upkeep of your property is based on two factors, one due to the wear—due to weather conditions, and the other due to use. Now it has generally been conceded by maintenance engineers that two thirds of your depreciation is due to wear and one third to use. So one year would not reflect true conditions as regards maintenance of way. That is, a railroad might spend the money for maintenance when it had it, but nevertheless it would be incurring the damage and deterioration of its property by the action of the elements when it did not have the money to spend. And the same may be said of locomotives and freight cars. They deteriorate, too, through age and obsolescence, (St. 34) regardless of the use in a particular year.

Pages 21 and 22 of Exhibit "11" have been prepared to show the cost per element of switching in the terminals re-

ferred to. In other words, the information shown in the first two columns "Description of Service and Total Hours" was brought forward from pages 25, 26 and 27. The numberals indicated in the column headed "item number" will be later used in showing the movement of cars through the terminal. In other words they will be code numbers, a little later in the exhibit. The third column on pages 21 and 22, total cars, are also the result of our field study. The switch foreman in (St. 35) making their reports also gave us the number of cars, loads and empties, handled during the seven-day test period. The next column "Number of cars handled per Hour" is simply the division of the total hours into the total cars. The cost per engine hour is again brought forward from sheet No. 24. That item is shown at the bottom of Sheet No. 24. And the cost per car in each element of service is again obtained by dividing the number of cars handled per hour into the cost per engine hour. And later in the exhibit it will be shown how these costs per car are applied.

[fol. 199] Now turning to pages Nos. 16 to 20, inclusive, which are the final pages in regard to the terminal studies, I will explain how we arrive at the switching cost per hour. On page 16 it will be noted that we have shown information for the Hillyard, Spokane terminal, over on the left-hand side of the sheet. Hillyard is the G. N.'s large classification yard adjacent to the City of Spokane. I have considered the terminal as one because they are adjacent and the same engines work in both. In Item 1 we show the movement of Hillyard class yard to Spokane industries. Now you will notice under elements of switching service performed, there are seven code numbers and I will interpret those code numbers by referring to page 21. You will notice at the top of the page, on page 21, item 1 classification "Hillyard". That is referring to this same item, the one on page 16. Now that cost would be 55.5 cents. That is the first element that we are considering (St. 36). Item 9, again referring to page 21, is the weighing of cars. This particular group of cars were weighed. So you would add another item of 64.4 cents. The next item 3, referring to page 21, is transfer service between Hillyard and Spokane, and adding another item of 52.9 cents. Item 6 industrial switching at Spokane would add $2.04, approximately. I have two sixes there. That is loaded move-

ments into the industry. You will notice the item says G. N. line haul cars terminated there. That is the movement in. Now we have followed the empty movement of that car away from the industry. In other words, the car, after being made empty at the industry, must be taken back to our classification yard again. It is going out of that service. So that the second 6 refers to the empty move from the industry, and we again apply the empty move cost of $2.04. Item 3 again transfers the car from Spokane to Hillyard, which is our main classification yard in that district. Therefore, adding another cost of 52.9 cents, and when it reaches the classification yard, the car is classified and put some place for future use. That again adds [fol. 200] 55.5 cents. The sum of all of those items amounts to $6.91 as shown under the heading cost per car. And our investigation showed that during this seven-day period two cars were handled in that manner. Therefore the total cost of handling those two cars was $13.82. This explanation is typical of the way I have handled all the cars. Now this information relates strictly to intrastate cars handled during (St. 37) this period. We had the car numbers of every intrastate car moving and then after having obtained that information we sent a list of each official of each terminaal studied, and they traced the movements through for us, and the movements, as I have shown here, are the actual movements.

This study relates to carloads, but I have also attached to that loaded car any empty movement which would be proper to assign to it (St. 38).

Pages 16, 17 and 18 refer to strictly carload business intrastate. Pages 19 and 20 refer strictly to L. C. L. business intrastate. By "L. C. L." I mean "less than carload," or merchandise traffic. You ask me to make an explanation of the handling of a typical L. C. L. shipment. On page 19 under the head of Hillyard-Spokane Terminal G. N. haul line cars terminated, Item 1 shows from Spokane class yard to Spokane freight hours. The Code "2" relates to classification at Spokane. That is (St. 39) the loaded movement. Code "7" relates to freight house switching at Spokane, the loaded movement. And again we use Code "7" for the empty movement away from the freight house, and classification at Spokane. That covers all of the movements on eleven cars during this seven-day

period. That is the cost of $2.27 a car is obtained in the same manner that I explained for carload traffic. That was what we call L. C. L. freight. In other words, it is handled under a different rate, and it was strictly less than carload local traffic. On page 20 you will notice in the lower right-hand corner that I have taken care of that situation. The total switching cost for the L. C. L. traffic [fol. 201] was $675.99, of which 77.78 per cent was chargeable to intrastate L. C. L. traffic, reducing the cost shown of $676 to $525.79, which puts that cost strictly on an intrastate basis. Plaintiff's counsel asks if I later reduced this L. C. L. movement to terms of car movements. I handled this feature in somewhat a different manner. Instead of using it in relation to cars, I have used these costs in relation to revenue net ton miles. In that way you avoid duplication. You see (St. 40) the same cars represent moving in Hillyard-Spokane terminal, and the identical car may be moving in Interbay, Seattle, and in that way it would be rather difficult to determine what would actually be the cost for one car. So by putting it on a revenue net ton mile basis, I think you overcome that feature of it (St. 41).

That completes my terminal study. That covered the week of June 9, 1934. You ask what consideration I gave the question whether that week was a week representative of operation conditions in 1933. Of course, we were obliged to make this study rather hurriedly because we wanted to get ready for this case and it so happened that the choice of this week developed that the engine hours for this seven day period as compared with the year 1933 were not 1/49 of that year, indicating that our cost would be somewhat understated. Instead of being 1/52nd, it would be 1/49th. This is the engine hours that are applicable to both intrastate and interstate switching. You ask why a week in which we had 1/49th of the year's business would produce lower costs per unit of traffic than a week in which we had 1/52nd of the year's business. Well, it indicates that your volume of yard switching locomotive miles are greater during that week and, while that is true, there are a great many costs which would not be variable with the locomotive hours. You have certain fixed costs in a terminal and therefore, by (St. 42) dividing all this number of inflated locomotive hours for the seven day period, you are reduc-

[fol. 202] ing your average cost. When the volume of business is greater, the cost per unit of traffic is less. That is because a large proportion of the elements of railroad cost are constant, regardless of the volume of traffic.

Referring to Ex. "11", page 15. In preparing a study of the cost of operations, there are always various accounts under the I. C. C. classification and, as included in the D. P. W. annual report, accounts that must be treated as indirect. In other words, it would be very difficult to say how much would be chargeable to this account and how much to that account so, after determining the charges to accounts which we may term as direct, we apportion the balance of the accounts on a percentage basis. In other words, they would be apportioned on the relation of the direct to the indirect. For example, on page 15 we show transportation expense freight proportion after excluding the amount which I have included in our terminal study for transportation expense and as shown in item 1, that figure is $1,786,380. That item is based on figures in our annual report for the year 1933. In item 2 I show (St. 43) what we have considered direct expense in our study of train operations which are wages of train engine men and motor men, wages of train men, fuel, water and lubrication and other supplies for train locomotives, engine house expense—train—station employees, station supplies and expense. Those are the direct accounts which you will find in my exhibit on later pages. And item 3 is merely the difference between item 1 and item 2 which will be used as indirect expense and item 4 is the percentage of the indirect to the direct cost and that is typical of the way in which I have developed a percentage of indirect expense to be applied later to the direct cost.

The items under "General" can be explained in the same way. In other words, referring to item 5, I show a total operating expense, freight exclusive of general expense for the calendar year 1933 excluding yard switching cost, [fol. 203] freight proportion in percentages charged to transportation charges $3,747,649. Now, the way I arrived at that figure was to—well, now the total operating expenses for the year 1933 were first taken from our annual report to the D. P. W. That would include maintenance of way, maintenance of equipment, traffic and the road proportion of (St. 44) transportation. I have thrown out of

the transportation the amount chargeable to yard service which would leave $1,786,380 so the total of those four general groups of accounts would be the same as shown for item 5. Now, under general expense, the total was $233,497 freight proportion as shown in the annual report. I have a work sheet on that.

Page 14 was handled in a manner similar to page 15 and I don't think any further comments are necessary. I also have a work sheet on that, as to my methods.

Page 13 relates to train switching expense applicable to interstate and intrastate traffic in the state of Washington only for the seven day period ended November 21st, 1933. It will be noted that while the yard study was made during June, 1934, we used this period (St. 45) of November, 1933, for the road cost study. The first group of accounts are the maintenance of equipment charges relating to locomotive repairs, depreciation and retirement. Those are the direct maintenance of equipment expenses which we have used in the study. The unit costs are based on the three year average and we have separated these costs between through trains, local trains and the freight proportion of mixed trains. The cost is based on the locomotive miles. For example, under through freight trains, we found that during the test period our locomotives made 206 miles in switching service. I mean by that train switching where we have no terminal service. At intermediate stations and initial and final terminals applying the unit cost shown in column 2 to the locomotive miles we developed the total cost for the maintenance of equipment proportion applicable to trains switching in the third [fol. 204] column. Then, after having obtained the direct expense, we add to it 10.82 & as developed on page 14 to cover the direct proportion of maintenance of equipment expenses and we further add 4.85% of $113, as developed on page 14 to cover the proportion of the general expense applicable to maintenance of equipment. I add the indirect expense first before taking the proportion for general expense (St. 46). The indirect expense is applicable to maintenance of equipment expense. General expenses are applicable to the total maintenance of equipment again including both the direct and indirect. Therefore, it is proper to add the 4.85 to $113.00 rather than the $102.00. Now, under transportation expense the direct accounts are applied for

train and locomotive, water for train, locomotive lubricant and other supplies and engine house expense—train—and there we again use the 206 locomotive miles times the unit cost per locomotive mile, which produces a total direct cost of $140.00 for locomotive operation in through freight trains and the same information being shown for local freight trains and mixed trains of freight proportion. Following item 4 we show the wages of train engine men and motor men and wages of train men who were employed on these trains during the seven day test period. Those were actual wages taken from time slips, and, in this connection, it will be noted that I changed from locomotive miles to train hours as a unit, because that is more appropriate when you are considering wages and, on that basis, I developed the wage cost for through freight trains, local trains and mixed trains. Now, the total direct expenses as shown in item 6 are increased by 23.70% as the indirect proportion of transportation expense or a total of $473.00 to which we add the proportion of general expense of 5.40, making the total for transportation expense of $499.00. Now, the grand total of train switching expense is the sum of item 2 and item 7 of (St. 47) $618.00 and on item 9 we show the total gross switch loads and empties of these trains during the seven day test period and on item 10 [fol. 205] we develop the train switching cost per car which, for through freight trains, was 78.7¢, local freight trains 90.4¢ and mixed trains freight proportion 86.3¢.

Page 12 still is dealing with road train operation but eliminates the train switching feature and this is also separated between through freight trains, local freight trains and mixed trains freight proportion. Page 13 relates to switching only. Page 12 has excluded the train switching cost. Now, under maintenance of way and structures, we have used a gross ton mile base because I think that reflects the use of your trackage and other maintenance of way appurtenances better than any other figure you might use and this also has been separated between the three classes of trains. The maintenance of way and structures, item 1, includes the indirect proportion to which I add 4.85 as shown on page 14, to reflect the proportion of general expense applicable to maintenance of way (St. 48). In Item 2 I show the total maintenance of way expense applicable to the test period for road freight train service. In item 3 we deal with maintenance of equipment, exclud-

ing train switching, of course, and there are the same three direct accounts, repairs, depreciation and retirement. That is a three-year average based on the locomotive miles during the seven days period multiplied by the average unit cost based on the three years and adding 10.82% to the total direct expense produces the cost shown in the item marked "Total" following the item "add indirect proportion". Plaintiff's counsel asks if I used the three-year average in all these things. Wherever I have used the three year average for direct cost. I have used the same period of time for the indirect, and also for the general expense. Now, in transportation expense I am considering the same direct cost which I did under switching expense on page 13 and the same number of locomotives miles is used for the maintenance of equipment accounts and the wages of train and engine men are the same or are as reported from the time slips for this seven day period. This is a special study. You ask if all these other trans- [fol. 206] portation expenses and maintenance (St. 49) of equipment expenses are all amounts reported for the year in State operation. The wages of train men were shown direct for this period and cost per locomotive mile as shown in group 5 and were based on information concurrently kept in the general office. Coming to line 8, we have the total transportation expense including a proportion of direct and a proportion in general. The grand total of those items is shown on line 9 and we then bring down from item 1 to line 10 the gross ton miles shown and produce the average cost per hundred gross ton miles shown on line 11, that will be used later in the study (St. 50).

On page "12" and the other pages I have been explaining, the figures are based on a period of seven days in the month of November of 1933. The figures that were used in my preliminary cost study, covered by pages 16 to 27, were based upon a week in the month of June, 1934. You ask why we used different weeks for the two studies. I was requested to make a study for the G. N. of the cost of handling intrastate traffic to the middle of June, 1934, and of course, to get a true picture of yard switching costs it is necessary to make a current study, and that was the reason that we made the study in June of 1934 for yard switching costs. There is nothing in the company's current records from which you can make such a terminal cost

study as I made in the month of June, 1934. You must get a field picture of terminal operations in order to get the true costs. That is not true of road haul costs, because we had sufficient records, such as conductors' train reports and other information from which we could develop the (St. 51) data shown on pages 12 and 13 of this study. The conductors' train reports to which I referred in making this part of my study are in the courtroom.

The next page number 11, relates to revenues earned within the state of Washington during the entire year 1933. Page 11 separates these gross operating revenues between [fol. 207] intrastate and interstate traffic, and also between the amounts apportioned to freight and passenger respectively. I think the exhibit is self-explanatory, and I shall not go any further. In certain items I have apportioned the entire revenue to freight or the entire revenue to passenger service, and others where I have divided the account as between freight and passenger (St. 52). Plaintiff's counsel asks me to explain how I did this. From account 101 to probably 133 inclusive, the annual report indicates clearly as to whether the items would be applicable to freight or passenger. From account 138 to and including account 152, it is difficult to get a correct proportion of the assignment to freight and passenger. In other words, it would be necessary to go over thousands of items of bills, and so forth, to determine that. So those accounts from 138 to 152, inclusive, are apportioned between freight and pasenger on the basis of the relationship of the direct allocations to freight and passenger in the account preceding the ones named.

Page 10 of the exhibit relates to the assignment to intrastate traffic of a proportion of the cost of reproduction new, less depreciation, as of I. C. C. valuation date, June 30, 1915, plus additions and betterments to December 31, 1933, to roadway property and equipment in the State of Washington. This exhibit indicates that of $122,038;008, $39,564,102 are applicable to intrastate traffic. This figure, as the statement indicates, was obtained by finding the relationship of intrastate operating expenses to total operating expenses in the state for the year 1933.

On page 9 I have developed the intrastate operating expenses applicable to certain revenue accounts other than the freight account, 101, as shown on page 11 just de-

scribed. In other words, the joint facility rent (St. 53) income and joint facility rents were obtained on the basis of the relationship of intrastate operating expenses to the total expenses within the state for the year 1933. And it will be noted under the heading Operating Expenses intrastate I have shown the expenses applicable to account 101, [fol. 208] freight revenue, shown on page 2, which I will explain later, and also the expenses applicable to revenues other than account 101. And the passenger proportion of operating expenses is also shown. Item 5 relates to Washington State Taxes applicable to intrastate business, and that computation was based on the relationship of Washington intrastate revenues to the gross operating revenues intrastate and interstate in Washington for the year 1933. In other words, "Item C" indicates a percentage of 15.38 as applicable to intrastate, from which I have developed the taxes shown in Item "F". The $77,627 in item 4, Account 508, page 9, is the rent the G. N. received from other railroad companies using its facilities in the state of Washington. In that amount was included $12,556 of taxes that had (St. 54) been paid on those facilities by the G. N. that was reimbursed to the G. N. by those tenants. So I deducted that amount in determining the net credit. In reaching the figure of $1,238,385 shown as Washington taxes in item 5 (b), I first deducted that figure under Account 508 of $12,556 taxes that were reimbursed to us by other companies. The $1,238,385 shown in item 5 (b) is the net amount of taxes that were borne by the G. N. on its properties in the state of Washington. I did not include in the $1,238,385, the taxes we were required to pay on property covered by the joint facilities, where we were the lessee. We treated those as rentals. Under account 541, at the top of the page you will find $859,089. That includes both taxes and rental (St. 55). This $859,089 was the total price we paid those other companies in interest on their investment and in reimbursements of taxes they had originally paid for the privilege of using their tracks in this state during the year 1933. The taxes included in that amount were $256,406. I have apportioned Washington State Taxes on the basis of intrastate and interstate revenues in Washington. I have allowed Washington a mileage prorate of interstate revenues in making this apportionment (St. 56).

[fol. 209] (The witness was then asked to state the reasons why he thought such mileage prorate of interstate revenues was proper. Plaintiff's counsel objected on the ground that the witness was not shown to be qualified to pass upon that question. The objection was overruled (St. 57). The witness then testified:)

I have given some thought to the matter, and in view of the fact that this is rather an important question I have prepared a memorandum which I shall read into the record, if satisfactory. I have several reasons why I think that the present method of apportionment is correct.

First. It is the method long prescribed by the D. P. W.

Second. It is the method used in all other states through which the G. N. operates.

Third. While other methods have been suggested, none have ever been agreed upon, and the I. C. C., after holding extended hearings, failed to make any decision.

Fourth. Any different method would have to be agreed upon by all the states and the I. C. C., and no such agreement is obtainable, as demonstrated by the proceedings before the I. C. C. in various cases. And I might cite as an example the case in connection with I. C. C. Docket 17,000, part 7.

Fifth. The argument that Washington's mileage proportion of interstate revenue should be augmented rests upon the contention that expense disproportionate to mileage is incurred at the Coast Terminals. Offsetting this, however, is the fact that operating expense disproportionate to mileage is incurred in other states. Examples of those are:

(a) Mountain operation in Montana, a condition which has been alleviated in Washington by the Cascade Tunnel, which very much reduces the operating expense formerly incurred in this state.

(b) Extremely cold weather on the central and eastern part of our line, which reduces both mechanical and personal efficiency.

[fol. 210] (c) Treating of water for locomotives on the plains, no similar expense being required in Washington.

(d) The fact that other states do not handle bridge traffic alone, but also have their own local expenses of originating and terminating traffic. Mr. Lonergan testified the other day that the Northern Pacific in North Dakota has as much originating traffic as through traffic. The same condition to at least an equal extent should obtain on the G. N., as we have practically the same amount of branch mileage in North Dakota as that of the N. P.

Sixth. The assumption that a mileage prorate of revenue fails to recognize the value of the traffic contributed by the Coast Terminals rests upon a misconception of facts. The following (St. 58) figures derived from the 1933 annual report to the Department of Public Works demonstrates that the Great Northern's interstate bridge traffic in Washington is practically equal to the interstate traffic that originates or terminates in this state.

I now quote figures from our 1933 annual report to the D. P. W.

Revenue tons:

Originated in Washington	2,307,988
Terminated in Washington	1,891,431
Or a total of	4,199,419

From which we deduct the intrastate tonnage also shown in the annual report in order to avoid the tabulation of the intrastate traffic both originating and terminating in the state (St. 59). From that we deduct the intrastate tonnage of 1,564,758 because we want to avoid the duplication of that figure, and we have a total of originated and terminated tonnage of 2,634,661 tons (St. 60). The total tons handled in Washington as shown by our annual report to the D. P. W. are 3,562,159. Deducting from that figure the amount of 2,634,661 tons as originated or terminated, leaves 927,498 tons of bridge traffic passing through Washington. Now, the total interstate tons would be 1,997,401, subtract-
[fol. 211] ing the bridge traffic, interstate bridge traffic.

The annual report shows that 1,997,401 tons were handled in interstate traffic and deducting from that figure the bridge traffic, interstate bridge traffic, amounting to 927,

498 tons, leaves a total of 1,069,903 tons of interstate traffic originated or terminated. Thus, the G. N. is shown to have 927,498 tons of interstate traffic which receives no terminal handling in the State of Washington. This condition has, to a considerable degree, resulted from (St. 61) the G. N.'s California extension, which has made the G. N. a through carrier as well as an originating and delivering carrier of interstate traffic in Washington. The contract by which the G. N. is permitted to handle its California and Portland business over the S. P. & S. for bids either taking on or putting off any traffic between Vancouver, Washington and Spokane. Hence, all this traffic is bridge traffic. The total amount of bridge traffic—927,498 tons—is almost equal to the total interstate traffic originated or terminated —1,069,903 tons. Thus, as against every ton which incurs a terminal handling in Washington, there is a corresponding ton whose terminal handling is entirely in other states. It would, therefore, be necessary to apportion as much revenue from other states to Washington as would be apportioned from Washington to other states if the mileage proration were to be modified by the arguments concerning terminal handling.

Seven. The mileage and I. C. C. value of the terminals of the G. N. in the Twin Cities and at the head of the lakes which the G. N. is permitted to handle its California and (designated as "Eastern Terminals") and in Seattle, Tacoma and Spokane (designated as "Western Terminals") are as follows: Eastern Terminals, the G. N. mileage is 384. Value 54,931.

Western (St. 62) Terminals 116 miles, value $23,547. Thus, reflecting a percentage of western terminals to eastern terminals in miles, 30.21% and in value 42.86%. There- [fol. 212] fore, on the assumption that operating expense is increased in proportion to the extent and value of terminals and that revenues should be allocated to states in the same proportion, there would be more revenue to assign from Washington to Minnesota than there would be from Minnesota to Washington on a car from the coast terminals to the Twin Cities terminals or vice versa.

Proceeding with my explanation of Exhibit "11", I next ascertain, on page 8, the cost of equipment rentals applicable to intrastate traffic. I have based this information upon the relativity of the intrastate car miles in Washing-

ton to the total car miles in the state of Washington, which reflected 20.20%, which applied to the net debits to freight car hire produces an amount assignable to intrastate traffic of $28,571, and to justify this figure, I have made an analysis of our intrastate cars handled during the seven day test period, which amounted to 1321 cars of which 291 were foreign line cars, or 22%. That is not in the study but I am giving you this information (St. 63). This 22% is higher than the 20.20% I have used in the study. In other words, there is an apparent understatement of this cost of freight car hire as assigned to intrastate business of $2,546. You ask as to any special items of service of the G. N. intrastate in Washington, very largely conducted in foreign cars. I would say that practically all of our petroleum and gasoline traffic is handled in foreign tank cars. The depot of the large oil companies for the distribution of their petroleum product in the state of Washington are situated on the G. N. line between Seattle and Everett (St. 64). And from the storage tanks at those places tank cars are filled for movement to various places in Washington. I don't think the G. N. owns any of those tank cars. I think they are all foreign line cars. You ask if that is a heavy volume of business. It is quite heavy with the G. N. because oil is used a considerable extent in the state of Washington, I understand. The G. N. pays rental for the use of those cars. I think the rental is on a mileage basis—so much [fol. 213] a car mile.

Referring to page 8, passenger car rentals have been determined on the basis of relationship of passenger car miles in the state of Washington to the system which produces a percentage of 17.58 and I next ascertained that on the passenger car miles in Washington 30.89% were intrastate—well, that is not right—I next ascertained that the revenue passengers carried one mile were 30.89% intrastate which developed the cost per passenger car rental applicable to intrastate passenger traffic of $3,088 (St. 65). That includes Pullman cars. We pay a rental for Pullman sleeping cars. I think that would be the biggest factor in that item.

Referring to page 7, I now develop an expense applicable to the freight proportion of revenues as shown on page 11 other than the revenues allocated for account 101, freight revenue, and I do this by determining the operating ratio

applicable to account 101, which amounts to 51.33%. This operating revenues—applying this operating ratio of 51.33% to the operating revenues freight proportion other than account 101, produces an operating expense of $79,239 applicable to revenue accounts other than number 101 freight. Item 2 refers to the passenger proportion of operating expense intrastate. I develop this cost by using the passenger proportion of operating revenues intrastate and interstate in the state of Washington as shown on page 11 and, by using the passenger proportion of operating expense in interstate and intrastate, as reported in the annual report to the D. P. W. for the year 1933. This produces an operating ratio of 161.09. I take a one year average expense items on that. I then applied this operating ratio to the intrastate (St. 66) operating revenues passenger proportion as shown on page 11 which produced an operating expense applicable to intrastate passenger business of $888,967.

Page 6 shows the development of various averages and [fol. 214] other factors which I will later use in equating various costs in my seven day study to an annual base and I think the study on this page is self-explanatory and can be applied later when I apply it to other pages of my study in raising these costs to a year's business. It will be noted, however, that, under the item of line haul, train switching, item 9, I have developed a cost per one thousand revenue net ton miles, which I will use later in determining this train switching cost at terminals where yard switching service is maintained. I have related that cost to 1,000 revenue net ton miles which will be used in equating to a year's cost (St. 67).

The information shown on page 5 shows the cost of station service including wages of station employees and station supplies, and so forth, chargeable to intrastate traffic, and it shows that for the year 1933 the amount chargeable to intrastate business was $246,950. Under item "3-B" it will be noted that I use the tons of interstate freight amounting to 1,997,401, and the tons of intrastate freight multiplied by 2 in order to give it the same weight as interstate. In other words, assuming that it would only get one handling within the state. That amounted to 3,129,516, or a total of 5,126,917 tons, if all the tonnage would be assumed as interstate and dividing that amount into the amount

shown in item "3-B", $404,564, produces, as shown in item "D", a cost per ton of 7.9 cents. In order to determine the cost per ton for intrastate freight we therefore multiply the 7.9 by two, which produced a cost per ton for (St. 68) intrastate freight of approximately 15.8¢, which applied to the 1,564,758 tons would produce the cost of $246,950.

In preparing this statement I estimated that all of the intrastate would receive one handling. But, as I testified this morning, approximately 927,498 tons would be bridge traffic. Consequently, insofar as the station expense is con- [fol. 215] cerned there would be no cost applicable to this traffic within the state of Washington, and if on this basis I should revise this statement I would have only 1,069,903 tons of interstate traffic, which would receive station service. What I did was to apply a multiple of two to the average cost of station service in order to take account of the fact that each intrastate shipment both begins and ends in the state, while I assumed that each interstate shipment would either begin or end in the state, but not both. And my suggestion is that on the basis of my showing that the G. N. handles practically as much interstate bridge traffic in Washington as interstate traffic that either originates or terminates here, it might have been proper to have a multiple of four instead of two.

Deducting the bridge traffic as stated, I have a net amount of 1,069,903 tons (St. 69). I am quoting this from a supplemental sheet I have here, an additional sheet. Now referring again to the intrastate tons of 1,564,758, in that figure we included 728,968 tons of logs, which leaves a net figure of 835,790, which would receive two terminal handlings or 1,671,580 tons. This is also on a supplemental sheet. It would be 1,671,580 tons, if stated on an interstate basis. Now in my original study I have given logs two station expense costs, but in this calculation I have allowed for only one handling, which would produce 728,968 tons. The total of these three items on an interstate basis produces 3,470,451 tons, or at the rate of 11.7 cents per ton, which multiplied by two, to give the effect of two terminal handlings for intrastate traffic, produces a cost per ton of 23.4 cents. Multiplying the traffic, other than the logs, the intrastate traffic other than logs, 835,790 tons by 23.4 cents produces $195,575 applicable to station expense. And logs

728,968 tons at 11.7 cents a ton for one handling only produces $85,289. Added to $195,575 produces a total of $280,864 as applicable to station handling for intrastate (St. 70) [fol. 216] traffic, which compared with the $246,950, shown in item "3-F", page 5, shows that we have understated this cost by $33,914. Item 5 on page 5 shows the method of equating the yard switching expense at our major terminals to a year's basis, and as shown on page 6, item "10B" the switching cost per one thousand revenue net ton miles was approximately $1.46. The intrastate revenue net ton miles for the year 1933 as shown in our annual report to the Department of Public Works was 138,265,617, which applied to the cost of $1.46 per one thousand revenue net ton miles produces a switching cost applicable to the year 1933 for intrastate traffic of $202,256.

Turning next to page 4 of the exhibit I have developed the cost of freight car repairs, depreciation and retirements applicable to intrastate traffic, based on figures contained in the annual report to the D. P. W. for the three years ended December 31, 1933, I determined the cost per car mile including both the loaded and empty car miles for freight car repairs, depreciation and retirements of approximately 1.8 cents. That is based on the loaded and empty car miles contained in our annual report reduced to a revenue basis, divided into the amounts reported for freight car repairs, depreciation and retirements. I have not computed that anywhere in my exhibit. I have no work sheets. There is nowhere an exhibit (St. 71) where you will find that. Referring to item "1-C", which refers to page 6, item 5, we find that for every one hundred revenue net tons miles we had 5.4976 loaded and empty freight car miles which, applied to the intrastate revenue net ton miles for the year 1933 produced the car miles shown in item "E", loaded and empty, which multiplied by the cost of 1.8 cents per car mile produces a figure of $133,061 for freight car repairs, depreciation and retirements chargeable to intrastate traffic for 1933.

Item 2 relates to train supplies and expenses, and again taking my figures from the annual report to the D. P. W. in 1933, I find that the cost per loaded and empty car miles [fol. 217] is approximately 52.5 cents, which multiplied by the car miles shown in item "1-E" on page 4 produces the cost of $39,895 chargeable to intrastate traffic for the year 1933.

On page 3 I am restating the seven day period costs to a year's basis, and I think the figures are self-explanatory, because they all relate to previous pages referred to in the exhibits.

And item 6 shows that for line haul costs, exclusive of train switching for intrastate traffic, the cost was $555,371. The line haul train switching expense shows in item 9 that for the year 1933 intrastate traffic should be charged with $89,763.

On page (St. 72) 2 I have a recapitulation of all costs which are strictly comparable with freight revenue, account 101. In other words, I have included on this statement the line haul costs of line haul train costs exclusive of train switching or train switching costs, freight car repairs, depreciation and retirements, train supplies and expenses, wages of station employees and station supplies and so forth, traffic expense and yard switching expense, and as shown item 8, this amounted to $1,334,268, all of which is applicable to intrastate traffic.

On page 1-A I have shown the relationship of intrastate and interstate revenue net ton miles for the month of November, the seven day test period and the year 1933. And the statement indicates very clearly that for both the month of November and the seven day test period that the periods used for the study were relatively heavy as compared with other months of the year, and therefore the costs used in my study would have a tendency to be understated. (St. 73.)

Page 1 and the final page of this section of my exhibit shows the gross operating revenues brought forward from page 11. The operating expense brought forward from pages 2 and 7. The railway tax paid as shown on page 9. The joint facilities rent, equipment rent as shown on pages 8 and 9 and the net railway operating income as shown in item 9, which amounted to $202,458. In item 10 [fol. 218] I have shown the cost of reproduction new less depreciation as of I. C. C. valuation date June 30th, 1915, plus additions and betterments to December 31st, 1933, of roadways property and equipment in Washington intrastate proportioned as shown on page 10, amounting to $39,564,102. Item 11 shows that the annual rate of return earned upon this reproduction cost less depreciation was 61/100ths of 1%. Item 12 shows the interest on the repro-

duction cost at 5¾% per annum to be $2,274,936 and item 13 shows that the Washington intrastate traffic for the year 1933 failed to earn a return of 5¾% per annum on the reproduction cost of $2,072,478.00.

The next section of my exhibit covers pages "A" to "F" inclusive, and relates (St. 74) to the results of our intrastate operations in Washington if the cost study were based upon intrastate revenue reported to D. P. W. after the elimination of revenues received from interstate and foreign commerce as reported in amended answers to interrogatories.

On page "F" I show the reproduction cost of property less depreciation in the state of Washington applicable to intrastate traffic, which amounts to $29,733,312, as compared with $39,564,102 shown on page 1.

Turning to page "E", I developed a cost applicable to intrastate traffic for the joint facility rent, income and joint facility rents which, in the case of the G. N., amounted to a net debit and is shown in item 7-e. This amounted to $93,119, the freight proportion, as compared with $158,024 shown in item 4-g of page 9 of exhibit 11. The passenger proportion chargeable to the joint facilities account net debit as shown in item 7-j of page e amounted to $100,336 as compared with $99,403 (St. 75) as shown on page 9 of exhibit 11. The total of the freight and passenger proportions as shown by item 8, amounting to $193,455.

Page "D" relates to the equipment rentals chargeable to [fol. 219] intrastate traffic and shows that, for the higher freight cars, intrastate traffic should be charged with $16,825 as compared with $28,571 shown in item 3-a, page 8 of this exhibit and the passenger proportion $3,141 as compared with $3,088 shown by item 3-b on page 8, making a total as shown by item 6 of page "D" of $19,966.

Page "C" relates to operating expense chargeable to intrastate traffic and shows by item 3 that the operating expense would amount to $1,730,361, as compared with $2,302,474 shown on page 1 of the exhibit. Railway tax accruals following the same percentage of 15.38%, which is the percentage of Washington intrastate taxes based on gross operating revenues applicable to the intrastate business shown by item 4-c, amounted to $335,247, as compared with $516,489 shown on page 1 of the exhibit. In it we have transferred certain freight from intrastate to interstate

traffic. You ask if I only changed item 101. 101, and in account 143 there was an item of $25,000 (St. 76) for wharfage which was transferred. That was in account 143, Miscellaneous. And in account 110 there was a small charge transferred from intrastate to interstate. I don't have that amount now. It was a small item. This page shows the freight revenue restated to be $1,622,644. Passenger revenue $557,116, total revenue $2,179,760. The figure is taken from the report to the D. P. W. (St. 77), schedule 710, page 700.

Page "A" is a recapitulation of the pages B to F inclusive and shows that the gross operating revenues amounted to $2,179,760 or operating expense, $1,730,361. The final results shown by this portion of my exhibit amount to a net railway operating deficit as shown by item 9 of $99,269 and item 11, of course, would be a deficit rather than a rate of return earned and item 13 shows that we fell short by $1,808,934 of earning a return of 5¾% per annum on the cost of reproduction new less depreciation of property and equipment in Washington assignable to intrastate traffic.

By way of general explanation, pages 1 to 27, inclusive, [fol. 220] of Exhibit "11" are based upon the division of revenues between interstate and local business as reported to the D. P. W. for 1933 (St. 78). While pages "A" to "F", inclusive, are an adjustment of the first set of figures to the division of the business between local and interstate as reported in the G. N.'s amended answers to the interrogatories in this case.

You ask me whether, prior to this case, an exact and precise classification of the business as between interstate and local has ever been a matter of importance. No, sir, this is the first time in the history of the G. N., I think, that this question has arisen. Since the annual report was filed, there has been an analysis and recheck of the business for the purpose of classifying it correctly. The result of that analysis and recheck was reported to this court in the amended answers to the interrogatories.

(The witness indicates bundle in which the switch cards used as the basis of his terminal study are contained.) (St. 79.)

Def.'s Ex. "12" is the card used by the switch foremen in their terminal except the Seattle Inter-Bay terminal.

Def.'s Ex. "13" was the card used in the study at our Seattle Inter-Bay terminal. Def.'s Identification "14" contains a complete record of all switch movements made by each switching crew during the seven days ended June 15th, 1934, at each of our major terminals in Washington, prepared on the forms as identified exhibits number 12 and 13. There were approximately 240 men engaged in these studies (St. 80).

I have heard the testimony of Mr. Percival, and his general description of the services that interstate and intrastate cars would receive both at the points of origin and destination, and at these intermediate classification yards, sometimes called terminals. You ask if in my cost study, [fol. 221] wherever a car, whether interstate or intrastate, has received one of these intermediate classifications, I have applied the cost of that work to that car. I might explain the study in this way: When the foreman secured a card for their work for the seven days, they included all cars switched both interstate and intrastate. For instance, they might classify fifty cars, 25 of which were interstate and 25 intrastate, there would be one charge assigned to that movement, and then when I made the—applied the cost to only intrastate cars the result would be—the method of doing that would be to apply this average cost to an intrastate car. In other words, after getting this information from the switch foreman I merely applied the cost to intrastate cars (St. 118). The remainder of the costs of that service in general are in the G. N.'s account as applied to the interstate cars. In addition, when a car, whether interstate or intrastate, receives a terminal service at the point of origin or destination, I have similarly applied the cost of that work to that car. The valuation of the cost to that movement would be applied in the same manner as I described for classification. My study related specifically to bring out the cost of handling the intrastate business, and to do so I had to set the cost of switching of traffic. It was intermingled in the yards. A switch engine does not handle intrastate traffic in one movement and interstate traffic in another. And the remainder of the expense that was incurred within the state of Washington on interstate cars would be in the general expense of the G. N. in the state of Washington (St. 119).

There were approximately 60 employees engaged in the terminal cost study. In preparing Exhibit "11" it was also necessary to use the conductors' reports for the week ended November 21, 1933. You ask what use I made of the conductors' reports contained in the bundle marked Def.'s Ex. "15". The data shown on each train conduc- [fol. 222] tor's report was tabulated onto a large sheet, which showed the date of the train run, that is the date the train started its movement, the engine number and the train number when it was assigned a number, or if it was an extra train it was so indicated, and the name of the conductor. In addition to that it showed the number of locomotive miles in both road service and in train switching service—that is, the principal locomotive miles, the helper locomotive miles, the loaded car miles separated between intrastate and interstate, the gross ton miles separated in the same manner, the net ton miles—revenue net ton miles also separated as between interstate and intrastate. And these reports also were sent—or copies of these reports were sent to the division superintendent's office on which he noted the wages for the particular (St. 120) train runs or wages of engine men and train men, in order that there be no mistake as to what particular trains we wanted the information upon. And after tabulating each conductors' report, each and every one for the seven days, they were recapitulated as to the units that I have just mentioned. The recapitulations are shown on the sheets contained in the bundle marked Def.'s Ex. "16" for Identification. You ask if the three bunrdles marked respectively Def.'s Exs. for identification "14", "15" and "16" contain the basic data to which I referred in making my study, Exhibit "11", other than the information I obtained from the company's general books and records or from its report to the D. P. W. Yes, sir, these bundles, of course, Exhibits number "15" and "16" refer to the train portion of the study, and Exhibit No. "14" refers to the yard portion.

(Def.'s Ex. "11" was thereupon received in evidence with the understanding that plaintiff's counsel might save his objections thereto by moving against the same after the cross-examination of the witness. (St. 121-2.)

(Def.'s Exs. "12" and "13" were thereupon received in evidence over plaintiff's objection that the same were im-

[fol. 223] material. St. 122. The witness then continued:)

I made a study to determine the estimated annual reduction that would occur in the G. N.'s net railway operating income in Washington if the transportation of intrastate traffic were to be discontinued. It was during the year '32. I think from about March on through until June or July. It took that long to get the study completed. The basic data was obtained in March, 1932. The result of my study is contained in Def.'s Ex. "17", consisting of sheets 1 to 13 inclusive (St. 123).

(The testimony of the witness with respect to this exhibit is omitted, inasmuch as the facts sought to be established thereby are not disputed. St. 124-127.)

Def.'s Ex. "18" contains the conductors' train reports for the week ending March 9, 1932, and Def.'s Ex. "19" contains the recap of the conductors' reports for the same week (St. 128).

(Def.'s Ex. "17" was thereupon received in evidence. St. 128.)

(The witness was then asked if he was acquainted with the G. N.'s relative volume of traffic in the years 1932 and 1933, to which he replied that he had the annual reports there. Plaintiff's counsel thereupon objected to the witness answering unless the reports were put in evidence. St. 129. The objection was overruled. St. 131. Whereupon the witness testified as follows:)

In Washington the revenue net ton miles for the year 1932 were approximately 522,337,000. In 1933 they were approximately 598,601,000, or an increase of about 13%. Based upon the result of my study of the traffic in 1932 and the volume of G. N. traffic in 1933, you ask me what I say as to the saving the G. N. could have made from withdrawing from its intrastate traffic in Washington on January 1, 1933 (St. 131). I think the relative saving would be about the same for the year 1933 as it was in 1932. That is to say, the saving would have amounted to something like 14% of the revenue lost.

On page 401 of the annual report of the D. P. W. for the [fol. 224] year 1933 is shown a total of 8,361 miles of road

operated for the G. N., of which 1,171 miles are in the state of Washington, or approximately 14% (St. 132).

On cross-examination he further testified as follows:

I do not supervise the making of the G. N.'s annual reports to the D. P. W. of this and other states, but I have access to all the reports and records of the G. N. Those reports are under the supervision of our comptroller, who is the head of our department. You ask who determines whether a given operation is interstate and which is intrastate in making out these reports. Oh, there is possibly fifteen or twenty people that would be involved in all of the revenues shown there. For instance, the accounting department is divided into various other sections. One department handles the freight revenue, another department the passenger revenue and still other departments handle various other accounts shown in the annual report, so it is hard to say just who would have charge of all of those revenues. As I say, there would be more than one person involved. You ask who would determine, from the standpoint of the company in making these reports, whether a given shipment in the state of Washington originating in the state of Washington was or was not intrastate business. For example, account 101, freight revenue, our auditor (St. 145) of freight receipts would be the one to decide from weigh bill inspection as to whether a shipment is intra or interstate, so far as freight revenue is concerned. That has been true for a number of years.

You ask if we transferred to the interstate account, the kinds of shipments which were reported in our 1933 report to the D. P. W. as intrastate business. I did, for the purposes of this exhibit only. You ask when I made this change and who instructed me to do it. I made the change since coming to the west coast under the directions of our attorney, that is as far as the exhibit is concerned now. [fol. 225] That is all I was interested in (St. 146). You ask how long ago that was. Well, within the last week, this particular portion of my exhibit was prepared, from pages A to F inclusive. They only mentioned this to me about a week ago. You ask if I was supposed to be the one that was making this study for the purposes of determining the earnings on intrastate business in this state. I

was furnished with all the information from which to make my deductions, that is as to what our results would be with the intrastate traffic. First I made the study in accordance with our annual report. I was instructed so to do by our legal department in Washington. I was requested last June to start the study based on our annual report to the D. P. W. and that was the main study from pages 1 to 27 inclusive. As a result of that I made the study contained in that portion of Def.'s Ex. "11", which is numbered "1", "2", and consecutive numbers. That was completed about a week ago (St. 147). When I got here, I submitted that study to counsel in Seattle, just as it was with the exception of pages "a" to "F" inclusive. You ask if it is true that after examining that study I had made, the G. N.'s counsel, for the first time, suggested that I hadn't put enough operating revenue over into the interstate side or that I had put too much operating revenue over into the intrastate side. Well, I don't think I was given that impression by our attorneys. My first study was based on the annual report submitted to the D. P. W. and, of course, I know that there are many questionable items in that report and as to whether they would be interstate or intrastate revenues and those are the items which were eliminated from the intrastate revenues in the preparation of pages A to F of the exhibit. I attended the meeting with the Tax Department during last June, I believe it was, and went over all these matters and I know there are quite a good many items that are not properly classifiable as intrastate revenues in our report to the D. P. W. (St. 148). For that reason I prepared pages A to F of the exhibit, to eliminate those. I did [fol. 226] that sometime within the last two weeks. You ask who it was told me what particular items should be switched over from the intrastate revenue items to the interstate revenue items. I did that under instructions of my attorneys. You ask if they told me which ones to switch over. Well, some of our other accountants from St. Paul prepared that information and it was given to me to make this particular portion of the study. You ask when that information was prepared. Well, I am not assigned to that particular portion of the work, so I cannot say just when that was prepared. You ask when I received it. I only received it within the last two weeks in Seattle, after I had submitted to counsel for the G. N. that portion of the ex-

hibit in which the pages are numbered numerically (St. 149). I have a copy of what I was instructed by the G. N. attorneys to deduct from the exhibit. Plff's Identification "20" is the data which I used or based my deductions on (St. 150). You ask if Identification "20" was all the data that was turned over to me for the preparation of the supplemental portion of Def.'s Ex. "11". Yes, this is all that was turned over to me. You ask if any of that data is contained in the report to the D. P. W. No, not as shown here. You ask if it is shown anywhere except as included in other items: With the exception of account 110 and 143, all that revenue is included under revenue account 101, freight. They are included in lump sums in the annual report. You ask if they are included in larger sums than the amount stated in Identification "20". Yes, this is a part of the amount shown. You ask if they are shown in our books in St. Paul. Yes, they would be in our St. Paul records. You ask if there is anything in our books at St. Paul to indicate the interstate nature of these particular items (St. 151). I think the weigh bills would be the best indication as to whether they are interstate or intrastate. You ask if a way bill of a shipment of apples from Wenatchee to Seattle would indicate whether or not it was going beyond Seattle. It is my understanding that a weigh bill of that nature generally indicates pretty clearly whether the shipment is destined for export or not. I never saw one of them, I am just [fol. 227] quoting from hearsay. You ask if I ever saw any of the weigh bills identified in any of the so-called shipments for export referred to in exhibit 20. No, sir, my work doesn't require me to examine weigh bills (St. 152).

(The foregoing testimony was taken on Tuesday, October 23, 1934. St. 68. At this point an adjournment was taken until Wednesday, October 24, 1934, at 9:30 A. M. St. 152. At the reconvening of court the witness continued:)

I might qualify my answer to your questions yesterday by stating that I had known for some time past, in fact since March of this year that there were many items of revenue which might properly be called interstate rather than intrastate, and while I had knowledge of the approximate amount I did not attempt to make an exhibit until I came to Seattle approximately three weeks ago to determine the accuracy of the figures which we wished to throw

into the interstate revenues from the intrastate. You ask me when I found out those amounts approximately. Through our accounting department. You ask if I examined the books of the company personally. No, I did not examine them personally, but I want to make this explanation that in the general office in the accounting department my work is more or less segregated from the work from the freight auditors and other persons concerned in making this segregation. In (St. 154) other words, I prepare cost studies based on data which comes to me, and of course this revenue feature would only come to me in total. I would not look at the books to verify it in any way. You ask if it is a fact that I did not do that with any part of my exhibit; that I did not look at the books at all. No, if I had to do that this study would not be ready for maybe another six months. You ask if it is not a fact that the company's books show these various items that have been transferred from the intrastate to interstate, to be in fact intrastate. I don't know whether they do or not. I have taken these revenues as they came to me, and I would rather have the [fol. 228] next witness explain that feature of it. It is true that these revenues have been included as intrastate for a long period of years in the G. N. reports to the D. P. W. (St. 155). The separation heretofore has been in more or less of an arbitrary manner, because it was not really vital as to whether some of these revenues would be intrastate or interstate and—well, to be frank, when this tax question arose, I think it was only to the advantage of the company to then go into this segregation in more detail and determine just what was strictly intrastate revenue, and that is what we have done. The G. N. has had many rate cases in various states and before the I. C. C. (St. 156).

(The witness was then asked whether or not it was not a matter of importance in these other rate cases that the G. N. had in other years as to how the G. N. kept its accounts as between intrastate and interstate revenue. Defendant's counsel objected to the question unless it was limited to some case involving Washington rates. The objection was sustained. St. 160. Whereupon the witness continued:)

You ask if I know of my own knowledge anything about the actual fact of whether or not these movements are in-

trastate or interstate (St. 160). I think I will say I don't know. I have been furnished this statement and incorporated it in a cost study, and that is as far as I care to go with it (St. 161).

You ask whether in preparing Def.'s Ex. "17" I took the revenue divided as contained in the report to the D. P. W. or whether I took my modified showing with respect to the apportionment wherein I eliminated certain items as to interstate and transferred them to intrastate. The revenues were based on the report to the D. P. W. The saving exhibit was naturally based upon the revenues as reported to the D. P. W. That was the only logical thing to do when we were trying to consider what we would lose by eliminating intrastate traffic. It was perfectly proper to use them in the saving exhibit (St. 162). You ask which is right, [fol. 229] Exhibit "17" or Exhibit "11" (St. 163). They are both right for the information they are intended to show (St. 164).

You ask whether or not I believe that in a rate proceeding in Idaho involving the intrastate rate, I should use a mileage prorate (St. 165). In view of my statement yesterday, I don't think it is for me to say what should be done with the interstate revenues in Washington or any other state. As I stated in my testimony yesterday, a matter of that kind would have to be decided by state commissions and the I. C. C.

Idaho is practically a bridge state so far as the G. N. is concerned (St. 167). You ask if it would be proper to use a mileage prorate in a rate investigation affecting the amount of the intrastate rates in Idaho. Before answering that question I would like to make a study of the conditions in the state of Idaho as well (St. 167) as any other state through which the G. N. runs, to give an intelligent answer on that question. You ask if it is conceivable that more than a mileage prorate or less than a mileage prorate might properly be used in a study of this kind in any state. (Counsel for defendant answered for the witness that it was conceivable.) You ask why. Well, it could be conceivable if you investigated certain operating conditions in a state and found out that the state was not credited with its full share of interstate revenue, due to operat-

ing conditions which required more expense than in other states through which a road might operate. That is conceivable. You ask if the revenue from interstate shipments is not supposed to cover the relative costs in the different states (St. 168). Supposedly so, yes. The expenses in my study are localized to intrastate traffic as far as I can do so. And the expenses as reported to the D. P. W. as to interstate business are localized so far as possible. In this computation, revenue on interstate shipments is apportioned to Washington as to each individual shipment on a mileage prorate basis. The apportionment is from [fol. 230] station to station. That doesn't take into account the movements of the car in the terminals at all. Car mileage is not considered after the train reaches the terminal. In apportioning revenue on a shipment between Seattle and some point outside the state, the switching movement in Seattle is entirely ignored (St. 169).

In a shipment from Seattle to St. Paul, the cost of the terminal handling is all chargeable to Minnesota, and the state of Washington gets the full benefit of the mileage prorate of that shipment. In such a shipment Washington has a terminal handling. The middle states have their terminal costs, too, in that shipment. There is terminal handlings on a shipment moved from Seattle to St. Paul. All interstate must have terminal handlings (St. 172). You ask if I call those terminal handlings where they switch the car and make up new trains. Yes, that is all considered. You ask if I would consider the mileage prorate apportionment of interstate revenues proper if the G. N. road did not extend west of Spokane. Again we would have to investigate to find out just what the relative costs would be. I think it is difficult to give an offhand answer to a question like that. I have no opinion. You ask if I have made a study to determine whether the mileage prorate is proper as to the state of Washington as to individual shipments and the service rendered to each. No, I have never made a study to that effect. The study would have to be made not only for Washington, but for every state through which we operate. For want of a better method we have been using the method as reported in the D. P. W. (St. 173).

On page 700 of the G. N.'s report to the D. P. W. entitled "Railway Operating Revenue earned within the State," appears a footnote providing: "The figures en-

tered as 'revenues earned within the State on interstate traffic,' are compiled upon a straight mileage basis in accordance with order of the Railroad Commission and are given under protest for the reason that this Company claims that basis does not accurately reflect the revenues earned [fol. 231] within the state of Washington from such traffic.'' I am not responsible for that note being in the report and I wouldn't give my opinion as to whether or not it is correct.

(Defendant's counsel thereupon admitted that the G. N. is responsible for that note, and that a similar note had been contained in the annual reports, he supposed, for 20 years. St. 174. The witness then continued:)

Referring to Def.'s Ex. ''11'', page 9: The item under the head of Washington intrastate and interstate, account 541, Joint Facility rents, Debit, shows what we pay out in joint facility rents (St. 210). The item of $859,089 includes taxes. $256,406 in taxes are included in that amount. We paid taxes to the extent of $12,556 in the rents that we received for the use of our line. In computing our Washington state taxes, we have not added those taxes that we have to pay on the lines of other carriers of which we have the joint use. At item 5-B on page 9 I have shown only the taxes which were strictly paid by us. We did not include any taxes paid by us which we later billed to other lines. You ask if the taxes that we paid to other companies for the use of their lines plus the amount that we actually paid on our property constitute the actual taxes that we have to pay on operating property used by us. Yes, the amount that we pay to a foreign line would be tax applicable to our traffic, that is correct (St. 211). Item 5-B on page 9 indicates the taxes which were assessed and paid on our own operating property on an ad valorem basis, less what we billed to our tenant lines. We deducted the taxes which our tenant lines contributed, but did not add those we paid on other foreign lines (St. 212).

(Referring to the propriety of crediting as against the taxes paid by the N. P., the amount of such taxes paid by the companies having joint user rights over its lines, Mr. da Ponte made the following statement at this point:

''I am inclined to think you are right that we should credit those taxes. I thought so from the first, but Mr.

Peterson was doubtful about it, and we have done so. I [fol. 232] think you are correct in saying that those taxes should be deducted, the amount of taxes to be charged. We did that. As a matter of law, Mr. Peterson did not attempt to pass on it, but I did, and he did not make the exhibit in time because we did not have the time" (St. 214-5).

The net railway operating income of a railroad is the gross revenues less operating expenses, less taxes, plus or minus these joint facility and equipment rentals, whether it is a credit or debit, and that result is known as the net railway operating income. No deduction of interest on bonds is made in computing that net railway operating income. The net railway operating income reflects strictly what it is costing to operate the road. It does not go into the other fiscal data of the company. You ask if, in determining that, we add any credit item as to joint facility rents. Whichever way it may be. In the case of the G. N. it is usually a debit item. I believe in the case of the N. P. it is a credit item (St. 216). You ask if I consider that net railway operating income is the test as to whether we are making money or losing money in our operations in Washington. I think the net railway operating income is a fairly (St. 217) good measure of what a railroad is doing in the way of earning money or losing money in a state or on the system or in the United States, for that matter. You ask whether or not any charge for interest on capital stock invested or bond interest, or short term obligations or any other interest charge is made or credited in computation of net railway operating income. No. sir (St. 218). We have to pay the Pullman Company so much a mile, per car mile, for the use of their equipment, and they set a minimum charge a road should earn per car per annum. If the G. N., for instance, earns more than that minimum during a year we are paid something by the Pullman Company. But to my knowledge we have not received anything in return from the Pullman Company, owing to the poor passenger business. I cannot say whether, in Washington, we are making more or less than the minimum prescribed. I know that the system as a whole has not received anything from the [fol. 233] Pullman Company. I could not say from any figures in the report to the D. P. W. or from our books in St. Paul, whether or not the revenue from the Pullman Cars

we actually use in intrastate service in Washington reaches this minimum figure (St. 219).

The preponderance of our interstate shipments are made over our main lines. I would think that, proportionately between interstate and intrastate we do, a greater proportion would be interstate on the main lines. I think there would be a higher proportion of interstate on the main lines than on the branch lines. There is more interstate than intrastate traffic on the Portland-Seattle line (St. 221). That was shown by the seven day study. My study shows that the interstate net ton miles on the Portland-Seattle line for the seven day period were 1,096,184, and intrastate, 288,533, or a total of 1,384,717, or approximately 21% intrastate (St. 222). We did not apportion our joint facilities rents on that basis. Joint facility rents are apportioned on page 9 on the basis of operating expense. The seven day figures are the only ones we have on that. You ask if that is the principal line on which we pay joint facility rent. Yes, that represents the greater amount. I would say practically all of it (St. 223).

Referring to page 9, Def.'s Ex. "11": The total amount we paid out in joint facility rents was 859,000 plus, and the total amount we took in, excluding taxes, was 65,000 plus, and the net amount was 794,000 plus (St. 224). I then apportioned that between freight and passenger service intrastate and interstate on the basis of operating expense for the entire state. The freight proportion was 65% and the passenger proportion, 35%. You ask why I apportioned it on the basis of operating expense, and ask what relation that has to the operations on that particular line as between freight and passenger. It is a method customarily used for apportioning items of this nature. At the time I prepared this study I did not go into the question of how much [fol. 234] traffic was inter and how much intra on this particular line. I suppose our wheelage reports show the relative amount of passenger car miles and freight car miles on that particular line. You ask if that wouldn't show the relative use of the two kinds of services. Yes, I suppose it would. You ask if that would be the fairest way of determining this. Oh, it depends upon the point of view. I made the statement up on this base. I presume there are other methods, just a question of judgment as to which is correct (St. 225).

But I did apportion it according to the total amount of expense incident to passenger service in the state of Washington, as compared with the total amount of operating expense incident to freight service in the state of Washington (St. 226). You ask whether I can determine from relative expense incident to freight and expense incident to passenger service, whether a given piece of line is used exclusively for passenger service or exclusively for freight service or the proportion of each. In preparing this exhibit I merely—I used this method to secure some indication of how much of this joint facility rent debit should be assignable to intrastate and interstate traffic. It is, I think, some light on the matter and shows relatively how much we should apportion to intra and interstate. If you want to go into small sections of the line, why, I suppose there would be—well, it simply would be impossible to work out a cross study unless you studied each small section of the line (St. 228). We keep a record of our car miles on the Portland-Seattle line, and know how much the passenger car mileage and freight car mileage is.

You ask how I apportion the freight proportion to intrastate and interstate respectively. I relate that to the operating expense applicable to our intrastate freight revenues and intrastate passenger revenues as shown by item "4-F" of page "9". And the result is that I apportion approximately 30.6% or $158,124 of the operating expense to total intrastate freight expense. Whereas the relative use shown of relative net ton miles during the seven day [fol. 235] test period indicated that only 21% of the ton miles hauled over that line, revenue ton miles, was intrastate (St. 229). That seven day period indicated that. It might be greater over a period of time, I don't know. I then apportion 35% or $90,403 of the passenger proportion intra and interstate, to the intrastate alone. You ask how I arrived at that figure. On the same base I arrived at the freight, by using the relationship of the freight expense intrastate and the operating revenues intrastate. I assume that the relation between intrastate expense and intrastate revenues are the same as the relation between interstate expense and interstate revenues. I think item 4-H explains that. In other words, it says that the passenger proportion of intrastate operating expense amounting to $888,967 divided by the amount shown in item C, $2,481,135

of passenger proportion of operating expense, produces a percentage of 35.8 which, multiplied by the passenger item of operating expense in item 4-E, produces $99,403 (St. 230). All mail and express revenues are allocated to interstate according to our annual reports for 1933. I don't think it would have been a very difficult problem to determine the relative number of intrastate passenger miles hauled over that line during that week. I think it would take a special study. You say there might not have been any local revenue passengers hauled during 1933 over the Seattle-Portland line so far as anything I know is concerned. On the other hand, there might have been a great many. You ask what relation the factor I have used has to the number of passenger miles intrastate to the number of passenger miles interstate hauled over that line. It probably has some relation, I don't know (St. 231). You ask if it isn't a fact that I couldn't take the factor that I have used and determine the relative number of interstate passenger miles and intrastate passenger miles hauled over that line during this year 1933. Without investigating I don't know just how well that factor would represent the actual condi-[fol. 236] tions. You ask if the way to determine the relative amount of the rent apportionable as between intrastate passenger and interstate passenger would be to take the relative passenger miles hauled intrastate and interstate over that line. Yes, I think that would be a proper basis to determine the relative use (St. 232). I have apportioned a total of $257,000 to the Washington intrastate freight and passenger (St. 233).

Page "8", Ex. "11", is an attempt to apportion the debit balance of hire of freight cars. I know there was foreign cars handled during the November test period in intrastate traffic. I don't know how many were oil and how many other traffic. I don't know whether they were oil or what they contained. I don't know what the contents of the cars were. I don't know whether they were tank cars, or not (St. 233). I first apportion hire of freight cars on a relative car mileage basis between Washington and the system. And then as between intra and interstate I still apportion it on the basis of the car miles. I got the Washington intrastate freight car miles applicable to the year 1933 from page 4, Item "1-E". The total for the state is shown in the second item under the item the (St. 234) hire of freight

cars, thirty-seven million. That does not include cabooses. That is only loaded and empty freight cars. The Washington intrastate per car mile does not include cabooses. I apportion the passenger car rentals on a passenger mile car basis as between the system and Washington first. I then determine the Washington proportion on the basis of revenue passengers carried one mile. That is, the state of Washington is apportioned between interstate and intra on the basis of revenue passengers carried one mile, or .89 per cent intrastate. That includes passengers carried on trains that have no Pullman service at all. It reflects the relationship between all passenger miles regardless of what kind of cars they might be riding in. It is true that none of that expense should be apportioned to service where there was no Pullman cars used on the train at all. But [fol. 237] we have a substantial intrastate movement in our trains which contain Pullman cars, for (Tr. 235) instance between Seattle and Spokane and Seattle and Portland, and I think that would justify this basis. It is only where there is a deficit that we have to pay any rentals for Pullman car service (St. 236).

Page "7", Exhibit "11", I think, explains (St. 236) fully just how I arrived at that figure. You will notice under item 1-B on page 7 that I have shown total operating expense applicable to freight revenue, account 101, intrastate, as shown on page 2, $1,334,268, which I relate to total freight revenue, account 101, intrastate, as shown on page 11 of $2,599,331, which produces the operating ratio of 51.33 per cent. I then applied that operating ratio to the balance of intrastate revenues as shown on page 11. In other words I deduct from the total intrastate revenues the amount applicable to account 101 freight, which leaves $154,372, to which I have applied the operating ratio applicable to account 101, which assigns an expense of $79,239 to the revenues other than account 101. You ask how I distinguish the operating expenses set forth in item 1-B, account 101, from the operating expenses incident to the other freight revenue. The expenses which I have shown in item 1-B relate particularly to the cost of train operation, traffic expenses, and so on. I think my exhibit on page 2 will show what I considered (St. 237). The operating expenses which I considered directly applicable to freight revenue, account 101, that is, where you could definitely sah that they were

in connection with handling it. I will go back to page 7 again. By assigning the operating ratio of 51.33 per cent to operating revenues other than those included in account 101, I have taken care of the expense of handling the business which earned the $154,372 as shown on page 7. In other words, I have assumed the same operating ratio for all intrastate freight revenues as I did for the account 101 (St. 238). You ask if I didn't include all the possible op- [fol. 238] erating expenses in computing my expenses for the seven day period, in determining the cost per ton mile. All of the train costs I have included, but in addition to the train costs you have some other item. You ask what expenses I didn't include in making that seven day study. In the seven day study—referring to page 2, the item of traffic expenses would be one that I computed from the annual figures in the state report. You ask if the traffic expenses were not apportioned for the seven day period. No, there was no study made of traffic expenses for the seven day period. The traffic expense amounted to $66,972. I used the $1,334,000 (last figure on page 2) in connection with my operating ratio to start with (St. 239). You ask me why I had to add in this item "c" at all, and if all of my operating expenses have not been taken care of already in my seven day study. I have not taken care of any operating expenses applicable to the $154,372.

The item 1-A on page 7 shows $2,599,331 as freight revenue under account 101, which is brought forward from page 11 of my exhibit. The total freight revenue as shown in the first column on page 11, intrastate, is $2,753,703. Deducting the revenue under account 101 leaves $154,372 to which I still must assign some cost to handle that business (St. 240). Page 7 apparently is in error on that item 1-B. It should have been instead of $150,554, it should have been $154,372 times 51.33%, which would increase the amount $79,239.

After the seven day study has been computed to a year's basis, then all of the expense accounts under the I. C. C. classification have been included (St. 244). (Questions by Defendant's counsel) In my item 1-B, page 7, I have included only the proportion of freight operating expense which is applicable to the services that are represented by the revenue shown in line "A" on that page. I have not included all of the operating expenses that were incurred by

the railroad. I have not included all of the expenses that [fol. 239] were incurred by the railroad in all its freight business. The items that I have not included are those that are applicable to the services represented by the intrastate revenues that are shown in line "c". In other words, in addition to incurring a cost of $1,334,268 for handling the freight traffic (St. 245) under account 101, we also incurred an expense in handling the balance of our revenue as shown on page 11, the first column. In other words, it would be revenues accounts 101, 111 and 112 (St. 246). After developing an operating ratio for handling the revenues under account 101, the intrastate freight revenues, I found that there was an operating ratio of 51.33% developed, and I therefore assumed that in view of the fact that freight revenue, account 101, was approximately 90% of the total freight revenue, as shown on page 11, that the operating ratio of 51.33% would have to govern, because the item of account 101, freight revenue, must surely determine your operating ratio for the balance of the revenues (St. 247). In my item 1-B, page 7, of $1,334,268, I say I have considered only the expense incident to the traffic from which we received the revenues accounted for under account 101. You ask me if, in so doing, I haven't taken full account of my station employees' wages, for instance. I have taken full account of the expenses which were required to transport the freight which earned $2,599,000 of freight revenue. You ask if in doing so I haven't accounted for all of my wages already. Yes, but I still have other items of revenue here. You ask if it isn't a fact that if I have charged all of the expenses already, I shouldn't charge them again. I can't see that I have charged all of the expenses. I have only charged 90% of my expenses, approximately (St. 248). You ask where I get the 90%. Well, on the base of this figure here, that is 90% of the total freight revenue. That is, the intrastate revenue.

The information on page 4 is developed from the loaded [fol. 240] and empty freight car miles as shown in the annual report to the D. P. W. for the years 1931, '32 and '33 and the cost of freight car repairs, depreciation and retirements, accounts 314, 315 and 316. From the annual reports I determined for the three year period there were 116,320,584 loaded and empty car miles and, applying that to a figure, the percentage of 92.15%, (St. 249) as I explained

this morning, to state the freight car miles on a revenue base, produced 107,187,418 car miles. That is on account of the proportion of none-revenue. I have stated them on a revenue base in that manner. The total cost for the years '31, '32 and '33 of freight train cars depreciation and retirements was $1,614,842. That item was taken from the annual report and dividing 107,189,418 car miles into that amount of money produced the average cost per car mile as shown in item 1-A on page 4 to which I add the proportion, indirect proportion of maintenance of equipment expense, 10.82%, and the proportion of general expense applicable to maintenance of equipment 4.85%, producing a total cost per item 1-B of approximately 1.8¢ as applicable to the cost per revenue freight car mile for repairs, depreciation and retirements.

As far as the G. N. is concerned, the eastern terminal of our iron ore business where it is loaded is in Superior Wisconsin (St. 250). I said that a check made during the test period showed that there were approximately 1321 intrastate cars handled altogether during that seven day period, and of those, 291 were foreign line cars. I don't know whether the company had available cars of its own to handle that business during that period. I am not an operating man. I can't say as to that (St. 251). You ask if it is not a fact that the reason we have a debit or credit balance on these various rental of equipment items, is commodities originating on our line pass to the lines of foreign companies and commodities originating on the lines of the foreign company pass onto our line and we pay the foreign lines the $1 a day while the car is on our line and vice versa. [fol. 241] Yes, that is the way that goes. You ask how there could possibly be an inter-company movement of freight as to intrastate business, unless the two lines happened to be in the same state. Well, I think the situation could occur in this way. We will assume that a car was made empty at some local station in Washington, a foreign line car, and the agent is requested to furnish a car for an intrastate shipment. Rather than go to the expense of getting a G. N. car into that station, they merely load the foreign line car and let it take care of the intrastate shipment. I think that is probably the way the foreign line car use would originate. It is possible to use the two (St. 252) (St. 253).

On further Cross-examination he further testified:

The items of "interchange" as used in lines 5, 6 and 7, Def.'s Ex. "11" means where we deliver to, or receive from, a car related to a foreign line. In other words, suppose we have a shipment that is going to the N. P. from our line. When our switching crew delivers it to this certain point in Seattle, that is as far as we take it. Then the N. P. engine would take it from there on. It is shipped on one line to be delivered by another line. It may be coming from another line to us for delivery. You ask what the industrial switching shown in 8 to 12, Exhibit "11", consists of (St. 316). Well, I think the industrial covers the whole movement there. I might explain it in this way. A car comes in from line haul into Interbay, we would say, the first movement it would get would be classified out of the road train by the switch engine. The next move would be a transfer move to Seattle. It would relate to item 2 on page 26. The next move would probably involve another classification at Seattle which would relate to item 1 and the next move would then relate to item 8, industrial switching at Seattle, if the car was going to some industry in the vicinity of Second and Occidental Avenues or, in the case of item 9, it might be going to an industry in the vicinity [fol. 242] of Fifth Avenue, Seattle. In case of a car to be shipped over the N. P. or some other line from a point upon which we have an industrial track and from an industry which we serve, we would handle the car on our own industrial tracks and deliver it to the N. P. (St. 317). You ask if the situation would arise where we would charge the N. P. a certain amount for handling the car on our own tracks. I think, according to the zone agreement, it might and, on the other hand, the N. P. could be charging us for certain switching they perform for us.

You ask what the item of revenue, account No. 110, denominated "Switching" on Exhibit "11", page 11, consists of. That consists of—I think the larger proportion of it, the revenues derived from what we usually term intra terminal switching. In other words, it covers cars that probably never are involved in line haul switching, that is in Seattle, in particular, and at Everett and Spokane we move cars quite frequently from one industry to another industry within the terminal, as they may be loaded with a certain commodity at one industry and taken to another and made

empty. They are not ordinarily line haul cars that are switched in that service (St. 318). I think the revenue from such switching is received on a per car basis. We credit the revenue to this account 110 in that case. You ask if there is any classification on page 26 that includes that class of work. Yes, if we were making a terminal analysis of the cars which were switched intra-terminal. You ask if these elements of service that are itemized from 1 to 22 on page 26, Ex. "11" include that character of work. Yes. This page 26 would cover all movements that a switch engine might make in this termina-. You ask whether, in my determination of the costs per engine hour in my seven day study, I included that kind of switching. In determining the cost per engine hour, I determined the cost which would relate to any kind of switching that the engine might do, both in interstate traffic and intrastate traffic or any traffic at all. These are only inter-terminal switching (St. 319).

[fol. 243] I think I see what you are driving at in connection with this. From a study of exhibit 11 and on the work sheets which were delivered to Mr. Sharpe during my cross examination, it will be found that approximately $850,000, pages 23 and 24 for the year 1933, would be applicable to yard switching freight as an expense. Of this amount $202,000, page 2, was found to be applicable to the cost of switching intrastate on G. N. line haul cars in major terminals. The remainder of these yard switching revenues of $648,000 would, therefore, represent the cost of switching interstate traffic as well as from tentative line haul traffic interstate and intrastate and the intra-terminal switching, that is to say, switching of other than line haul cars between industries and so forth in the major terminals. In view of the fact that this legal proceeding did not involve the cost of switching interstate traffic in Seattle, the $648,000 was eliminated from the study and no further use was made of that amount. However, as I have stated, there is included in this amount of cost of switching intra-terminal and competitive intrastate line haul traffic which cost would be comparable with the amount of intrastate switching revenue, $41,977, shown by account 110 on page 11; compared with the cost of switching this traffic the revenue derived is abnormally low.

(Thereupon plaintiff's counsel objected to the witness testifying that in his opinion of such cost being abnormally low and his statement in regard to another proceeding. The witness then testified in answer to questions propounded by defendant's attorney that he made a cost study and the exhibits were all on record in Docket No. 14,563 before the I. C. C. The court thereupon overruled plaintiff's motion. Whereupon the witness continued:

I submit the following typical examples of the switching revenue per car received for the G. N. and the cost thereof in connection with the handling of this intra-terminal business. The various elements of switching required to handle [fol. 244] these cars were furnished me by Mr. W. P. Maloney, G. N. travelling auditor at Seattle, who testified recently in this trial (St. 322). The elements of cost used in my computations were obtained from pages 21 and 22 of exhibit 11. The Interbay Seattle terminal revenue received by the G. N. per car $855, switching costs per car $10.14. Operating ratio 111%. Interbay Seattle terminal revenue per car, G. N. revenue per car, $8.55, switching costs per car $9.87, operating ratio 115%. I am giving you various examples of these intra-terminal movements. Again, Interbay Seattle terminal, $5.75 per car, the switching costs per car $6.83, operating ratio 119%. Interbay Seattle terminal revenue per car, $14,00, switching costs per car, $14,94, operating ratio 107%.

(Plaintiff's counsel then moved to strike all of the testimony as to specific instances of the operating ratio as to specific haulage or service rendered, on the ground that unless they are all put in, they are not material. That they might make a considerable revenue on one and no revenue on another. That defendant should not be allowed to detail a few instances and not give them all. That if that is to be investigated, we will have to open up the whole subject of G. N.'s operating ratio as to switching service (St. 323). The court denied the motion (St. 326) and permitted the witness to testify to further special instances as follows:)

Delta, Everett, terminal, revenue per car $5.80; switching cost per car $10.18, operating ratio 174%. Hillyard, Spokane, terminal, revenue per car $7.00; switching cost per car $8.59, operating ratio 123%. The examples just

cited indicate clearly that an operating ratio of 51.33% is far from sufficient to cover the cost of intra-terminal switching. These examples were furnished by somebody else. That individual gave me the amount of revenue from these various hauls, taken from the tariffs. This individual gave me these examples as to these various hauls. I asked him for the particular examples. He gave them to me orally [fol. 245] (St. 327). They would naturally be all intrastate movements because they are within the Seattle terminal (St. 328).

C. A. MANTHE, called and sworn as a witness for the defendant, testified as follows:

I reside at Seattle and am superintendent of — for the G. N., and have held that position since June 12, 1934. Prior to that I was assistant superintendent of Spokane. I participated both at Spokane and Seattle, in the supervision of the terminal cost study mentioned by Mr. Burn in his evidence. You ask me to explain how that study was conducted. The code cards were turned over to the yard master in charge of the terminal. They, in turn, delivered them to the switch foremen with a set of instructions directing them how the code cards were to be followed, which showed, of course, the amount of time spent in doing switching under the various codes, the number of cars handled during that period of time. The code cards were in the form of Def's. Exs. "12" and "13" (St. 81). You ask me what supervision I gave this work at Spokane and Seattle. The cards were turned in to us from day to day and checked with the general yard master of the terminal. I left Spokane on June 11. The work had been, the study had been in progress then, I think, three or four days, as I recall it, and it was turned over by me to my successor, Mr. Percival. When I came to Seattle I took up the supervision of a similar terminal study that was being conducted there. Mr. Cleary had conducted the first part of that study in Seattle. His position was trainmaster. At the time of the week when I came over, I took up the work where he dropped it and followed it to the conclusion. I gave the work at Seattle the same character of supervision that I did at Spokane (St. 82). When these cards were

[fol. 246] completed and checked by me, they were sent to the Superintendent's office at Spokane, and from there transmitted to Mr. Burn at St. Paul (St. 83).

On cross-examination he further testified as follows:

Terminal service and expense in connection with operating movements is both intrastate and interstate and is a considerable part of the total expense connected with the total service rendered as compared with the line haul (St. 84).

On further direct examination he further testified:

You ask what official positions I have held in various places for the G. N.: Superintendent at Klamath Falls, Oregon; Superintendent at Crookston, Minnesota; train master on the Marchs division; train master on the Spokane division; and prior to the outside work secretary, and later chief clerk to the general manager. In the latter position I was doing work that pertained to the entire Great Northern system (St. 139). As trainmaster of the Marchs and Spokane divisions of the G. N. I had jurisdiction of all the G. N's lines in Washington. I know the manner in which the G. N. hauls its interstate and intrastate traffic. That traffic is hauled in the same train and with the same employees. It largely uses the same facilities regardless of the classification of the business. The principal cities of Washington served by the G. N. are Seattle, Spokane, Colville, Bellingham, Burling, Concrete, Wenatchee, Tacoma, Okanogan, Omak, and it has a line extending from Vancouver, B. C. to Seattle. It operates under trackage rights for 999 years over the N. P.'s line between Seattle and Vancouver, Washington (St. 140). It has a main line which it owns extending from Everett on its coast line eastward [fol. 247] across the state through Spokane and Hillyard to the eastern boundary of the state. It has a branch extending from Wenatchee up the Columbia River to Oroville, in addition, branch lines located at various places in the state. It handles both interstate and intrastate traffic to and from all these places that I have enumerated and other smaller places on its railway lines. As a practical matter all the business, whether intrastate or interstate, is intermingled and handled on the same trains and with the same employes. You ask if the G. N. as a practical matter, could

discontinue its intrastate service and continue to conduct its interstate service without an extremely large increase in the cost of the interstate service. No, it could not (St. 141).

(Def.'s Ex. "18" was thereupon received in evidence (St. 142) Def.'s Ex "19" was received in evidence over plaintiff's objection that the same was pure hearsay as to any facts purporting to be shown therein. The objection was overruled (St. 143).

FRANK V. PERCIVAL, called and sworn as a witness for defendant, testified as follows:

I took Mr. Manthe's place when he was transferred to Seattle. I picked up the supervision of the terminal study in Spokane at the point where he left it off. Referring to Def.'s Ex. "12", these cars were gotten out with the idea of allocating elements of cost in connection with the handling of cars throughout the terminal. The various classes of switching were subdivided as indicated on the classification and the switch foreman required to allocate the time of engines (St. 86) engaged in the different elements of service, showing in that service the number of cars handled, loads and empties, and the proportion of engine hours consumed in the various classes of work. You ask what super-[fol. 248] vision I gave this study. After the cards were turned into the yard master, I made it a point to check and recheck the work done by the foremen, each day until the study was completed, and also looked over—checked over the cars that had been previously completed prior to my arrival there. I have had terminal experience of approximately 28 years. Some of the places are: Everett, Seattle, Spokane, Minneapolis and St. Paul. I was superintendent of terminals for the American Expeditionary Force at base ports of La Rochelle, La Pallici and Etat Division of the Bendee Railroad. I was in direct charge of the American operations in that terminal for a year and a half. That was the third largest freight base port that we had in France.

You ask what I did with the cards such as Def.'s Ex. "12" for the week after they had been turned in. The cards from the terminal of Spokane and Hillyard (St. 87) were

sent to the division headquarters at Spokane, and they were rechecked again at that point, not only the cards from the terminals of Spokane and Hillyard, but also the terminal of Interbay, Seattle and Everett, Delta, Bellingham, Tacoma and Appleyard at Wenatchee. These cards were checked in detail again, and on the back of each card or the face of it was allocated the wages paid to the crews in question. After that was done they were sent under registered cover to Mr. Burn at St. Paul. The part of the work I directly supervised covered the terminals at Spokane, Hillyard and Wenatchee. In addition to those three terminals there were reported into the division office at Spokane the terminals of Bellingham, Everett, Seattle and Tacoma. The latter four places were originally directly supervised first by Mr. Cleary and later by Mr. Manthe. After the cards from all of these terminals including those on the east side of the mountains, had come into division headquarters, I [fol. 249] went over them all before they were sent in. You ask if in my opinion, they were a correct report of the terminal work. Yes, sir. They checked in accordance with our division records (St. 88).

On cross-examination he further testified:

I am familiar with the various switching operations at the various terminals in the State involved in a carload shipment originating in Washington and passing outside the State. A shipment originating in Bellingham and passing to a point outside of the State of Washington, moving to a point outside of the State of Washington, would involve certain switching operations. You ask what would be the normal number involved in an eastbound carload shipment from Bellingham (St. 89). The first initial terminal handling at Bellingham and the reclassification at Everett. You ask what the reclassification at Everett would involve. The car would have to be switched and possibly weighed, if it had not been weighed, and classified. On its arrival at Everett, the loaded car would receive a terminal inspection and a terminal switching. They would classify it on the track designated as an eastbound track in the order in which the train has to be made up, and move from that point by switch engine to another side track at Lowell, a distance of 3 miles. There might be 30, 40 or 50 cars hauled from Everett to Lowell at once, and sometimes less. It

1
6
3

would not often happen that as few as one car would be hauled. The eastbound train out of Seattle would pick up this out of cars that were taken to Lowell and move them to Wenatchee or Appleyard (St. 91). The cut of cars of the transfer is taken over to Lowell, and when the freight train from Seattle arrives the engine is cut off and picks up this cut of cars and doubles back on the train and de- [fol. 250] parts. We might have to pick up a few more at Skykomish, and they might be either intrastate shipments or interstate shipments or both. I don't know how much of one there is or how much of the other. You would then arrive at Appleyard, at Wenatchee (St. 92). There is a little bit more done there than there is at Skykomish, to the extent that all the cars destined to Wenatchee and Appleyard and up river points are set out of the train, and what freight is accumulated at Appleyard is added to the train. We take off some and take on other interstate and additional local, perhaps. I would say that most of the eastbound business at Wenatchee would be interstate, at least during the fruit season. I am talking of a through freight train. That would carry mostly interstate—not all, but mostly (St. 93). For a through freight train there would be no other stops from Wenatchee until you arrive *arrive* at Hillyard, with the exception of possibly setting out at Spokane, for the Spokane proper business. Hillyard is 5 miles beyond Spokane. On reaching Hillyard, the train would be entirely reclassified under our present scheme of operation. Some of the cars would be iced, if it was the icing season, and some of them would be weighed, and they would be switched in unit order for movement east, and a new train made up. That is what I call a through train (St. 94). You ask how many switching operations by switch engines would be involved as to that Bellingham car. There would be one at Delta, Everett, and one at Appleyard, Wenatchee, and one at Hillyard, and one at Bellingham where it originated. That would be four. In moving a car of lumber from Napavine, Washington, to St. Paul, via the S. P. & S. with a transfer at Vancouver, and redelivery by the S. P. & S. to the G. N. at Spokane, you ask how many switching operations would be involved at terminals at which switching engines are regularly employed. [fol. 251] It would be handled by local freight from Napavine to Vancouver, Washington, and from that point it

would be classified by the S. P. & S. in a train for movement to the N. P. yard at Erie Street (St. 96), the N. P. Yard at Spokane, and that possibly might receive some switching at Pasco, but I doubt that, though, and arriving at Erie Street, Spokane, the car would be delivered to the G. N. by transfer switch engine and moved from Spokane to Hillyard by G. N. switch engine. There would be the originating service at Napavine, and at Vancouver, the switching operation to switch it onto the S. P. & S. road. The S. P. & S. freight trains at this time terminate in the N. P. yards at Spokane. The S. P. & S. pays the N. P. the cost of the switching service. But that switching service is all, nevertheless involved in that shipment. The car is delivered to the G. N. at Spokane property, and then the G. N. hauls it to Hillyard, 5 miles, and makes it up in an eastbound train. A shipment of lumber originating in Longview, and hauled in the same way would involve an additional service at Longview. There would be a terminal service on the Longview and Northern (L. V. & N.) and at the junction of the L. V. & N. and G. N. there would be another switching service onto the G. N. through train. The L. V. & N. is now owned by the N. P., G. N., O. W. and Milwaukee. But we would nevertheless have the additional switching service. Coming the other way, if the G. N. took on a car at Chehalis, that freight would then go via Seattle and Everett. Such a car would be picked up by the Portland and Seattle through freight and moved into Interbay and classified (St. 99) at that point and onto the through eastbound train. We would have the original switching service in Chehalis, and then it would continue on in that train until it reached Seattle. And it would be made up in a train there which would have from that time on the same vicissitudes as the car coming from Bellingham.

[fol. 252] The G. N. has a branch running north out of Wenatchee over the Okanogan country. An eastbound interstate car from Okanogan would be picked up at Okanogan by local train, and hauled to Appleview, and at that point it would receive attention there as to icing, and ventilation, and made up, and classified there, and made up in a through train to the East, and would have the same switching service at Hillyard as the others (St. 100).

As to a car coming from California on the G. N.'s new road, you ask what would happen to that car after reaching

Bend, Oregon. The S. P. & S. would take delivery of it at Wishram, on the Oregon side (St. 102). Wishram is in Washington. In Washington it would be made up into an S. P. & S. train, at the G. N.'s expense. In that connection there possibly (St. 103) wouldn't be any particular expense of picking up a car at Wishram, simply stopping and picking up a certain number of cars at that point that were all intact and keep going. The S. P. & S. hauls this particular car in its own trains and with its own crews, and the G. N. pays for that service. The possibilities are there would be something added to the train at Pasco. The S. P. & S. would reimburse the N. P. on a contract basis for the switching at Erie Street yards in Spokane. Our expenses would not start until the car was delivered to us. We would pay the S. P. & S. for that service in the form of rentals eventually. It is approximately true that all interstate eastbound business originating west of Spokane is entirely reclassified at Hillyard (St. 104). There are other trains running through that town. We would have the same reclassification at Hillyard into other trains of any shipment coming through from points east of Washington and destined to points in Washington west of Hillyard (St. 105). All the switching service that I have given as examples on eastbound service would be approximately [fol. 253] the same on westbound service. You ask if Washington may not be looked upon as a great big freight yard for the assembling of freight traffic. Not any more so than any other terminal point on the Great Northern or any other intermediary terminal point. We are talking about business here destined to points without the state. True, all classes of business receive these terminal handlings within the State excepting those terminals where the business originates or terminates. There is a difference in that case (St. 106).

On redirect examination he further testified:

If each of the 6 cars traced on cross examination had been destined to Colville, Washington, each would have received the same handling testified to, and would in addition have received a terminal handling at the point of destination. You ask if there is a difference between the work that is done at the originating or terminating point and the work that is done at an intermediary classification yard. Well,

the difference begins immediately after your train has been classified. For example, it costs as much to switch a train at Seattle or an intermediate terminal, but after that is done, then you have to effect delivery of the car to the consignee and that is where your cost begins to go up. If it is moving in the opposite direction, before (St. 107) you can get it into this classification yard, you have to get it from the shipper's side track and bring it in there. That is also one of the points where our costs go up.

On recross-examination he further testified:

On arriving at Colville, this car would probably have to be set in, spotted, at the gentlemen's place of business. [fol. 254] Possibly there would be other cars there to take out. We would run it up to his warehouse on his industrial track and leave it there and move the train on. Well, it sounds very simple with only one car, but you are usually around Colville an hour and a half doing that local switching (St. 108).

I testified that this switching operation at Colville might involve holding the train there for an hour and a half,—a local train. You ask if it would also involve holding a train over for an hour and a half to pick up the car at Napavine or wherever it originated (St. 109). You ask if doing all that would not involve an awful lot of expense. Yes, but the work has to be done regardless of expense.

We will have to assume that it costs more to run a local train than it does a through freight train because that local is engaged in intermediate switching. We pick up and deliver interstate cars with that local train the same as we do intrastate cars (St. 110). You ask if that one local delivery service we perform involving an hour and a half would not be the equivalent of hauling the car a good many miles on the line. Well, again, it would depend on whether you were hauling them in a through freight or a local freight. Assume this local train was an hour and a half at Colville on station switching and went along 5 miles further and did some more station switching. Of course, it costs more to run that local train than it would a through freight train. You ask if that would not be the equivalent in expense of hauling a car many miles on the line haul movement of that train. Yes, I presume it would, but it would be difficult to arrive at exactly how much (St. 111).

On further redirect examination he further testified:

[fol. 255] If those eastbound interstate cars referred to were destined to St. Paul, you ask if the trains hauling them would not receive intermediate terminal switching between Hillyard and St. Paul (St. 113). Yes, at White Fish, Montana, Havre, Montana, Williston, North Dakota, Minot, North Dakota, Breckenridge, Minnesota, and a full reswitching and reclassification of the train at Wilmer, Minnesota. Wilmer is a terminal located 100 miles west of Minneapolis. You ask what terminal handling they would receive at the Twin Cities. Primarily the east and west trains are classified for delivery at Wilmer, classified at Wilmer for delivery to Minneapolis. That is to obviate the additional classification of the train at Minneapolis. If the car were destined to some consignee in Minneapolis, you ask me to describe in a general way what switching the car would incur. Well, if the car was destined to a consignee located on the G. N. Tracks, or tracks of other companies, in West Minneapolis, it would be set out at Lyndale Junction, and from that point on it would receive a complete terminal handling, from that time on until it arrived at the consignee's place of business. You ask what that complete terminal handling would be. Well, presuming that the car was destined to West Minneapolis, to some of the industries located on our own track at that point, it would be set out at Lyndale, classified into a transfer moving in that particular district, and after arrival there it would be classified again and placed at the consignee's warehouse (St. 114), by switch engine, and of course that becomes quite involved when it is destined to consignees whose places of business are located upon other railroad owned tracks.

In 1931 I rode one of our fast freight trains out of Seattle to St. Paul. In that train approximately 20% of the total leaving Seattle were carried through on the train in-
[fol. 256] tact. The rest were set out at intermediate points, either to pick up preferential tonnage or became bad order en route, or something else. Some were probably destined to consignees west of the Twin Cities. Some were going to the Burlington at Billings. You ask if, replacing this 80% of the cars that were dropped somewhere en route, there was not additional business picked up (St. 115). Yes, sir, at the different main freight terminals, beginning at Wenatchee and Spokane and east.

On recross-examination he further testified:

The G. N. connects with the Burlington at Billings, and the N. P. at Laurel. You ask if a big part of our train was not transferred onto the Burlington at Billings. The general ratio would be about, in a 100 car train, would be about 1/5th would route via Billings. You ask if our service at the Twin Cities would not be practically the equivalent of the service at Seattle. A little more complicated at Minneapolis, by reason (St. 116) of the fact that it is a larger terminal. You ask if the handling of the specific units in the train would not involve about the same time and expense in Seattle as they would in the Twin Cities. Well, that is a difficult question to answer. These fixed expenses, cost of cars and terminals, are not stationary. They keep fluctuating from day to day. You ask if it is not a fact that I cannot compare the expense on an average at Seattle with the expense at the Minnesota Transfer. Well, you understand, the Minnesota transfer primarily was first intended for the interchange of through carload business, as between the different railroads at that point, but of late years the industrial section has built up adjacent to Minnesota transfer to that really now 3/4ths of our business is terminal business rather than interchange of carload through freight (St. 117).

(Witness excused.)

[fol. 257] STIPULATION

It was stipulated by counsel that if Mr. Cleary, referred to in the foregoing testimony, were called as a witness, he would testify to the same effect as Mr. Percival did with respect to the particular service he performed in connection with the special study (St. 109).

EDWIN C. MATTHIAS, called and sworn as a witness on behalf of defendant, testified as follows:

I am one of the attorneys of record in this case, and in the suit that was filed in the Federal court to restrain the enforcement of the occupational tax law against the railroad company. I have participated in various conferences

with the Washington Tax Commission concerning returns that were to be filed by the G. N. Railway Company under the occupational tax law; principally with Mr. Jenner, Mr. Harsh was present at some of them. I understand Mr. Harsch is sort of an attorney or legal advisor for the Commission (St. 254).

I am familiar with how it came about that we filed amended answers to the interrogatories after we had made a further study of that account, and the reasons how we came to eliminate some of those revenues as not being properly included as intrastate commerce. Shortly after the opinion was handed down by the Federal Court denying the preliminary injunction, Mr. Jenner asked for a conference with the railroad attorneys, and he ame to Seattle and we had a conference in Mr. daPonte's office. That was, I believe, late in January, 1934. It was at least some time prior to February 15th. At that time he said that the Commission was somewhat embarrassed because the railroads had not filed returns. That as long as the Federal case was pending there was some explanation for it—while the case was still pending it had been as a matter of fact decided [fol. 258] against us, and he wanted to (St. 255) know if we would not come in and file returns.

Well, we told him we did not want to file any returns, at least before a final order was entered in that case, and we were considering filing an amended complaint.

That conference did not result in anything because we could not tell when we could get a final order from the Federal Court, because at that time Judge Neterer was sick, and the agreement was that we would try and bring it about that some other order would be entered soon.

Well, subsequently there were several conferences with Mr. Jenner along that same line, at one or two of which Mr. Harsch was present. My recollection would be that there were probably 3 conferences altogether, and maybe 4. We finally filed an amended complaint after the final order had been entered denying—no, I don't know as an order was entered, but we filed our amended complaint in the Federal Court case. When I say "we" I mean all 4 railroads. Under date of February 15, 1934, Mr. Jenner wrote the G. N. a letter, and sent a copy of it to all the other railroads, and I see also to Mr. Sharpe. I have that letter

before me. I don't know as it is necessary to introduce it in evidence.

He says in that letter, in substance, that he sees that the Federal Court case is not going to end very soon, because we have gone ahead now and filed amended (St. 256) complaints, and he supposes they will have to go up to oral argument, and he says in fact this: "In this we see nothing but the possibility of considerable delay before a final order is entered. You have indicated that you shall not file returns until such an order is entered. Under the circumstances the Commission must proceed to determine the tax liability of the railroad companies for the last 5 months of [fol. 259] 1933. Without returns from the companies this can be done only upon assessments by the Commission. If you now feel that you can change your decision with reference to the filing of the returns for these months, or for such of them as you have information available, without awaiting the entry of the final order in this case, please advise us." Signed "Business Tax Division, By T. M. Jenner."

Now that is the last 2 paragraphs of the letter, and the first paragraph refers to the Federal Court case.

Now having that letter before us, we, of course, had in mind what Mr. Jenner had told us at some of these conferences. In fact, I think at every one, that if the Commission had to make an assessment, they would impose the penalties provided by the Act, but as they construed it if we filed the returns, even if we did not pay the taxes, they could not impose penalties, and they wanted us at least to file the returns or they would impose the penalties. So we did not want to incur penalties, and therefore we proceeded —I say "we" in this respect, I mean our company, and I believe the others did likewise, to advise our accounting representatives to prepare tax returns. And those returns (St. 257) were prepared therefore more or less in haste and no study was previously made as to the items which should or should not be included in those returns. What I mean by that, I, as attorney for the railroad Company, up to that time had given it no thought, because we were contending the statute was unconstitutional, and we did not expect to pay any tax, and the amount had not become material.

Therefore upon telegraphic advice that the returns should be prepared, our comptroller prepared them and sent them out to me, and I filed them at the time this rec-
[fol. 260] ord already shows, which I believe was about February 24th. Yes, it was between February 15, when we got the letter from Mr. Hess, and February 24th. The returns had been prepared in St. Paul and sent out to me, and on February 24th I mailed them to the Tax Commission.

In the protest accompanying that return which I prepared I stated that there would be likely to be some corrections made. I had no specific corrections in mind at that time, and merely included that statement under an abundance of precaution, because I realized they had been prepared in more or less of a hurry to avoid the imposition of any penalties.

Then on March 6 the Commission issued a typewritten set of instructions, which they entitled "The Liability of Steam Railway Companies under Chapter 191, Laws of 1933 and amendments thereto," in which they set forth, in 4 typewritten pages, or about 3 and a third typewritten pages, single space, references (St. 258) to these I. C. C. accounts, and the Commission's interpretation as to what revenues under these accounts are subject to the tax and what are not subject to the tax. And Mr. Harsch sent those to me, a copy of those to me, under date of March 6th he signed the letter. That was under both the original act and the amendment. He refers to both of them. Now that letter, I see, is copied to the attorneys for the other railroads. Following that letter the railroad accountants—my file shows—got together in the East on March 29th, and raised certain questions with reference to whether some of those revenues were not, as a matter of fact, I. C. C. revenues instead of intrastate. And the Tax Commission advised us that they would like to hold a hearing—in fact this letter of March 6th from Mr. Harsch transmitting
[fol. 261] these regulations says, "The Commission will be glad to set a date for a conference to discuss the matter, if you so desire."

Now we did not ask for a conference at that time, but the Commission did set a date, and that was subsequently agreed upon with the railroad attorneys—I had fixed the date that was agreeable to all of us—of May 11th, and

Mr. Tower and Mr. Burn, I believe, came out from St. Paul, for our company, and the attorneys, Mr. Merritt for the U. P., and Mr. Macfarlane for the N. P., and Mr. Edwards for the Milwaukee, and their respective auditors, Mr. Pinger for (St. 259) the N. P. and Mr. Strassman for the Milwaukee, and Mr. Langton of the U. P. went down to have a conference with the Commission. That was attended by those men, with Mr. Jenner and Mr. Harsch for the plaintiff—at least the purpose of the meeting was to determine if possible what revenues were subject to the tax. Well, we had just merely a friendly discussion, not of specific revenues, but raising specific instances and questions which would arise before the Commission. And Mr. Jenner or Mr. Harsch stated that in view of the pendency of this lawsuit in which those questions would have to be determined, they could not see how they could determine them at that conference, and the meeting was adjourned with the understanding that if they reached any contrary conclusion, and they thought an agreement was possible, they would give us notice and we would come back again.

Well, following that meeting—it had by that time become very apparent to me that there were many and sundry legal questions involved in connection with the revenues which had been reported in our answers to the interrogatories and in our original returns and in our report to the D. P. W., which from the standpoint of a lawyer I believe were not [fol. 262] intrastate revenues. Therefore, I undertook a study of the legal questions involved.

Now, before passing to that I neglected to refer to the answers to the interrogatories. On either the (St. 260) last day of February or the 1st day of March we were served with the complaint in this case and with the interrogatories. I transmitted those to Mr. Hess in St. Paul immediately, our comptroller, because, of course, under the statute an Answer has to be filed promptly, and I requested, I recall, that they be in my hands by the 16th of February. And they were prepared there without legal advice, I believe, because I gave none, and they were filed immediately upon their receipt. That was prior to the time we had given any serious thought to the question of whether some of these revenues had been improperly classified as intrastate.

Under date of March 19th Mr. Hess had written to me also calling my attention to the fact that there revenues from export shipments, such as apples to the Seattle docks, and so forth, in these revenues, which we had reported under account 101 as intrastate, whereas they were probably foreign. And so as a result of all of that I went into the study of the question, and wrote at length under date of June 15th to our Comptroller, Mr. Hess, and I have no objection to putting a copy of the letter in evidence, although I do not see why—it would only encumber the record. I made of course, no attempt to pass upon the facts, but I attempted to state my conclusions as to the principles of law involved, and directed that they—requested that they make a study of the accounts for the purpose of picking out of the accounts the revenues which were properly classified as interstate or foreign under the principles of law as I had concluded them to be (St. 261).

[fol. 263] At that time the cost study had been—Mr. Hess' office had been requested to make a cost study and I said in my letter to Mr. Hess that it would be necessary to file amended returns, I thought, and amended answers to the interrogatories if he determined there were any such revenues in accordance with my advice. I also requested—well, I directed, in a way, how the auditors should go through the accounts for the purpose of determining these questions and I also suggested that, in making this cost study, it should be made in the alternative, that is, it should be made first under the revenues as reported to the Department, and, second, that it should be made, taking into account any revenues that he found which should be thrown out as being either interstate or foreign. My idea being that, by such a study, we would have an entire picture when the witness got here to testify at this trial. That is contained in my letter (St. 262). Being familiar with the way our business is transacted by departments, I know that this part of the letter got into the hands of the auditor and apparently my suggestion about the cost study being made to that extent was not called to Mr. Burn's attention. He worked in Mr. Hess' office. I expected to go back to St. Paul and check up on this cost study with the witnesses that had gone over the accounts but I had a bridge case, Emerson Street Bridge case set for trial in the Federal Court which was continued and lasted much longer than was expected and the prepara-

tion of the case took a great deal of time so I didn't get out of that case, finally, until the 1st of October, and there wasn't enough time left to go back to St. Paul and do this work in time for this trial. Therefore, Mr. Burn arrived out here and when he arrived I found for the first time the cost study had just been made on the one base. That was [fol. 264] the basis of the 1933 revenues as reported to the D. P. W. The date of my letter to Mr. Hess was June 15, 1934. I may say that I spent about 3 weeks st-*yd*ing the questions involved. Of course, it was in line with my other work, too, so it took more time than it would otherwise, but I was from some time in May at odd times looking into the questions and (St. 263) there are numerous and sundry questions raised by these accounts. That is in the form of a brief; I cite cases, yes. Mr. Burn arrived here about 2 weeks ago, Thursday. You ask if with him were not Mr. Brown and Mr. Tower connected with the accounting department who had been making studies of certain business which it was thought might possibly be properly classified as a matter of law as interstate business. Yes, I told Mr. Hess. I advised him he should have some one in his office go through the records who could be prepared to come here and be a witness and those are the men that he had sent in answer to that request. After this a conference was called by Mr. Balmer and myself of certain gentlemen residing in the state of Washington who could advise with our auditors on these questions concerning the practical handling of the business. You ask whether or not, as a result of that conference, certain conclusions were reached as to what part of the business that we had originally reported as intrastate was, as a matter of law, interstate (St. 264). Yes, and I might say, in that connection, if I may go back, that I found that, prior to my letter to Mr. Hess, they had been going into these accounts and they had decided on certain revenues to eliminate and after receipt of my letter they put some of those revenues back in. For instance, I can cite oil coming into Richmond Beach and later reshipped to points in Washington. Under my advice I said that was intrastate commerce, although they had previously through those revenues should go out, so there wasn't any [fol. 265] attempt to decide the question except upon a strictly legal basis.

HERBERT H. BROWN, called and sworn as a witness on behalf of defendant, testified as follows:

I reside in St. Paul and am supervisor in the office of auditor of freight receipts of the G. N. Railway. I have had 27 years of accounting experience with the G. N. I am familiar with plff's. Identification "20". (Mr. Matthias, of counsel for defendant, states that this was not introduced in evidence.)

Plff's. Identification "20" was then offered in evidence as Def.'s Ex. "20" as a convenient statement showing what had been eliminated to which the witness' testimony may be related, and not to prove the fact that the items thereon were properly to be eliminated as intrastate traffic.) (St. 266.) I am familiar with Def.'s Ex. "20", and participated in its preparation. You ask if I also made some study of the accounts of the G. N. railroad company in St. Paul to determine whether certain of these revenues are interstate or intrastate. Yes. You ask if I made a study concerning the item shown on exhibit "20" as account "101", freight subdivision, "A", consignments originating in Washington and specifically billed for export $92,580. Yes. You ask how I made that study. This represents freight charges on shipments billed from the state in Washington to a port in Washington specifically for export of car for a specific boat. Figures were obtained from the agents in Washington and from reports in the general office. You ask me to what part of the records in the general office I referred in making that study. We prepare our statistics in the office by the punch card system. There is a punch card made for every carload received, way bill, that is locally received way bill. There [fol. 268] are also punch cards made for all of our interline statements covering business interchanging with other lines and from these cards we listed all shipments of flour and apples from (St. 267) stations in Washington to Seattle dock. Now, that is material that was obtained in our office.

(At this point the following proceedings were had:)

"Mr. Sharpe: Now, Your Honor, I want to object to all of this testimony upon the ground that the books of the company have not yet been introduced in evidence and, until they are, it is all incompetent and immaterial and hearsay. These things are all most necessary and, it appears from the testimony of the witness, are all a part of the records

of the company and which are back in St. Paul and are not included. I understand and, I think, counsel agree, it is not included in the report to the D. P. W.

"Mr. Balmer: They are included, but not segregated. The books cannot be produced because they are too voluminous.

"Mr. Sharpe: I object to any testimony of this witness in regard to the contents of the books until the books are produced and it is pure hearsay. I have no possible chance to investigate these matters without the books.

"Mr. Balmer: The case is within the voluminous evidence rule. The books cannot be produced. The witness can testify to his inspection of the record.

"Mr. Sharpe: He said they were all on cards and he got his information from station agents and so on, which is certainly hearsay.

"The Court: I think the objection may be overruled (St. 268).

"Mr. Sharpe: Exception."

The witness then continued:

In addition to that we wrote to stations and ports in Washington and asked them to furnish us with statement of billing covering all carload shipments originating in the state of Washington and by them exported, with the exception of flour and apples for seattle dock which we obtained in the office and, therefore, the agents were not required to furnish them. You ask why I looked for shipments that were destined to the Seattle dock. Because it was our understanding that Seattle Dock is practically all used for export or trans-shipment to coastal points. The revenue [fol. 267] from total amount of shipments of that kind that I found during the 5 months period was $92,580 (St. 269).

(The witness was then asked what investigation he made of Item "B" in Def's Ex. "20": "Consignments originating in Washington and billed to warehouses and elevators practically all of which would be exported or transported by water and/or rail to other states, total $65,558." To this question plaintiff's counsel objected as follows:)

"I object on the ground that it calls for the conclusion of the witness and is pure hearsay and upon the further ground that it is obvious that this inquiry would raise a

large number of collateral issues in this case, each of which (St. 269) would require a trial by this court for the purpose of determining the true character of these particular shipments and each and all of these particular shipments."

The witness then continued:

You ask what investigation I made of item "B". We wrote to agents at Seattle, Tacoma, Everett and Bellingham and asked them to furnish us with the statement of billing during the period from August 1st to December 31st, inclusive, 1933, covering all shipments originating in the state of Washington billed to elevators and warehouses, practically all of which would be imported or transported by boat and/or rail, either in interstate or foreign commerce. We received statements from the agents in reply, a statement for Everett and Bellingham being blank. The agent at Seattle submitted a statement in which he says—

(Thereupon plaintiff's counsel objected to testimony as follows:)

("Now, I object to that as pure hearsay as to what was done here and by correspondence between the agents of this interested, extremely interested (St. 271) party in trying to upset a law as to it and it certainly is not proper;) these are self-serving declarations included in any correspondent- between the agents of this company and their [fol. 268] collection not only relieves them from the tax but, according to their showing, they are losing money on this interstate commerce. It wipes the tax out entirely, according to their contention. How can a case be proven upon any such evidence as that, Your Honor. Surely this is pure hearsay and self-serving. There are no records and this isn't an attempt to get in their record. It isn't anything kept on their books."

(The objection was overruled (St. 272). Whereupon Defendant's counsel stated that the witness wrote for the information because the books were in Seattle and he had to write to the agent there to get them. Plaintiff's counsel thereupon objected to the testimony on the further ground that it was not the best evidence, was pure hearsay, and an attempt to inject the contents of the G. N.'s books into the

record without producing the books and without producing the original documents upon which such statements were based. The objection was overruled (St. 273). Whereupon the witness continued:)

The agent at Seattle submitted us a statement covering carloads of grain which originated in the state of Washington and received here during the period August 1st to December 31st, 1933, inclusive. These carloads delivered to Hanford Street Port of Seattle elevator (joint tracks) and Northwest Dock and Elevator Company, located on N. P. tracks. The agent at Tacoma also submitted a statement headed "Shipments billed to elevator and warehouse for water transportation August 1st to December 31st, inclusive, 1933."

(The witness was then asked if the total of the revenue reported on that group of shipments was $65,558 for the 5-month period. Plaintiff's counsel objected to the question, whereupon the court said: "It may be understood all the objections you have may run to this" (St. 273). The witness then continued:)

You ask what investigation was made of Item "C" on [fol. 269] Def.'s Ex. "20" entitled "All other imports billed to Washington stations from Washington ports." (Plaintiff's counsel objected to questions on the "same ground.") This item covers imports as enumerated in the above captioned figures were obtained in the general office from the original way bill where the original way bill showed revenues to origin in other states or moved in by steamship lines. (Objected to by plaintiff's counsel on the ground that the way bills were not in evidence and plaintiff had no chance to examine them. The objection was overruled.) You ask what indications there were on the way bills that these shipments had come from other states or foreign countries. (Question objected to as hearsay. Thereupon defendant's counsel stated that he was content that plaintiff's counsel have a general objection to all of this testimony on all possible grounds.)

I have a list here showing origin on our line at Seattle or Seattle dock *weigh* bill, date and number of port charges for each individual shipment, also the information as to the origin beyond shown on the original *weigh* bills. You ask what was typical of some of those origins beyond to

indicate that the business was import business and not local. (Objected to by plaintiff as calling for conclusion of the witness, in addition to the other grounds.) (St. 274.) A great many shipments showed origin of the Pacific Steamship Company. I find one Los Angeles, California, San Francisco, California, some from the Williams Steamship Company and I see one here from Chicago, Illinois, one from Peoria, Illinois and various points in other states or moving by steamship line.

You ask what investigation I made of Item "D", Def.'s Ex. "20" "the initial local state revenue collected for ship-
[fol. 270] ments into transit stations." We were furnished with a list of the stations on our line in Washington at which transit privileges are accorded and the commodity. (Counsel for Plaintiff: "Same objection to this testimony.") Using this list as a guide from the cards prepared from the original way bills and interline statements in our office we listed all of the shipments covering such commodities into such transit points. The total revenue of those shipments was $308,896.

You ask as to Item "E", Def.'s Ex. "20", "Absorbed switching". Item "E" covers absorbed switching. The amount shown here is $14,997 (St. 275). This covers switching by a line at a terminal where the company performing the switching did not have the line haul and the company having the line haul has absorbed the amount of this switching in their operating revenue. This absorbed switching account is a debit to freight revenue, account 101. Our accounting procedure in our office, it has been customary to charge all of such items to interstate freight, rather than to allocate some of it to intrastate freight and this item covers the amount of switching absorbed on intrastate cars and merely transfers this item from the interstate to the intrastate columns.

Item "F", Def.'s Ex. "20", covers billing and transit adjustment on grain originating outside of Washington and the produce reshipped to points in Washington, amount $41,055. That is revenue collected for the outbound movement in the state of Washington from transit stations in Washington on business, however, which had originated in other states and moved from those other states into the Washington transit station (St. 276). You ask what the character of service or change is that the shipments re-

ceived at those stations, giving a few typical instances. [fol. 271] Well, sometimes they are merely cleaned and separated in transit, covers fabrication in transit, milling in transit, turning the wheat into flour or feed, creosoting the poles in transit, grazing of livestock in transit. You ask if they are privileges accorded in connection with the through movement of the freight. When the point of origin of the raw product is in one state and the point of destination of the finished product is in another state, the business is governed by interstate rates published with the I. C. C. and the railroad company's revenues are collected on the basis of those tariffis (St. 277).

I investigated the item of $13,157.72 deducted in the amended answers to interrogatories: "freight revenue intrastate in Washington received from United States Government shipments". This item represents freight charges on U. S. Government freight, on which the charges are collected from the U. S. Government. The original freight bills, approved by the government official receiving the freight, was (St. 278) sent to the general office of the receiving freight agent for collection, and it was from these original freight bills that this item was compiled. The freight bills show that the shipments were U. S. Government shipments. I also investigated an item of $6,033.22, which was deducted from the intrastate revenues originally reported both in the original Answers to Interrogatories and in the original returns to the Tax Commission, on account of freight revenues earned within the State of Washington on traffic handled by and on acocunt of the State of Washington. This was obtained from our agents who were required to send us a copy either of the original way bill or of the freight bill covering every shipment consigned or paid for by the state. It covers mainly charges for state [fol. 272] institutions and for the State Highway Department. I might say that business where contractors doing business for the State of Washington is not included in this amount. You ask if it included only the business that was consigned to or from the State or state officials. Yes, sir, largely State Highway Department (St. 279).

On cross-examination he further testified:

You ask from what source I got the information, $92,580, Item "A" on Def.'s Ex. "20". The records in the G. N.

office consist of punched cards and also of the way bills in our settlements with the original lines which are the G. N.'s general offices at St. Paul. You ask how many way bills would be included in that item. I would estimate 1000 way bills. It must be understood, however, that our way bills are bound in forwarded station order by months, in volumes, and those volumes are being used very considerably. If we were to bring all of those volumes it would be a very voluminous record (St. 280). I could not state positively whether copies of those way bills are located in Seattle. I believe those way bills are made in duplicate or triplicate or quadruplicate. I believe the station agent has one copy. I could not be positive, but I believe they have. When the forwarding agent, who is the one who retains a copy of that way bill, way bills that shipment, he very frequently does not know where the shipment is going, the car may not be weighed and the correct weight is not on the way bill, and even the correct charges are not on the way bill, those charges being verified by the receiving agent after the car has been weighed, and also verified in our office. I mean that the agent at the station from which the goods are [fol. 273] consigned does not always know where the car is going. The way bill is made out when the shipment is ready to move forward. Shipments are very often diverted (St. 281).

They do not go to the place where they are originally billed. The only method in which the State's attorney could possibly check my figures on item "A", Def.'s Ex. "20" would be by an examination of those way bills.

Referring to Item "B", Def.'s Ex. "20", total, $65,558. This information was obtained by letter from agents in Washington. We would not be able to tell from the way bill all of the information necessary in preparing this. I wrote to the agent and asked him, and the agent wrote to me and purported to tell me, and then I took this information off of those letters I got from the agents (St. 282).

Referring to Item "C", Def.'s Ex. "20", you ask what kind of shipments I would have in mind in that case. Well, these are shipments originating either at some other state in the United States or some foreign country, and rebilled at a Washington port to a point in Washington. You ask where I could get the information as to whether they were rebilled at the Washington port. From the original way

bill issued by the Washington port or the agent at the Washington port. What I have said in regard to way bills in conncetion with Item "A" in Exhibit No. "20" would apply likewise to "C".

Referring to Item "D", Def.'s Ex. "20", you ask if I know anything about transit shipments. I am not a traffic man, but I know something about transit shipments. It is very intricate. In the first place when goods are shipped to a transit station, the local freight is paid. And the consignor registers his goods in transit (St. 283). He may not exercise that privilege at all. You ask if the converted product may not be shipped to an entirely different sta-
[fol. 274] tion than that indicated upon the register. Well, I am not a traffic man, but I suppose that he could. I would say the consignor has complete and entire control over the goods. When the consignor registers the goods in transit, I don't think he registers it for consignment to a definite place. You ask if it is not a fact that he can sent it anywhere in the world he wants to after it is converted. I am not a traffic man, but I would say that he could send that to any destination where through rates apply from the point of origin, and transit privileges are allowed at this station. I got that information from way bills. You ask if I got it in the same way that I got my information as to Item "A", from way bills. Well, in the same way that we got the apples and the (St. 284) flour. That was by examining cards that were made from the way bills. We did not even look at the original way bills to see what they said, but got that information from these punched cards. Punched cards are a system by which you punch cards in a certain way and you can run them through a machine and have them all sorted or tabulated, and get any statistics of any character we want, included on the punching in the cards (St. 285).

Item "E", $14,997, absorbed switching, was all converted from interstate to intrastate (St. 285).

Referring to Item "F", "Milling in transit adjustments on grain originating outside of Washington and the products reshipped to points in Washington." The shipments from points outside of the state to the transit station in Washington would, of course, be interstate. You ask if the reshipment from the transit stations to Washington points, if deemed a separate transaction or shipment, would not be

local. If deemed a separate transaction, they are moved only within the state, but they are governed by an inter- [fol. 275] state charge from the point of origin outside of the state. Under "F" we transferred $41,000 from intrastate to interstate. The information as to "F" was taken from reports furnished to our office by the Transcontinental Freight Bureau (St. 286). (Question by Defendant's counsel.) That is an agency of all the carriers. They just furnished us the information. You understand this is a form that is regularly furnished our office every month, and covers all of the outbound business. We make our books up according to that report. That information would be contained in way bills. Copies of the way bills would be in the State of Washington (St. 287).

Plaintiff's counsel thereupon moved to strike all the testimony of the witness in regard to the amount of the various items shown on Def.'s Ex. "20", from "A" to "F", inclusive, and each of such items, on the ground that such testimony was not the best evidence, in that he failed to produce the records upon which his testimony was based, the way bills being in the State of Washington and available; and upon the ground that such testimony was purely hearsay. Counsel further moved that the testimony of the witness be stricken with respect to those items concerning which the data was acquired by correspondence between various agents of defendant as pure hearsay, even the letters themselves if produced, being self-serving declarations. Whereupon the court said: "That is the same objection. Your motion is the same as the objection that you made at the time of the introduction, and the same ruling. The court will reserve its ruling" (St. 288).

William P. Maloney, called and sworn as a witness on behalf of defendant, testified as follows:

I reside in Seattle, am travelling auditor of the G. N., and [fol. 276] have been engaged in railroad accounting work with the G. N. for 19 years, 16½ years in Seattle. I am familiar with the Company's business in and about Seattle, and with the business the company does at its dock in Seattle. You ask if I made an investigation to determine the true character of the item shown on Exhibit "20" as

wharfage in the amount of $25,000.00, which was transferred from the intrastate to the interstate accounts in the railway company's amended Answers to Interrogatories and amended return in this case. In the usual course of my duties I audit that account (St. 289) regularly. You ask if I know how this money was earned by the G. N. (Objected to by plaintiff as not the best evidence. Objection overruled.) You ask for what service it was earned. (Objected to by plaintiff as not the best evidence. Objection overruled.) For wharfage, loading and handling charges on freight handled over our dock at Seattle, Washington. You ask where that freight was moving. (Objected to by plaintiff on the same ground. Objection overruled.) It comes from the boats and goes forward to various destinations both in and out of the State of Washington. It also moves by rail from various points of origin to the Seattle dock, and goes forward by boat to various foreign and domestic destinations out of the state. You ask if it was all earned in connection with the forwarding either of shipments that were going from the State of Washington to outside points or from outside points inside of the State of Washington and passing over this dock. Yes, sir. It was for services performed in the transfer from rail (St. 290) to ship, or ship to rail, as the case might be. (Objected to by plaintiff as not the best evidence. Court reserves its ruling.)

[fol. 277] On cross-examination he further testified as follows:

You ask where I got my information concerning the movements of this freight. It is shown in the station records at the Seattle dock at Seattle. You ask from what original sources we get the information when it is entered in the station records at Seattle. Well, on the freight arriving, coming off a boat, we get a copy of the ship's freight list, which shows the weight and the destination. In some cases it is through ocean bill of lading. Usually it is forwarded from Seattle. You ask if any of this $25,000 includes consignments in which there is a through bill of lading from some point out (St. 291) side of the state to some point beyond the limits of the state. Yes. You see, take your through ocean bills of lading from points in the East, consigned for shipment through to a point in the Orient, would be handled that way. You ask how many of

those. Well, I could not say the proportion or even how many. That would be shown by these bills of lading of which we have copies at the Seattle dock. I have said that there were also shipments that came off of ships and were later reshipped to some other points. You ask what the sourses of that information were. It would be shown on the ship's freight list in the first place, and if the shipments were handled by, say, a brokerage firm in Seattle, and reforwarded by them, it would all be shown on the billing which they furnish us. All the wharfage earned at the dock is included in (St. 292) the $25,000. (Questions by defendant's counsel.) Shipments coming from the Orient are, in a great many cases, billed to Seattle as a single consignment already marked—each case marked for various destinations in the United States. An import brokerage house in Seattle will issue a new bill of lading then, a domestic bill of lading for each individual lot on which the shipment will then move to the various destinations in the [fol. 278] United States. The final destination, of course, is determined before it leaves the Orient, and the case is so marked. (Questions by plaintiff's counsel.) This information is all shown by these various bills of lading in our possession. It is all a matter of record at the Seattle dock office (St. 293).

Plaintiff's counsel thereupon moved that the testimony of this witness in regard to this $25,000 item be stricken as not the best evidence, and pure hearsay. The Court stated that it was reserving its ruling on this the same as the other (St. 293-4).

JOHN A. TOWER, called and sworn as a witness on behalf of defendant, testified as follows:

I live at St. Paul and am tax accountant of the G. N., attached to the Comptroller's office. The comptroller is in charge of all the company's books and records. I made an investigation concerning the item of $1,820; account 110, switching, in Def.'s Ex. "20" (St. 294), "(c) and (d)" should be corrected to "(b) and (c)" on the exhibit, under account 110. You ask me to explain the deduction that was made. It is switching pertaining to revenue of the general classes shown in items "B" and "C" under account 101, freight; on exhibit "20".

On cross-examination he further testified as follows:

You ask how I know it was that kind of switching. Under my direction I had the auditor of station accounts give me the revenue he received from switching for shipments that come under B and C here. I wrote a letter (St. 295) to the auditor of station accounts, and he wrote back telling me what they were. I am testifying from what his report was to me in response to this letter. That is my sole source of information. (Questions by defendant's counsel.) The [fol. 279] auditor of station accounts is one of the subordinate officials to the comptroller. My letter was writen for the comptroller (St. 296).

Plaintiff's counsel thereupon moved that the testimony of the witness be stricken on the ground that the same was pure hearsay, and that books and records of the company from which this information might properly be secured had not been introduced in evidence: On this motion the court reserved his ruling (St. 296).

H. O. Berger, called and sworn as a witness on behalf of defendant testified as follows:

I live in Seattle, and my business is consulting rate and traffic expert. I have been engaged in that business since 1927. Prior to that time I was with the D. P. W. from 1921 to 1927 as assistant, and as rate and traffic expert for the Department during that time. I made an investigation of how the commerce covered by the items shown on Def.'s Ex. "20" was moving, with a view to ascertaining whether it was properly classifiable as intrastate commerce on the one hand or interstate or foreign commerce on the other (St. 297) hand. You ask how I made the investigation. In company with Mr. Maloney and Mr. Brown we examined certain of the station records at the Seattle and G. N. Seattle dock offices to specifically check certain of the shipments that were reported in there, and determined from those figures there, from those records, and also from the information that was available, the nature and character of the movements of the shipment. You ask what investigation I made of Item "A", Def.'s Ex. "20",—"Consignments originating in Washington and specifically billed for export", and what I found concerning the character of the commerce.

(Plaintiff's counsel objected to the question as not the [fol. 280] best evidence and pure hearsay. The court reserved its ruling (St. 298-9). Whereupon, the witness testified:)

The particular commodities that we found were involved were flour, apples, lumber, poles and potatoes. In the case of the flour we found that generally shipments originated in the Spokane territory or—yes, so far as originating in Washington is concerned. The flour would be billed directly to a particular steamer and a dock and would indicate that it was destined to Yokohama or some Oriental point or some destination not located in the state of Washington. In the case of the apples, the move there generally, but subject to exception, in this respect, that the exceptions are to have the billing direct to a particular steamer and a particular dock, but the general practice was for the billing to indicate for export on the way bill or the record and the specific destination in the sense of the steamer to which shipment would be sent and the dock was placed with the yard office after the arrival of the apples at Interbay yard.

In the case of lumber, that, like the flour, is billed directly through to the steamer and to the dock generally, showing the destination to which it is going.

Poles generally consist either of cedar bolts used for pencils, slats or it may be logs which are shipped to the Orient and the potatoes generally are billed direct to particular boats destined to Honolulu or the Hawaiian Islands.

Referring to item "B", Def.'s Ex. "20", "Consignments originated in the state of Washington and billed to warehouses (St. 300), elevators", etc. You ask me to relate my investigation and what I discovered.

(Thereupon plaintiff objected to such testimony as to that particular item for the same reason urged against item "A", and stated that he wished it understood that he ob- [fol. 281] jected to all testimony of this nature connected with any portion of Ex. "20" on the same grounds already urged. Counsel for defendant stated that he was willing that counsel have that general objection, whereupon the court said: "That may be understood" (St. 301). The witness then testified:)

That consists of grain originating in the state of Washington and billed to the Hanford Street elecator or Northwest Docks and Elevator and the shipments to those particular docks are devoted to export business entirely. Now, I won't say entirely, because there are exceptions to the rule, of course, but I made an investigation through the operators of the Hanford Street elevator to determine for the season of '33 and '34 the exact movement of the grain out of Hanford Street elevator for that particular period to offshore or foreign destinations and the figure that I obtained indicated that percentage was 95.2% of the grain that went into the Hanford Street elevator moved out by vessels to these destinations and the balance, or 4.8% moved by rails to various destinations.

You ask what the general practice is of accumulating grain in those elevators (St. 301). (Plaintiff's Counsel: "I object to that on the same grounds urged." Defendant's counsel: "You don't need to make those statements. I understand you have an objection to every question.") Generally, in the purchase of grain, there are two classes of buyers. The one is the export broker and the other is the milling broker. Oftentimes you will find the two of them combined. That is, engaging in the same business. There happens to be at the Hanford Street elevators, that elevator is not now operated by the Port of Seattle, but it is operated by a company called "The Port of Seattle Elevator Company." I think that is the correct name. [fol. 282] The real operations are being conducted, or rather, I think, the ownership of that company is being conducted principally by the Pacific Continental Grain Company of Seattle. There are, over in the Hanford Street Elevator, the grains which may be owned by various export farmers including such as South and Company, the Farmers' National—I don't just definitely recall the name, but it is one of the large grain exporting companies in which the Government has indicated a strong interest and, in that matter, the grain is accumulated for the export in large quantities to vessels. It may move to those vessels from the elevator into the hold of the vessel itself or it may move both from the elevator and direct from cars into the vessel.

You ask whether the stream of commerce in grain (St. 302) conducted through those elevators flows out of the

state of Washington to other states or foreign destinations beyond or is a stream of commerce that is stopped at the Port of Seattle.

You ask where most of this grain originating in Washington is produced. It originates generally in Eastern Washington, I think exclusively. Eastern Washington is part of a large grain producing belt in the Inland Empire. You ask if there is a local market in the state of Washington for the great part of the grain that is produced in the Inland Empire or must it find its market beyond this state. (Objected to by plaintiff as immaterial. Court reserves its ruling.) The normal production of wheat in these United States is about eight hundred million bushels. The production in the Inland Empire is in the neighborhood of one hundred million. Or, in other words, that territory produces about one-eighth of the total production of the United States and necessarily indicating that the ter- [fol. 283] ritory itself is a large exporting territory in the sense of not being able to consume it.

You ask what investigation I made of Item "C", Def.'s Ex. "20", "Imports billed to Washington Stations from Washington ports." (objected to by plaintiff on same grounds theretofore urged as to "A" and "B". Objection overruled.) In the same manner as we examined the particular way bills of records. In this case we examined the copies of the way bills that were issued by the agent at the originating port. I might state, as an example, some of the character of the shipments that were developed upon that examination as being typical (St. 304). There was a shipment of tin plate which was brought to Seattle by the Calmore line, which line is engaged in intercoastal business from the Atlantic Seaboard to the Pacific coast. That was a billing which was transmitted to the G. N. Railway agent and indicated on its face that the final destination of the shipment was, as I recall it, either Mt. Vernon or Everett, Washington. I mean the ship's billing transmitted to the G. N. Agent. In the case of another shipment it would be about the same only the shipment would originate at an Oriental port and brought in by the American Mail Line or the N. Y. K. Line or any of the foreign lines engaged in the business in the Orient and likewise destined to a Washington point. If I recall correctly, one of them was to Wenatchee, Washington. Then there

was a third class and that is handled in this way, the billing showing the manner in which it was carried prior to its being put in the hands of the Seattle G. N. agent. Shipments are forwarded by car loading or forwarding companies. I have in mind the Universal Car Loading Company. That company engages in the forwarding business, [fol. 284] so called, which is to accumulate in the eastern United States a large part of miscellaneous less than carload shipments into a carload so as to obtain the benefit of carload rates and to ship those to a central point from which they are again sent to the final destination (St. 305). In those cases, shippers being familiar with the practice of these companies, forward their less than carload shipments to such forwarding companies and, with directions which clearly indicate the final destination. The packages, likewise, are marked for final destination.

Referring to Item "D", Def.'s Ex. "20", you ask me to state what it is and what I found. Item D consists of commodities such as grain, apples, dried beans and peas. It could include livestock, but we didn't find any record of livestock. Lumber, posts, poles and shingles. (Objected to by plaintiff as hearsay and not the best evidence. The objection was overruled.) This would include the revenues on shipments which are going into these transit stations for a later transit (St. 306) use. Grain, for example, may be either cleaned or milled and then reforwarded under the rates and tariffs that the railroads permit and the switching business is conducted on the basis of the through rates from the original point of origin to the final destination of the completed product. The same is true—well, not the same is true as to apples—but the apples are permitted storage in transit. The dry beans and peas are permitted for cleaning, sorting and storage. Lumber, ordinarily, is for milling or further finishing. Posts and poles may be for creosoting or for sorting. The same will apply to shingles. The revenue that is reported in item D is the revenue from the original point of origin to the transit station and the final destination of the shipments have not yet been determined. You ask if it is not a fact that in [fol. 285] the case of the grain, the final destination of the shipment has not yet been determined. Yes, and one might say the same as to the other commodities, but the limitations of the transit tariffs are such that, for example, on

lumber and other commodities the destination is bound to be a point outside of the state of Washington in order to obtain the benefit of the transit rate.

Referring to my investigation of Item "E", Def. Ex. "20". (Same objection by plaintiff and same ruling.) Mr. Brown has already testified to that (St. 307) and I should affirm the statement that he has made with respect to it.

You ask as to Item "C". (Same objection by plaintiff as to the other items, and the same ruling.) This shows that it consists, I might take an example that will tell the story better. Grain may be shipped from Chinook, Montana, a point on the G. N. Railroad, to Spokane, Washington, where it is sent to a flouring mill or to a cleaning plant for the purpose of milling or cleaning. Later on, and within the period of limitation that the tariff will permit, the shipment may move forward in the form of cleaned wheat or flour or feed from Spokane to a point, Wenatchee, Mt. Vernon or some other point in the state of Washington beyond Spokane. The revenue that is included in here is that revenue which was collected on the out-bound movement from Spokane to Wenatchee, or Mt. Vernon, as the case might be, which is the balance of the through rate from Chinook to the final destination, Mt. Vernon, for example, plus a transit charge made,—the transit privilege, having been exercised at Spokane, Washington (St. 308).

On cross-examination he further testified:

[fol. 286] The information with regard to Item "A" was obtained direct from the records in the G. N. Seattle dock office. There would not be bills of lading there, because the bills of lading would be at the originating points. You ask what kinds of records there are. They would be the expense bills, demurrage records, and other accounts that they kept. These are original books of entry in so far as they purport to cover a certain method of accounting operations. I got all of this information from these books personally. We did not check over every shipment, but we did check enough in the limited time that we had to verify what has been reported, and what we had checked were included in that terminology. Mr. Brown (St. 309) gave me the working papers from which I made the examination, and I checked up some of the shipments. I checked them

from the books of the company located in Seattle. I think we checked more than a full month out of the file.

(Plaintiff's counsel thereupon moved that the testimony be stricken as hearsay and not the best evidence, the company's books not being produced. The court reserved his ruling (St. 310). The witness then continued:)

I obtained my information as to Item "B" from the same sources—the books of the G. N. in Seattle. You ask if they are shown by way bills. Well, the way bills would be forwarded back to St. Paul. They would not be available now, because the way bills are always made at originating stations, and after having passed through, in their course of transportation to the destination, the agent merely subtracts those and then sends the final or the original way bill back to St. Paul, so he has just the abstracts. He does make from that way bill an expense bill, which shows all of the information as to matters of this character on its [fol. 287] face, and those are available. Those were in Seattle and were available to me and I examined them, and they are still there so far as I know. I did not check all of those $65,000 in items. That was handled in the same way as Item "A". You ask how this information in regard to what happens to the wheat at the Hanford Dock is shown (St. 311). That was a special investigation I made myself by going to the Pacific National Grain Company, and examining its records.

(Thereupon plaintiff's counsel moved that all the testimony in connection with item "B" be stricken on the same grounds urged as Item "A". The court reserved its ruling (St. 312).)

You ask if I got my information as to Item "C" from the G. N.'s books in Seattle. Yes, those were taken from the copies of the way bills and from the bills of lading. I took them from the way bills in Seattle. The bills of lading and the copies of the bills of lading, the first copies are retained by the agent at Seattle on the outbound movement that he has.

(Thereupon plaintiff's counsel moved that all the testimony of the witness with respect to item "C" on Ex. "20" be stricken. The court: "Same ruling" (St. 312). The witness then continued.)

You ask where I got the information with respect to Item "D". Only as to Seattle that we obtain that information, and we checked the original records that we had there, that would be the expense bills that they would still retain there. Those were all available to me in Seattle. I did not check them all. I think we checked a month's business. When a consignor registers a shipment in transit, he is not obliged to register the ultimate destination of the converted commodity. If he ships it within a definite time and to the particular stations that are covered by the tariff, then [fol. 288] he gets the benefit of the through rate plus the transit (St. 313) charge. Otherwise he would have to pay the local from the station to some other point, or to some point that he chooses to have it consigned. You ask if the shipment is not entirely within the consignor's control at all times, even though it is registered in transit. Yes, I think any shipment is within the control of the shipper except in a very few cases.

You ask what I studied in regard to Item "F". The only thing we had available would be the expense bills at Seattle on such shipments as were handled in that manner. That we checked were checked were in Seattle, yes, and typically of the way shipments from Spokane to Seattle, for instance. You say you are speaking of the records, and ask how we found out about them. Well, we went to the expense bills. Those also show the original point of origin, like in the example we took. It would show Chinook, Montana, as being the originating point. All those records were in Seattle (St. 314) when we examined them.

Plaintiff's counsel thereupon moved to strike all the testimony of the witness in regard to items "D", "E" and "F", as hearsay and not the best evidence, since the books of original entry were available and not introduced. The court reserved its ruling on such motion (St. 315).

[fol. 289] PLAINTIFF'S EXHIBIT "8"

Is a certified copy of "Information Report" dated February 20, 1934, filed with the Tax Commission February 26, 1934, and signed Geo. H. Hess, Jr., Comptroller, in which the estimated amount of average monthly business of the G. N. is estimated at $235,000.00. Attached to said report is a copy of a letter on the G. N. letter head signed

by Edwin C. Matthis, Attorney for Western Washington, and addressed to the State Tax Commission under date of February 24, 1934, which letter reads as follows:

"Enclosed please find Information Report and Business Tax Returns of the Great Northern Railway Company for the months of August, September, October, November and December, 1933. These returns are made under compulsion to avoid the imposition of penalties as threatened by the Commission, in accordance with the written protest hereto attached. The amount shown in these returns will undoubtedly require some correction. In the first place revenue received on account of business done for the State of Washington has not been eliminated, as authorized by the statute, and adjustment will be made accordingly, either in report to be filed for the month of January, 1934, or in the annual return to be filed for the taxable year 1933. Should the law under which this tax is imposed be finally upheld by the courts, the amount shown in these returns may require further correction by deducting items or amounts included which should have been omitted, or by adding items or amounts which should have been included. It is our understanding that the returns are filed subject to any such corrections, in the event the statute should finally be upheld and corrections become necessary."

There is also attached to such Report a form of protest signed by the G. N., by its attorneys, and designated:

Protest accompanying returns of Great Northern Railway Company for months of August, September, October, November and December, 1935, filed in pursuance of Chapter 191, Laws 1933 as amended."

[fol. 290]

DEFENDANT'S EXHIBIT "9"

Are certified copies of amended business Tax Returns made by the Great Northern Railway Company (by Geo. H. Hess, Jr., Comptroller), for each of the months of August to December, 1933, inclusive. Said returns are made under protest attached thereto. Such returns contain the following data:

	August to December, 1933, inclusive					
	August 1933	September 1933	October 1933	November 1933	December 1933	August 1933 to December1933
Gross Amount	$696,587.64	$709,954.07	$828,952.57	$679,034.06	$562,438.60	$3,476,766.94
Proceeds of sales or income derived wholly in interstate or foreign commerce	520,369.55	514,526.03	628,329.50	480,119.44	443,707.60	2,587,052.12
Proceeds of sales to the United States Government, its departments or institutions	6,155.23	3,007.58	3,709.16	3,925.47	994.34	17,791.78
Proceeds of sales to the State of Washington, its departments or institutions	1,606.26	2,794.39	993.15	373.42	266.00	6,033.22
Total amount of deductions	528,131.04	520,328.00	633,031.81	484,418.33	444,967.94	2,610,877.12
Taxable amount	168,256.60	189,626.07	195,920.76	194,615.73	117,470.66	865,889.82
Amount of tax	2,523.85	2,844.39	2,938.81	2,919.24	1,762.06	12,988.35

[fol. 291] DEFENDANT'S EXHIBIT "10"

Is Defendant's Amended Answers to Interrogatories. The answers to Interrogatories 1, 2, and 4 are the same as the answers first filed (Plff's Ex. "2"). The answer to Interrogatory 3 is the same as the answer first filed except that the following sentence is omitted:

"The Interstate Commerce Commission has prescribed no rules or method for reporting to the State of Washington the revenues and expenses within that state."

The amended answer to Interrogatory 5 is as follows:

(Interrogatory 5: "State by the following accounts and account numbers (or by such accounts and account numbers as the same appear upon your books of account) the total amount of the railway operating revenues received by you, or which have accrued, as a result of business transacted by you wholly within the state of Washington (a) during each of the months, August, 1933, to December, 1933, inclusive, and (b) from August 1st, 1933, to December 31st, 1933, inclusive:" (Plff's Ex. "1"))

Answer. "The railway operating revenues received or accrued from business transacted wholly within the State of Washington during the month of August, 1933, to December, 1933, inclusive, by accounts stated in Interrogatory (5), as developed by a recheck of the accounts kept by the Great Northern Railway Company are as follows:"

(Here follows a statement of said revenues for said months as shown by the tabulation set forth on the following page. Def.'s Ex. "10.")

[fols. 292–311]

(Def's. Ex. "10") (page 2)

Acct. No.	Name of Account	August to December, 1933, Inclusive				
		August 1933	September 1933	October 1933	November 1933	December 1933
101	Freight	$136,779.16	$158,573.46	$167,738.40	$162,928.28	$82,020.24
102	Passenger	26,188.61	26,644.50	21,237.88	25,506.58	31,423.63
103	Excess baggage	172.61	259.85	150.22	215.21	140.06
104	Sleeping car	.....	.....	.....	.....	.....
105	Parlor and chair car	356.58	262.20	261.45	215.40	311.75
106	Mail	.....	.....	.....	.....	.....
107	Express	.....	.....	.....	.....	.....
108	Other passenger train	130.61	114.91	105.39	210.99	174.24
109	Milk	1,076.74	777.42	813.08	498.68	487.20
110	Switching	3,552.29	2,993.73	5,614.34	5,040.59	2,913.54
111	Special train service	.....	.....	.....	.....	.....
112	Other freight train	.....	.....	.....	.....	.....
	Total	$168,256.60	$189,626.07	$195,920.76	$194,615.73	$117,470.66

Following the foregoing tabulations, is the following:

"The corrected figures are largely the result of an analysis and examination of Account 101 and the elimination of revenues received from interstate and foreign commerce and from transactions with the United States and the State of Washington. The revenues received and reported to the Interstate Commerce Commission under the other account numbers set forth in this interrogatory, but under which no revenue is shown in this answer, are unsegregated revenues received either partially or entirely from interstate commerce."

[fol. 312] DEFENDANT'S EXHIBIT "12"

Is a card 10 by 5 inches in size designated "Switch Foreman's Work Report" upon which is printed what is termed "Code of Engine Service," describing by numbers various services rendered by switching engines. The card also has blank spaces for the entry of data as to Engine No., Date, Time Worked, Switch Foreman, No. of Brakemen, Time, from — to —, Work done, Cars Handled, Loads —, Empties —, and Remarks.

DEFENDANT'S EXHIBIT "13"

Is a card 10 by 5 inches in size designated "Great Northern Railway Company Yard Movements, Seattle, Wash.," upon which is printed what is termed "Code of Yard Movements," describing by numbers various services rendered by yard engines. The card also has blank spaces for the entry of data as to Engine No., Date, Time Worked, Switch Foreman, No. of Brakemen, Switch Crew Time, From — to —, Work done, Cars handled, Loads —, Empties —, and Remarks.

[fol. 313] DEFENDANT'S EXHIBITS FOR IDENTIFICATION "14" TO "16"

These identifications consisted of packages said by defendant's counsel to contain data connected with the special studies made by defendant. These were later withdrawn with the consent of plaintiff's counsel (St. 423).

[fol. 314] DEFENDANT'S EXHIBIT "17"

Consists of 13 set-ups in connection with the special study made by defendant for the week ended March 9, 1932, made for the purpose of determining the amount in which the annual revenues and expenses would be reduced by a discontinuance of defendant's intrastate business. Since the accuracy of the ultimate figures resulting from these calculations are not disputed by plaintiff, this exhibit is omitted.

[fol. 315] DEFENDANT'S EXHIBIT "18"

Is a copy of the testimony of C. R. Lonergan and T. M. Jenner called as witnesses for the defendant in state of Washington vs. Northern Pacific Railway Company, which testimony is in substance, as follows:

C. R. LONERGAN, called and sworn as a witness on behalf of defendant, testified as follows:

I am traffic expert for the D. P. W. the National Carriers including the N. P. and G. N. and other lines have now an application pending before the I. C. C. for an increased rate. There has been an application filed for an increase in the state of Washington with the Department, and that is pending before the Department. You ask if there is any way of knowing when that application can be heard. I think the carriers request that it be not heard until after the I. C. C. makes its findings, because the same increase is asked for of the local rates as is asked for the Interstate rates. What that increase will be cannot be known until the I. C. C. acts. There is no chance of bringing the state case to trial before that. There is no way of knowing when the I. C. C. will finally make its order. It will probably be some time early next year, because the hearing extends until December.

On cross-examination he further testified as follows:

I am familiar with the proceedings taken by the railroad companies in that case that I referred to in my testimony, which is Ex Parte No. 115. You ask if the railroad companies raised in that case the rates should be increased by reason of the imposition of this occupational tax. I don't [fol. 316] believe that was one of the reasons they gave. I might say this, that at the hearing the carriers put in their case in Washington. It was put in starting, I think, October 1st, 1934. You ask if they introduced evidence in regard to what their occupational tax would be, at that hearing. I did not hear any. I was there. They stated what their entire expenses were. I did not hear anything about them including the occupational tax. They included their item of taxes in their statements of revenues and expenses. In putting in their evidence they did not follow the classification that is detailed in their reports, in the I. C. C. reports. Most of the exhibits were composite exhibits covering

western railroads and eastern railroads and southern railroads. It was not any separate showing made by any one railroad. The N. P. and G. N. figures were included in this northwestern group. You ask if any particular railroad had the right to make a separate showing if it so desired. Well, it was not done that way.

(Counsel for defendant thereupon stated that there was no occupational tax included, because none had ever been levied against the railroad, much less collected, and we don't think any will ever be collected, either. So it certainly was not in the showing. Whereupon the witness continued:)

I do not know that the occupational tax was in the showing made by the northwestern railroads in said hearing. These were the general figures of expenses of revenues that I had reference to. You ask if the I. C. C. hearing relates to local rates in the state of Washington. It includes rates beyond 220 miles in length on merchandise, and in some cases it includes rates for all distances. But generally speaking the application is made up so as to exclude any advances in rates where truck competition is involved for distances up to 220 miles. You ask if there is any proceed-
[fol. 317] ing for an increase of rates brought by the G. N. or N. P. other than the one before the I. C. C. As I testified here, the carriers also filed an application with the D. P. W., a similar application. In fact it is identical with the I. C. C. application, and they are requesting the Department to take no action, not call a hearing or do anything about it until the matter of interstate rates is definitely settled by the I. C. C. so that it is pending. It was filed in September, 1934. You ask whether in that application the railroads state any claim for this occupational tax. No.

T. M. JENNER, called and sworn as a witness on behalf of defendants, testified as follows:

I am a member of the Tax Commission. Exhibit "D" attached to the Answer appears to be a copy of Senate Bill No. 18. I attended a meeting before the Legislative Committee at which this bill was up for consideration. I don't recall whether it was the Revenue and Taxation Committee

or not. Mr. Sharpe attended that committee meeting and urged that the Committee favorably report out this Senate Bill 18. The bill never got to the floor of the House as far as I know. I don't know whether it died in the original committee or the Rules Committee.

On cross-examination he further testified as follows:

Mr. da Ponte, Mr. Balmer and other railroad attorneys were present at the committee hearings on said Senate Bill 18, and quite strenuously opposed the reporting of the bill favorably by the Committee.

[fol. 318] (It was admitted by plaintiff's counsel that Exhibit "B" attached to the Answer is a copy of Senate Bill "18" referred to in the foregoing testimony of T. M. Jenner, and that Exhibit "A" attached to the Answer is a copy of the first supplemental findings and order of the D. P. W. referred to in the foregoing testimony of Mr. Lonergan. St. 144.)

[fol. 319] DEFENDANT'S EXHIBIT FOR IDENTIFICATION "18"

This identification consisted of a package said by defendant's counsel to contain data connected with the special studies made by defendant. This was later withdrawn with the consent of plaintiff's counsel (St. 423).

DEFENDANT'S EXHIBIT "19"

Purports to be a statement on behalf of the G. N. in the matter of the assessment of the G. N.'s railroad operating property for the year 1933 adressed to the State Board of Equalization of the State of Washington. Since this exhibit is not deemed material, the same is omitted.

[fol. 320] DEF.'s EX. "20"

Great Northern Railway Company

Washington—Calendar Year 1933

Revenues eliminated as applicable to interstate and Foreign Commerce as reported in amended answers to interrogatories

Account		Total applicable	
		August 1, '33 to Dec. 31, 1933:	To year 1933
(101)—Freight			
(a) Consignments originating in Washington and specifically billed for export	$92,580		
(b) Consignments originating in Washington and billed to warehouses and elevators, practically all of which would be exported or transported by water and (or) rail to other states	65,558		
(c) All other imports billed to Washington stations from Washington ports	8,033		
(d) The initial local state revenue collected for shipments into transit stations	308,896		
(e) Absorbed switching	14,997		
(f) Milling in transit adjustments on grain originating outside of Washington and the products reshipped to points in Washington	41,055	531,119	1,097,178
(110)—Switching			
Switching revenue received on shipments pertaining to (c) and (d) under Account 101	.....	1,820	3,610
(143)—Miscellaneous			
Wharfage	.....	.....	25,000
Total		$532,939	$1,125,788

[fol. 321] Plaintiff's Evidence in Rebuttal

C. A. MANSCHRECK, called and sworn as a witness on behalf of plaintiff, testified as follows:

My business is supervisor of valuations, State Tax Commission. My duties in connection with that work are: assisting the Commission in arriving at valuations for taxation of public utilities, and so forth, by the Tax Commission. I am familiar with the G. N.'s annual reports to the D. P. W. and Tax Commission and with the method of accounting used in making such reports. I have been engaged in my present line of work with the Tax Commis-

sion since May, 1925. Prior to my employment with the Tax Commission I was assistant to the Director of the Department of Efficiency in setting up various accounting methods in the State Departments. I set up the accounts of the Income Tax Law, also set up the present system of accounting used in the Business (St. 331) Tax or Occoupation Tax. Prior to my employment by the Department of Efficiency, from June, 1916, to August of 1920 I was Chief Paymaster of the United States Shipping Board in charge of supplies and accounts. From 1909 to 1916 I was auditor of disbursements of the City of Seattle in the Comptroller's office.

I have examined the exhibit introduced in evidence in this case known as G. N. Exhibit No. "11". I have made a study of that exhibit as much as I can. I make my study in connection with work sheets furnished by Mr. Burn and the reports submitted to the D. P. W. I received Exhibit "11" about 5:00 Monday evening and this is Friday (St. 332). I got the work sheets on Wednesday. I prepared certain studys or set-ups in connection with G. N. Exhibit "11". I [fol. 322] prepared ~~all of~~ plaintiff's Exhibits "21", to "36" inclusive (St. 333) after making comparisons as to the work sheets and the figures contained in the reports to the D. P. W.

The purpose of Plff's. Ex. "21" is to restate the operating expenses applicable to intrastate operations, freight and passenger. Plff.'s Exs. "21" to "24" relate to the figures in Def.'s Exs. "11" pp. "1" to "27". You ask me to explain Plff's. Ex. "21", and how I arrived at the figures therein set forth (St. 334). In Item "1-A", where is shown the total freight revenue, account 101, intrastate, that figure was taken from G. N. Exhibit "11", page 11, account 101 freight. "1-B" was taken from G. N. Exhibit "11", page 2, line 8. The operating ratio is set forth in line "1-C", and is line "B" divided by line "A". Line "1-D" is the switching revenue assigned to account 110 as shown by Def. Ex. "11", p. 11. To this I applied the operating ratio and arrived at the figure $21,547 shown in line "1-E" (St. 335). This is in a measure a restatement of page 7, Def. Ex. "11". In computing that item I applied this operating ratio only to switching revenue, while on page 7, Def. Ex. "11" the ratio was applied to all the accounts other than account 101 as shown on Exhibit "11" page 11. You

ask me why I do that. Well, from my study of Def.'s Ex. "11" and the work sheets I find that there was no deduction made for maintenance of way and structure on the 3-year average. All of the expenses as charged for those 3 years were used in the study. This applies also to maintenance of equipment, traffic and transportation. In using all the figures contained or charged to expenses and used for the purpose of finding the operating ratio of 101, it is my contention that the expenses were distributed when they were [fol. 323] so allocated and the services performed by all of the employees of the company in freight services were engaged—or any part of the service was for the purpose of performing duties in connection with these various accounts, such as 111 special (St. 336) train, 112 through freight train, 135 storage of freight, 137 demurrage, 139 telegraph and telephone, 142 rents of buildings and other property, and 143 miscellaneous. In reporting to the I. C. C. and the D. P. W. the carrier itemized its various expenses connected with railroad operations by accounts. You ask whether the G. N. in making it showing in Def.'s Ex. "11" took into account each and all of these railway operating expenses that are used in connection with making these reports, and if not, which ones were not taken into consideration. I could not find that the amount shown in Account 446 on page 707, line 229, had been used in the calculations. On the basis of the average, the average of 3 years as used in the other computations, 1931 expenses are $20,000 plus, and in 1932 $9,000 plus, and in 1933 $6,000 plus, or an average of the 3 years of $12,342. Now in the study made and the figures used the defendant eliminated from transportation expense the direct yard and direct road costs which were substituted by the costs arrived at from the study made of the 2 different periods (St. 337). The actual items were substituted in the study figures for the reported items. It used those in connection with the terminal cost study and the line haul. You ask if the account which I said was not considered, related to any of the revenue included in any of the revenue accounts other than 101, in Def.'s Ex. "11". Well, not having the detail of the income that was credited to this account 143, I looked up the I. C. C. classification to see what these 2 accounts [fol. 324] should include, and not having the detail I can-

not answer whether the expense was incident to any of the revenue items or not.

Again referring to Plff.'s Ex. "21", the passenger expense in line "2-A", is the figure found by the defendant in its calculations as $888,000 plus. Then, to find the total railway operating expenses applicable to intrastate operations, I add the 3 items in the last column.

Referring to Plff.'s Ex. "22", you ask me to explain, first, how I apportioned (St. 338) the taxes. I first apportioned between freight and passenger, both interstate and intrastate, on the basis of car and locomotive miles, and arrived at the proportions shown in lines "D" and "E". Then I apportioned the freight and passenger as applied to intrastate business only. I found the total amount of the taxes payable by the G. N. by letter received the G. N. attorney, Plff.'s Ex. "37" (St. 339).

(Plff.'s Ex. "37" was thereupon received in evidence (St. 339). The witness then continued:)

The figure contained on Line "F" was taken from this (St. 339) letter referred to as Exhibit "37", $1,257,860 to which I had added Federal taxes as apportioned by the G. N. Exhibit "11", page 9, line 5-B of $9,593, which gave me a total of $1,260,453, from which I deducted the amount of taxes contributed by tenant roads in the sum of $12,556, leaving a balance of $1,247,897.

I first determined what I should apportion to freight, interstate and intrastate (St. 340). I apportioned 20.2% of the taxes apportionable to freight service, to intrastate freight service, on a relative car mileage basis based on the test period as found in Def.'s Ex. "11", page 4 (St. 341). The net Washington taxes chargeable to freight operations was $997,883. The net tax chargeable to passenger was [fol. 325] $250,095. The amount was arrived at through computing the item line "E" multiplied by line "H" and the item on line "D" multipled by the item on line "H". These are all explained in the exhibit. The method of arriving at the relation between the intrastate car miles and the total interstate and intrastate is shown in "K". And applying that ratio of 20.2% to the amount appearing in line "I" I have the amount appearing in line "L". I apportioned the tax chargeable to intrastate traffic in the relation of the intrastate revenue to the intra and interstate

revenue, and found that to be the fraction set forth in line "O". To find the tax apportionable to intrastate passenger traffic, I multiplied that fraction in line "O" by the amount in line "J", and arrived at the figure in line "P", as apportionable to intrastate passenger service. I then added line "P" and "I" to get the total of $291,181. I then added the license tax payable by the G. N. as shown in line "R" and got the final total shown in line "S". I considered this a proper method of apportioning the tax from the available data. You ask whether I consider it the most fair method of apportioning taxes from the available data. Well, to my mind it shows the use made of the property, both intrastate and interstate, and the only way the tax could be apportioned (St. 343).

The purpose of Plff.'s Ex. "23" is to show the apportionment of joint facility rents chargeable to Washington operations. The exhibit is made on the assumption that the intrastate freight traffic for 1933 was the amount reported to the D. P. W. You ask me to show how I made the opportionment. I requested from Mr. Balmer the car mileage made on the G. N. Seattle-Portland line as to freight and passenger and, in reply to that request, the mileage as [fol. 326] shown in Item "A" was phoned to our office yesterday. The percentage or the ratio of passenger car miles to the total freight and passenger car miles is as shown in line B, the ratio of the freight car miles to the total freight and passenger miles is as shown in line "C". The joint facilities rent net debit shown in line "D" was taken from the G. N.'s Ex. "11", page "9", as indicated. The item of line "E" was the application of the ratio in line "C" to the amount shown in line "D". That is for freight. The passenger prportion in (St. 344) line "F" is the ratio shown in line "B" to the total amount shown in line "D". You ask why I took the result of operations of the Seattle-Portland line in making this apportionment. Because that is the largest property rented by the G. N.—joint facilities property—and carrying a heavier traffic. I had no corresponding material available as to any of the other properties which the G. N. rented. I found the total car miles, the total passenger car miles, and the total freight car miles operated by the G. N. over the Seattle-Portland line for 1933. And I apportioned the joint facilities rents net debit between freight and passenger service according to the rela-

tive passenger and freight car miles. I apportioned as between intrastate freight and interstate freight on the (St. 345) relation of intrastate net ton miles to the total intrastate and interstate, as testified to by Mr. Burn, and I found that the proportion was 20.84, and applied that percentage to the total of the tax assigned to freight, which produces the item appearing in line "H". I apportioned the passenger proportion according to the relative revenues from intrastate and interstate business taken from Def.'s Ex. "11" on page 11. That fraction is shown in line "K" to be 35.83%. I applied that percentage to the total passenger, intrastate and interstate, in line "F" (St. 346) and [fol. 327] reached the figure in line "L". In line "M" is shown the total to be apportioned. You ask my opinion as to this method of apportionment, considering the limitations of the material and data that I had before me. Well, it was the only way that I could work it out with the limited information that I had. I think it is the fair way (St. 347).

Plff.'s Ex. "24" is a restatement of page 1 of Def.'s Ex. "11," and is also a summary of Plff.'s Exs. "21" to "23." The items are I think, self-explanatory and refer to the pages where the data is found. The railway operating income in line 5 compares with line five in Def.'s Ex. "11," page "1."

The purpose of Plff.'s Ex. "25" is to show what amount would be deducted from railway operating expenses as shown in plaintiff's Ex. "4" if the item of expense of pensions were eliminated (St. 348). Of course that reduction would apply to the ultimate figure reached by line "8" of Ex. "24." It would correct all the way through where corrections are necessary. I think these figures in Plff.'s Ex. "25" are self-explanatory. The figures on Plff.'s Exs. "24" and "29" are in no way affected by my showing in Plff.'s Ex. "25" relating to pensions (St. 350).

Plff.'s Exs. "26" to "29" are all made in the same manner as exhibits "21" to "24" and are companion statements to these exhibits, taking into consideration the claimed interstate foreign commerce (St. 349). My method of computation is shown on each exhibit and all computations are correct to the best of my knowledge.

Plff.'s Ex. "27," I think, is in the main self-explanatory.

Referring to Item "D" you ask why I didn't use relative ton miles and passenger miles as applied to this new calculations by which defendant transfers a portion of its [fol. 328] intrastate traffic over to interstate (St. 350). For the reason as stated in the note there, it was not furnished to us by the defendant. (Questions by Defendant's counsel.) It wasn't asked for from the G. N. by me. (Questions by plaintiff's counsel.) It is not shown in the report to the D. P. W., or any exhibit offered in this case that I know of. That is also true of the starred item, line "D," in Plff.'s Ex. "28" (St. 351).

Plff.'s Ex. "29" is a recap and for the first 9 lines, corresponds to the showing made by the G. N. by the defendant in G. N.'s Ex. "11," page "A" (St. 351). I did not consider that cost of reproduction was a factor to be used in this case. Neither did I consider that equipment rent or joint facilities rent were factors to be used, and merely made those calculations because they were shown in the defendant's exhibit.

Plff.'s Ex. "30" was made to show the percentage by which the revenue per ton freight intrastate exceeds the per ton revenue on interstate. That is self-explanatory. Line "I" shows that the proportion is 132 plus per cent. In other words, the G. N. makes more than twice as much per ton mile from its intrastate than from its interstate business. The excess is 132% (St. 352).

Plff.'s Ex. "31" is intended to show the revenue per passenger (St. 352) mile on interstate and intrastate, and the percentage of difference between the two. I find in Line "I" that the revenue per revenue passenger mile on intrastate business exceeds the revenue per passenger mile on interstate by 23% (St. 353).

Plff.'s Exs. "34" and "35" are work sheets to show the methods that I used in arriving at the millages and the basic figure of 13.939 on exhibit "34" and 15.414 on exhibit "35" are used in the work sheet, which is exhibit "36." [fol. 329] You ask where it is on the work sheet. On line 19, Plff.'s Ex. "36" appears 13.939 and on line 23 appears 15.414 (St. 354). (Question by defendant's counsel.) With the exception that I have added a couple of work sheets, Ex.'s "32" to "36" are identical with exhibits introduced in the N. P. case. They were made for all four roads. (Questions by Plaintiff's counsel.) Plff.'s Ex. "32" in the

G. N. case is the same as Plff.'s Ex. "43" in the N. P. case; Plff.'s Ex. "33" in the G. N. case is the same as Plff.'s Ex. "44" in the N. P. case. All of my testimony in the N. P. case relating to exhibit "43" likewise applies in the present case to Plff.'s Ex. "32" and all of my testimony with respect to Plff.'s Ex. "44" in the N. P. case applies likewise to Plff.'s Ex. "33" in the present case (St. 355). My testimony in regard to Plff.'s Ex. "43" in the N. P. case applies likewise to Plff.'s Ex. "36" in the present case.

(It was thereupon agreed that the testimony of Mr. Manschreck including the cross-examination relating to those exhibits, might be lifted from the N. P case and placed in the present case (St. 356). Such testimony is as follows:)

Plaintiff's Ex. "43" is a comparison of aggregate taxes payable by certain interstate railroad companies under revenue laws in force prior and subsequent to 40-mill and other limitation acts, comparing the year 1932 with 1933. 1932 was the last year that there was unlimited millage. After that the 40-mill tax law and other limitation acts applied. The comparison is made for the transcontinental lines, the N. P. G. N. O. W. and Milwaukee (St. 356a). The first line "A" shows the total ad valorem taxes levied in 1932 payable in 1933 as to these four lines and the total. There were changes in valuations in 1933 as compared with 1932, and there was also a settlement of the N. P. tax case. [fol. 330] And so that there had to be an adjustment according to equalized values. In line "B-1" is shown the taxes, the valuations or rather the equalized assessed valuations for each of the roads for the year 1932, and in line "B-2" I show the same for the year 1933 as to each road (St. 356b). In line "C" I show the ratio of the one to the other for the purpose of harmonizing the showing as to 1932 with 1933. So that I find in line "D" the total ad valorem taxes that would have been payable for 1933 on the basis of the 1932 millage rates, by multiplying line "A" by line "C." In line "E" I show the total ad valorem taxes payable for 1933 levied under 40-mill and other limitation acts under the laws in force in 1933. Those were the actual taxes levied, and not the accrued taxes (St. 356c). Line "F" shows the total amount of occupational taxes payable for 1933 had the same been imposed for that entire

year. That was computed on the basis of 1½%, applied to the railway freight revenues less the mail revenues, intrastate only, as reported to the Tax Commission on page 22 of the Tax Commission report. That would be the maximum amount of occupational tax that could possibly be payable by these various companies for that year, after excluding mail revenue. Line "G" is the total of lines "E" and "F," being the sum of the occupational tax if it had been imposed for the whole of the year 1933, and the ad valorem (St. 356d) taxes which were actually imposed for the year 1933. In line "H" I attempt to show the net savings in total taxes ad valorem and occupational, which the named companies would thus have realized in 1933 under this new tax plan resulting from the enactment of these new limitation acts, and that was based on the application of the occupational tax to the full year's business. I had to use that in order to make a comparable showing, because I did not have the revenues by months. [fol. 331] To find this net savings I deducted the figures in line "D" from the figure in line "G."

What I have stated heretofore relates to all taxes, state, county and all ad valorem taxes paid by the company. I now come to what taxes, if any, have been paid so far as taxes imposed for state purposes alone are concerned. Line "I" shows the ad valorem taxes for state purposes which would have been levied for 1933 under revenue laws in force prior to the 40-mill and other limitation acts. You ask how I found that. Well, each year I am required to make up a statement to the State Board of Equalization showing amounts required for the various funds to be levied by the State Board of Equalization for the tax rolls of that year, and the millage requirements were used there and applied to the valuations to produce the amount shown on line "I." The "other limitation acts" referred to in the exhibit is the Showalter Bill which has a limitation of 5 mills on the state school fund levy. I took that into consideration. Line "J" shows the actual amount levied under the 40-mill and other limitation acts. That is the actual amount I did levy (St. 356e). Line "K" is a mere repetition of line "F." Line "L" shows the total ad valorem taxes for state purposes for 1933 as actually imposed, plus the total amount of occupational taxes which would have been payable for the whole year 1933 if the law had been in force during all

of that period. Then in line "M" I show the net savings in total taxes for state purposes alone, both ad valorem and occupational, which the named companies would have realized in 1933 under the new tax plan, and I reach that figure by deducting line "I" from line "L" (St. 356f).

Plaintiff's Ex. "44" purports to be a comparison of aggregate taxes payable by certain interstate railway com- [fol. 332] panies under revenue laws in force prior and subsequent to the 40-mill and other limitation acts. This is 1932 as compared with 1934, as to the same railroads covered in Ex. "43." It is made in the same manner as Ex. "43" (St. 356g). For the purpose of computing occupational taxes I have assumed that the taxable income of these various roads would be the same for 1934 as for the whole of the year 1933.

Plaintiff's Ex. "45" is a work sheet showing how the figures on Ex.s "43" and "44" were computed and applied. The exhibit is self-explanatory. All statements on it are correct (St. 356h).

You ask if it is not true that the 40-mill law reducing real and personal property taxes in the state did not confer any peculiar benefits upon railroads any more than it did on any other property. No, I don't think that is true (St. 356i). You ask what peculiar benefits it conferred on railroads. I think the allocation of real estate values as found by the State Board of Equalization to taxing districts on a millage basis, as provided by the acts for distribution of railroad valuation throws a lesser value in the high levy taxing district than it does in the low taxing district, and that the valuations so allocated, for instance, to the city of Seattle or the county of King, with large terminals, does not reflect or does not correspond to the actual value of other real property within the city, and to the extent of that particular taxing district the railroad property would bear a lesser (St. 356j) burden than other real estate in that district. The law provides for the allocation, but not the 40-mill law. Such benefit, if any, existed before there was any 40-mill limit. You ask if the same method of allocation was followed as is followed now. That method of allocation is provided by some other statute. There is no occupational tax levied directly upon real property (St. 356k).

On redirect examination he further testified as follows:

[fol. 333] The 40-mill limit law is not an absolute limit of all taxes to 40 mills. The tax levies range all the way from the thirties up to, I think, the highest was in Gray's Harbor, 106 or 104 mills on the assessed valuation. You ask how it happens that you can levy more than 40 mills. Due to the 40-mill tax law, providing for bonded indebtedness, warrant indebtedness and interest retirement, I know there is a heavy bonded indebtedness in certain cities and taxing districts. I don't know the amount. The full amount of levy for those purposes, so far as the property in those big centers is concerned, is unaffected by the 40-mill limit, so far as the levies for the payment of these bonds and the retirement of these bonds is concerned (St. 3561). The N. P. would not profit any more now than it did previous to the 40-mill limit law. I mean by that that the allocation of the property valuations for instance of the N. P. is made on the same basis as it was previously made, and that as long as the Act is in effect we could continue to allocate that value to taxing districts irrespective of the actual value of the property within the district, such as I mean in Seattle, for instance, were we allocate on a mileage basis. The same value or the same rate per mile is allocated, for instance, to—oh, we will take Kittitas County or any other county through which the main line runs, and it gives no effect to the intensive terminal properties within the city or county or wherever the terminal properties are located. I think that business property, hotels and apartment houses and things of that kind are paying proportionately more on the value of their property within the cities than the railroad companies are paying (St. 356m).

(Question by defendant's counsel.) You ask if I mean, according to my idea of the value of railroad property. [fol. 334] Well, as fixed by the State Board of Equalization (St. 346n).

On cross-examination by defendant's attorney, he further testified as follows:

You ask what study I have given to railroad cost accounting. Only in so far as related to matters of ad valorem taxation in the state of Washington, and the study I made during the past 3 days in going over the G. N. reports to the D. P. W. and the I. C. C. (St.356). Up to that

time my study of railroad statistics was practically confined to the question of ad valorem taxation. You ask if that question is not largely a study of values of the property rather than a study of the operating results. No, I go over the operating results quite thoroughly, take all the figures that are reported and my study that is made for the purpose of ad valorem valuation covers all those figures. It covers relative car mileage, relative ton mileage, relative passenger millage, relative revenues and relative expense. It covers very largely a comparison of the units of those things in the State compared to the units of the system as a whole, as reported to the Tax Commission and D. P. W. (Defendant's counsel admits that the witness has made studies of those reports.) (St. 357). You ask if I have ever had the responsibility of studying railroad statistics for the purpose of determining whether particular services were compensatory. No, sir, I have never studies those—well, I might qualify that statement of my answer there by saying that I have gone over some of the records that have been introduced in various rate cases before the D. P. W. if that is what you refer to. I have never prepared such studies myself. I realize the operations of a railway company such as the G. N. Railway in a state as large as the State of Washington involves an infinite variety of service. You ask if I realize that that [fol. 335] infinite variety of service is not conducted at the same time on the same train with the same employees to a very large extent. Well, I don't know what you refer to, Mr. Balmer, in that you have in mind local trains, for instance, local freight trains. It is probably true that high class merchandise may be moved in the same train in which cars of manure are being hauled (St. 358). The smaller circuses may be moved in the same train as silk hats. You ask if I could carry on those extreme comparisons for half a day and go over the whole classification of the revenue business which the railway company is hauling. The hauls are of different lengths, and I would say that the services themselves to some extent are different. Some shipments require icing, heating and expedited service, while there is a large amount of dead freight that does not require any of those special services (St. 359). I think that nevertheless, the several classes of service might all be handled in the same train at the same time, by the same employees, over the same railroad. You ask if I

realize the difficulty and flexibility of ascertaining the cost of the individual services that are all being performed together. Well, I can't answer that question, because I am not familiar with your general office practice, what duties are performed by these various employees within your office. I would say that it might be hard work to do it. It is not impossible to be done, any more than, I say, making a study of line hauls, switching or any other such related service as has been made in these various rate hearings. You say "not impossible, but a very complex study." Yes, I imagine it would be. The cost of carrying freight depends very largely upon the volume of the traffic. Ordinarily the cost per unit of moving freight decreases with volume (St. 360). That is because many of the expenses are constant. The overhead is practically constant. You ask if, below the overhead, there are not a great many ex- [fol. 336] penses though not utterly constant, nevertheless do not increase in proportion to increased traffic. That is true in many respects. You ask if it costs twice as much to move a train with 50 cars as it does with 25 cars, over the same railroad. No, because you have the same percentage of overhead applied to the 50 cars as you would to the train of 25. Your staff of employees and yard crews and train crews may not have been increased due to the additional 25 cars. Your train expenses, switching expenses and other expenses would be increased, such as I have in mind, as for instance fuel, water, repairs to equipment and such, because you have twice the amount of equipment and probably twice the amount of tonnage to pull over the rails, so I think your costs would increase proportionately. It would cost more to haul 50 cars than it would 25 cars. You ask if it would cost twice as much. No, I would not say that it would (St. 361).

You ask if I have ever made a study of the proportion of maintenance of way costs which varies in proportion to the traffic. Well, there are certain properties that would depreciate to the extent of needed repairs, if you did not move a single train over the line. So I don't know how you could make a comparison as to the increase or decrease in the traffic. I might answer your question partly by saying that the increased traffic would cost increased maintenance of equipment and also right-of-way, that is rails, ties and such items—because they were more heavily used. Consequently your maintenance on that class of

property would increase to some extent, but your maintenance on buildings would go on just the same, you would have to maintain those buildings whether you had a ton of freight in them or a thousand tons. Even the ties would rot and wear out on the railroad even though no trains were run over the line (St. 362). I am not familiar with all of the reports gotten out by the I. C. C. You ask if I ques- [fol. 337] tion the statement of the I. C. C. that only about one-third of the cost of maintenance of way varies with the volume of traffic. Well, I can't answer that question directly. I think it depends on the case involved. You ask whether in some cases it would be true. It may and it may not be true. I don't know. I would not say that it would not be true in any case. I say I don't know. The total cost of moving traffic on a railroad is made up of both terminal costs and line haul costs. Not only that, but you have to add to that a certain proportion of your overhead, if you were making a cost study. So far as the operating costs are concerned, a division (St. 363) of the main items might be made between terminal costs and line haul costs. You say that by terminal costs you mean the expense of originating the freight at the point where the shipment starts, and the expense of delivering the freight at the point where the shipment ends; that is, the expenses of picking up and delivering the freight at the termini, and you ask, if the traffic is the same, those terminal costs would vary with the length of the haul. I don't think they would. The line haul costs, however, would vary with the length of the haul. The railroads in the State of Washington are composed of both main line and branches. And that is true of the G. N. You ask if the traffic contributed by the branches to the main (St. 364) line reduces the cost per unit of moving freight on the main line, assuming it to be main line freight after it leaves the branches. Yes, it is reduced proportionately by the volume; that is, certain expenses are reduced proportionately. That is to a great extent true because of the general principle, that the cost per unit of moving traffic on a railroad reduces with increased volume.

A car mile means one car moved one mile, a ton mile means one ton moved one mile, and a passenger mile, a [fol. 338] passenger traveling one mile.

You ask whether, in determining whether a branch of a railroad is profitable, consideration should be given not

only to the (St. 365) expense of maintaining an operating branch, but also the reduction of main line expense resulting from the business contributed by the branch. Why, you would have to take all factors into consideration, whether the branch line originated and terminated its own freight or whether it received freight from main line or delivered freight to main line, you would have to give consideration to all items in a cost study. If the business of the branch moved partly over the branch and partly over the main line I would not, in determining whether the branch was profitable, consider only the expenses incurred there. You ask if I would not also consider the reduction of expense per unit of traffic that resulted from the traffic contributed by the branch to the main line. Well, there are certain costs that are allocated or distributed to all elements of service, such as branch lines and main lines and consideration would have to be given to those costs to determine whether those branch lines were either making or losing money (St. 366). You ask if I were attempting to determine the cost of moving traffic whose haul consists of a movement partly over a branch line and partly over a main line I would stop when I had ascertained the expense of moving it on the branch line, or would I carry my study on to determine the expense of moving it over the main line. No, I would not carry it over the main line. You ask if I think I could ascertain the true cost of hauling freight partly over a branch and partly over a main line by investigating alone the question of the expense of hauling it on the branch. Yes, you could determine that by allocating revenues to the branch line just the [fol. 339] same as you allocate to other lines. You ask what proportion I would allocate to the branch line. I don't know. I am not making a study of a branch line as to profits or losses. You ask if, in my exhibits, I have done that to any extent. No. I have allocated the joint facility rents of the (St. 367) G. N.'s Seattle-Portland line entirely to the traffic of that line. I don't think it is any more an item of expense than your interest on your bonds or funded debt. You ask if the G. N. could get traffic for its main line or other lines in Washington from the Seattle-Portland line without paying these rentals (St. 368). Why, if you did not rent it you would have to build it, and then you would have to pay interest on your bonds, the money that you borrowed to build the line. You ask if in that case the G. N.

alone would not have to bear the interest on the entire investment in the line. If it were solely used by the G. N. Whereas that line is used by three parties, and the capital charges and expenses are divided between the three. There is not only a lower capital cost, but a lower expense to each, per unit of traffic, to each of the three lines operating that railroad that there would be if each of them owned a similar railroad itself. I know that the traffic of the G. N. which flows to and from the Portland branch also moves over to other parts of its lines in the State of Washington, and in that way increases the volume of the traffic that is moved on its other lines. You ask if it does not thereby reduce the unit cost of moving all its traffic on these other lines. Yes, but I don't think the Seattle-Portland is a branch (St. 369). My answer would be "yes" whether I called it a branch or main line or secondary line.

You ask me to suppose that the G. N.'s Seattle-Portland line hauled nothing but intrastate traffic, but that such traffic, on reaching the remainder of the company's lines at [fol. 340] Seattle, also moved across the state, say to Spokane, on the main line, and that on the main line, in addition to this intrastate traffic from the Portland line, there was also a volume of intrastate freight moving, and you ask whether, under such conditions, the intrastate freight contributed to the main line by the Portland line would reduce the cost of hauling both intrastate traffic and interstate traffic on the main line. It may increase or decrease either your revenues or expenses. You ask if, under the principal that increased volume of traffic reduces the cost per unit of hauling traffic, you would in such case, get a reduction of your unit operating costs for both interstate and intrastate traffic on the main line. Ordinarily, yes, but I would not say in all cases (St. 370).

You ask whether I know, from studies that have been presented to me before the Tax Commission, that the general movement of traffic in 1932 was about similar to 1933, perhaps a little heavier in 1933. I think that is true. In a general way I am familiar with the character of freight that is handled on various G. N. lines in Washington. I know the G. N. has a line from Rock Port to Anacortes, Washington. I know one of the largest cement mills in the state is located at Concrete on that line between Anacortes and Rock Port (St. 374). You ask if I do not know that cement

is a low grade commodity which cannot stand long hauls. Yes. I would like to qualify the previous answer to the question ahead of this one, that cement can't stand a long haul, because cement is shipped from European ports to the Pacific Coast ports by steamer. I wouldn't want to directly say it couldn't stand a long haul. I presume that a large proportion of the output from the concrete plant to go to Washington destinations. It is used locally. I know that that branch did carry a considerable amount of log traffic. I don't know how it is now. I would expect log [fol. 341] traffic to move to intrastate destinations. I imagine the traffic on that line is sparse. You ask if the cost per unit of traffic would be correspondingly high. Well, that gets back to the question of allocation of revenues. The cost, compared with moving freight on other branches or on main lines may be higher and it may not. You ask if I wouldn't expect the cost per unit to be high on a line where traffic is sparse (St. 375). Not necessarily, so. If the freight is handled, both loaded and unloaded, by the railroad company and its employees, the cost would be much higher than either logs or cement loaded by the shipper. You ask if I am going to go into variations between different classes of traffic now. No, I was only thinking of cement and logs that you called attention to that move quite extensively over that particular branch. You ask whether or not, if the traffic were of a similar character, I would not expect the cost per unit of moving it to be higher on a branch line where the business was sparse than on any other similar line where there was a good volume of traffic. Well, there are circumstances there in connection with that. It might be higher and it might not be as high. I can picture a branch line that has very few employees on the line and the cost of doing business on that particular branch would be lower than the one with a greater number of employees of another branch line handling a greater amount of traffic. You say that might be, but that I have also testified that many of the expenses of operating a railroad are constant. That is true. A certain proportion of them are. You ask whether the maintenance, for instance, of a branch line with very sparse traffic to the standard of safety would not be just as heavy as the maintenance of any other line to a similar standard where the volume of traffic was heavy. I don't think so (St. 376). You ask if that is not true so

far as the safety factor is concerned. I can't answer it directly unless you allow me to give my reason. I think a [fol. 342] branch line moving a — amount of tonnage don't require the maintenance that the branch line does get that has a larger tonnage movement. You ask if I would expect the standard of maintenance to go down in proportion to the reduced volume of traffic on two relative lines. I know of cases where it has. You ask if in general I would expect that. Yes, I might say that is true, by some of the larger railroad companies right here in the state. You ask me if I am undertaking to say that in general the cost of maintenance per unit of traffic is not in inverse proportion to the volume. I am not attempting to give that impression. As previously stated, I don't think the volume of traffic on any particular branch line has anything to do with the maintenance expenditures actually made on that line. They can and cannot or would or would not make maintenance expenditures on that line (St. 377).

I did not study any of the operations shown on Def.'s Ex. "17", pages 12 and 13, because I did not have the information before me (St. 380).

Interstate business might (1) begin in Washington and move out, or (2) it might begin outside of Washington and move in, or (3) it might pass through Washington. You ask if it is not a fact that each of the first two interstate hauls would have but one terminal handling in the State. Not in all cases. You say you are referring to the handling at point of origin or termination. There might be handlings in between. I can think of several different cases where that might happen (St. 381). Generally speaking that is true. You ask if it is not a fact that in the case of the third interstate haul, there would be no terminal handlings in the state. With reservations I would answer that generally. You ask if it is not true that if the traffic were in other respects similar, the intrastate business per mile would have to be charged with two terminal handlings, whereas the interstate business for the first two classes [fol. 343] would have to be charged with but one. That is correct. You ask if it is not a fact that if the interstate business of the third class equaled in amount the interstate business of the first two classes, and the business were similar, there would be assignable to each mile of the line haul in the State of Washington but one-half a terminal handling.

Yes. In that case the relation of the total interstate to the total intrastate would be as one to four for terminal handlings. You ask if car miles reflect terminal handlings. No, the car miles of either intra or interstate would not reflect the terminal handlings. Ton miles do not reflect terminal handlings. You ask if the car miles or ton miles that are made in terminals counted or kept of record at all, or reported to the D. P. W. by the railway companies. Not to my knowledge. (Counsel for plaintiff concedes that the only place where car miles or ton miles are connected are on the line haul.) (St. 383.) You ask if the total cost to the railroad of handling its freight consists of first the terminal cost and second the line haul cost. There are costs in addition to that. Well, there is also a traffic expense in securing that business. You say you are classifying traffic expense as one of the overhead costs. So far as the operating cost is concerned, the large costs are the terminal costs and the line haul costs. The rate per unit is made to cover all items of service. The entire system revenues are reported to the D. P. W. You ask if they are not reported without a segregation for revenue between the terminal service and the line haul service. No, there are some segregations made, such as your switching (St. 384). I mean such things as intra-terminal switching and other items that are included in that revenue statement. In general they are reported without segregation. When you [fol. 344] divide the total revenues by the total ton miles to get the average cost per ton mile, you get a unit cost that reflects both terminal handling and line haul service, and it includes also other expenses. That means that to a certain extent, the terminal expenses are averaged over the miles of haul. You ask if it is not a fact that if you have one haul of 100 miles and another haul of 300 miles, and you divide the revenues by the ton miles, and the services are similar, you have only one-third of the terminal expense each ton mile for the long haul you do in each ton for the short haul. Well, that is a result of taking averages. You ask if it is not a fact (St. 385). It does not indicate to me that that is the actual cost of either service. One may cost more than the other, and consequently it gives an improper allocation to the actual costs of handling. You ask if I admit that if the services are similar and one haul is three times the length of the other, you get a unit cost on the long

haul that includes only one-third the terminal expense that really inheres in a short haul. As I said before the average may so indicate. I used averages—ton miles and car miles. You ask if I did not apply those averages indiscriminately to intrastate and interstate traffic. Well, I would not say indiscriminately. I applied them. I applied them in the same manner to both intrastate and interstate traffic (St. 386). I show in Plff.'s Ex. "30" that the revenue per ton mile on interstate freight exceeds revenue per ton mile on intrastate 132% plus. That gets us back to the point of the allocation of revenues again to particular states. The ratio shown in Plff.'s Ex. "30" is the ratio produced from the figures as reported to the D. P. W. I didn't use that ratio for assigning taxes. I used car miles.

[fol. 345] I understand the principle that rates are proportionately higher for short hauls than for long hauls. You ask why that is. Well, there are several factors to be given consideration in that (St. 387). I might sum it up in answering the cost of doing business. You ask if the cost of doing business per unit, per car or per mile, is not higher for short hauls than for long hauls. Not in all cases. You ask if it is not true, generally speaking. Well, I would not even want to answer that as to generally speaking. I know that it is in most cases, and in many cases. You ask if it is not true that the relatively higher revenue per ton mile on intrastate freight and interstate freight in Washington is undoubtedly largely due to the higher rates per ton mile that are charged (St. 388). I don't think it results from that (St. 389). You ask if I know whether that is a fact. No, I don't know that from the figures reported. I don't know anything about the rates; I never studied rates. I know revenues come from rates, and that railroads have no other place to get them (St. 390).

In Plff.'s Ex. "21" I make a downward adjustment of the G. N. intrastate operating costs in Washington. I did not attempt to construct a cost study of my own to determine at what expense the G. N. was handling its intrastate traffic in Washington. That was impossible for me to do.

Referring to Plff.'s Ex. "21" you ask if 51% is a normal operating ratio for switching. I never made a cost study of that. I don't know. I didn't undertake to study that service separately, but I assume in the studies that were

made and are attached to your exhibit "11" that the switching covering those cars was included in your engine hour costs because the classification, as shown there, shows the interchange handling and the industrial switching, and, to [fol. 346] get the total expense of the engines for 24 hours, all classes of service would have to be included. You ask if I made any effort to determine separately what the operating ratio was as applied to the G. N. switching operations in this state. Any effort to determine separately what the operating ratio was as applied to the G. N. switching operations in this state. I assumed and knew that the ratio of 51% was the average applied to all (St. 392) operations whether terminal or line haul. It was the only ratio that could be used under the conditions; I did not have the information from the study as to the actual number of cars handled in this particular switching. How many of them were intrastate or how many of them were interstate. Consequently, I can't arrive at a ratio. You ask if I made any effort to determine the operating revenue applicable to all G. N. switching. No, only the studies of the defendant's table. I took Def.'s Ex. "11" and the studies that were attached or a part of that exhibit as being the switching costs derived from this study. I did not compare those with the revenues from switching for (St. 393) the purpose of determining the operating ratio. An operating ratio is the ratio of expense to revenue. What I applied to this switching item was not the operating ratio of the G. N. switching operations in the state, but the total freight operating ratio in the state.

Plff.'s Ex. "22" undertakes to reapportion the taxes paid by the G. N. in the state for 1933. You ask if a passenger car mile is a similar thing to a freight car mile. Well, they both travel the distance of 5,280 feet. You ask if that is the only point of similarity (St. 394) between them. Well, under the definition of car mile, I can't see any difference. I mean each would fit the definition of a car mile, whether it is a passenger or freight car. You ask if the two things in fact are similar. I would say they were. The weight of a passenger car may be greater than the [fol. 347] freight car or vice versa. There are heavy passenger cars and heavy freight cars with their loads. You ask me what would be true in general—an empty passenger car compared with an empty freight car. I don't think there is any comparison because you have various sizes of

freight cars from flat cars or logging trucks to large heavily constructed cars and that is true of passenger cars. You have small coaches and (St. 395) you have large coaches. I am not able to point out or to state that they are similar. They are dissimilar in all respects, just the same as they are dissimilar even among the freight classifications. I don't know that generally speaking, a passenger car weighs a great deal more than a freight car. I know that the ordinary passenger car is very much larger than the ordinary freight car. I know that it has more wheels. I know that it is usually run in a train of not more than 13 or 14 cars. I will grant that freight cars are run in trains as long as 100 cars or more. That is not because of the weight. The time element is the reason for that. You ask if the fuel consumed in running a passenger train of, say, 14 cars 100 miles would be about the same as the fuel consumed in running a freight train (St. 396) that was much longer. I can cite certain instances where the fuel cost would be no greater, and also many instances where the fuel cost would be much greater. I don't know whether that is because of the higher speed of the passenger train (St. 397). Speed is an important factor in the passenger business, and while important, not so important as the freight business.

(At this point the following proceedings were had:)

[fol. 348] "Mr. Sharpe: I think this is wholly immaterial. It is very obvious that the proper method of apportioning the expense such as taxes joint facility rent is relative use. It doesn't make any difference whether the use is remunerative or not. It is the question of use that determines the proportion of tax.

"Mr. Baimer: Mr. Sharpe is exactly right.

"Mr. Sharpe: For that reason I object to going into the question of relative expense.

"Mr. Balmer: I submit that the reason that he gives sustains my question. That is to say, each apportionment must be on the basis of use. Now, it is brought out here that the use of a railroad by a freight car is entirely different from its use by a passenger car" (St. 399).

(Def.'s Ex. "38" was thereupon received in evidence over plaintiff's objection that the same was immaterial (St. 400-401). The witness then continued:)

If I had assigned tax to the passenger service, freight service, in proportion to revenues, as I did in dealing with the passenger service, I would have increased the freight assignment by 133% (St. 403).

In Plff.'s Ex. "23" I again treat passenger car miles and freight car miles as a common denominator. If the same questions were asked me concerning the specific sheets of my exhibit wherein I adjusted my original studies to the basis of Sheets "A" to "F" of Def.'s Ex. "11", my answers would be the same.

You ask my reason for presenting Plff.'s Ex. "25" relating to pensions. I thought that pensions was a system charge and not a charge directly to the state of Washington. Some portion may be chargeable to Washington, but I think the greater portion is a system charge. I don't think that the state of Washington is interested in the amount of pensions paid to its formers employees in a study of this kind. No doubt some of the men to whom these pensions are paid worked in the State of Washington. You ask if I don't think that a portion of the pensions that these men receive is chargeable to the state of Washington (St. 404).

[fol. 349] No, I don't, not in a study of this kind. I want it to be understood that I am not against the pension principle, and I am not finding fault with the company or criticizing the company for paying pensions. It was not with that intention that I made up this statement, but it was to show that if the pensions, as I stated previously, were absorbed as a system expense that Washington would be relieved.

You ask if I mean that if pensions were not charged to operating expenses at all the state of Washington would be relieved. No, I think they should be treated as a general expense. You ask if I think they should be charged to operating expenses. No, not and allocate directly back to Washington in the manner that they were (St. 405). My thought on the pensions was that pensions are a donation by the owners of this property to its former employees, and would be in the same class as paying dividends on its stock. I think pensions should be charged to profit and loss, and not to operating expenses. I think this is a gift or a grant. I don't think it is deferred compensation to those employees (St. 40

On redirect examination he further testified:

Passenger trains on the average move faster than freight trains. They generally move a great deal faster. It would take a freight train much longer on an average to move from Portland to Seattle than a passenger train. If that is true, a given passenger car would occupy the track between Vancouver and Seattle a shorter time on the average than a freight car. I can't say how much shorter. Freight cars are switched and occupy the right-of-way and tracks of the road longer than passenger cars (St. 407). If it is a question of the occupancy of the premises, a freight car would occupy (St. 407) on an average a given piece of track a much longer time in proportion per mile than would a passenger train. I know of several tracks within [fol. 350] the state of Washington that have been occupied by freight cars for many months now continuously.

Plaintiff's Ex. "39" is a statement showing the railway operating expenses as reported to the D. P. W. for each of the years indicated by accounts showing line numbers as well as accounting numbers, and the name of the account, and there are notations on it of services made as to the amounts that were included in the cost study for which amounts were substituted the actual cost figures. It is my conclusion that the costs which the G. N. charges in Def.'s Ex. "11", page "11", line "1-C" of $79,239 had already been included in its charge of costs of $1,334,268 in line "1-B" on page "7" of the same Exhibit. A rough draft of this exhibit was used by me in drawing that conclusions (St. 408). I testified this morning that accounts 201 to 280 appearing on pages 702, 703 and 704, lines 1 to 10. I named all of those, and these sheets here are to cover those accounts and the figures contained therein were the ones that were used in the cost study, except as stated the direct yard which appears on lines 170 to 184, and 185 to 195 were substituted by the study figures, and the amount appearing on line 229, account 446, is the only figure in the study that was not used.

Referring to my testimony as to the terminal handling connected with intrastate and interstate shipments, you ask if I understand that there are other handlings of freight that occur between the terminal handlings, both

on interstate and intrastate traffic. Yes, there are switching operations that might and are used or are performed other than the mere loading and unloading of the car. You ask if some of those switching operations are contained (St. 409) in Def.'s Ex. "11", page 25, under these elements [fol. 351] of service referred to. Yes, page 25, item 7, would be freighthouse switching or industrial track switching or team tracks. (Question by Defendant's counsel.) You say I would not refer to those as intermediate handlings of freight that had been picked up somewhere else. Well, a car, after it is switched out of the freight house, might be switched out to a team track, or might be taken down to the yard and classified and made up into a train, so it would have several handlings beside the loading of the car. (Question by plaintiff's counsel.) You ask if there are switching operations in connection with the ordinary moving of a train aside from the terminals. Yes, there are several movements, especially if the train were reclassified at Spokane or Hillyard (St. 411).

You ask whether in my opinion a mileage prorate division of freight revenue to the state of Washington is fair to the state. No I don't think it is fair to the state. You ask why. Why, it does not give to the state that originates the traffic a proper proportion of the total revenue, either originating or terminating in the state, either that originates or terminates. You ask why. Because of the added cost of handling, for one thing—the terminal expense. You ask if terminal expense is in any way reflected by the relative mileage of haul. It is not. I might cite as an example there the small railroad in the state, for instance, that originates on its line certain shipments for a very short haul. I refer now to Longview, Portland & Northern, five and a half mile haul was prorated thre and a half cents out of 62.5 cents from their road to St. Paul. I am not speaking of the division between carriers (St. 412). The division of revenues between states as reported. (Questions by defendant's counsel.) The L. P. & N. would report the total which they received, which is wholly an intrastate road, and [fol. 352] their earnings are necessarily by reason of that fact higher than they would be if the shipment were hauled all the way over the G. N. lines there would be less prorated per mile to the state of Washington than on that basis on a line haul on the prorate. I mean a carload of freight

originating in the state of Washington on the lines of the G. N. Railroad but destined to points east of the state of Washington, the revenues from that car of freight is allocated on a mileage basis, on a mileage prorate. Consequently either Washington, Idaho or all the bridge states, and the state delivering the traffic receives the same amount per ton mile, and the state either originating or delivering (St. 413) the traffic with added terminal expenses receives no more than the other states that only carry freight cars from line to line. For that reason I don't think that sufficient revenue has been allocated to the state of Washington or any other state on interstate shipments. You ask if I could determine what amount should properly be apportioned without a very exhaustive study of the subject. Well, I think a study could be made in the same manner as switching studies were made at the terminal stations.

You ask why the state didn't make a cost study similar to the one made by the G. N. There are many reasons. In the first place the Tax Commission has not got enough money to go out and perform a function like that. You ask if we had the records available for us to make a cost study of that kind. No, I didn't have the records available for us to make a cost study of that kind. No, I didn't have the records available. (Question by defendant's counsel.) The only figures I asked defendant's counsel were given to me freely and quickly (St. 414).

Referring to Plff.'s Ex. "21" line "1-E", I applied the [fol. 353] same ratio to the revenue from switching that the G. N. applied in determining the expense as to that particular classification of revenue.

Referring to Plff.'s Ex. "21", line "2-A" I used the same method in computing the passenger proportion of operating expense that I used in preparing the N. P. exhibit—relative revenues—and the same method followed by the G. N. accountant in his apportionment of passenger expense (St. 415).

You ask if I know what these other lines were that were covered by these joint facility rents debit items. (Mr. Burns states that that would not be shown in the report to the D. P. W.; that it is a matter of office records (St. 416).

I think it is true that while an empty freight car may not be as heavy as an empty passenger car, it will ordinarily

occupy the premises of the railroad longer than an empty passenger car. You ask if, in preparing Plff.'s Ex. "22", lines "M" to "P", there were any factors other than relative revenues for the apportionment between intrastate passenger and interstate passenger service. No, I didn't have any other factor but the revenue factor, and I use the same in this exhibit as I did for the N. P.

On recross examination he further testified:

You ask whether it is not a fact that more than a mileage prorate of interstate revenues ought to be assigned to a particular state would depend upon knowing the character of the interstate traffic that was being handled in that state. Yes, it would to a certain extent. It would be part of the study to compare the amounts of bridge traffic that were being handled through the state with the amounts of traffic originating and terminating there.

Plff.'s Exs. "39" and "40" were thereupon received in evidence (St. 418-419).

[fol. 354] Plff.'s Exs. "21" to "36" were thereupon received in evidence subject to defendant's objection that no proper foundation had been laid for their introduction in that the evidence failed to show the qualifications of witness Manschreck to testify on the subject of said exhibits (St. 419-420).

MOTION TO STRIKE

Plaintiff's counsel thereupon made the following motion:

"With respect to G. N.'s Exhibit "11", I wish to move to strike page "A" of that exhibit upon the ground that it is hearsay and based upon data established by hearsay evidence and reports and letters of absent individuals who have not been called as witnesses in the case and based upon the books of record of the company of the G. N. and on the further ground that it is wholly incompetent, irrelevant and immaterial. I move to strike page "B" of the same exhibit on the same ground. Page "C" I also move to strike on the same exhibit on the same ground; also page "D", also page "E" and I move to strike "F" on the same grounds

and also upon the ground that cost of reproduction has nothing to do with the disposition of this case; that the only issue in this case is whether or not the G. N. Company, during the year 1933, was making money or losing (St. 421) money on its intrastate operations in the state of Washington, not whether it was earning a fair return upon its property. I also wish to add that to my ground for moving to strike pages "A" to "F" of G. N.'s Ex. "11", that the apportionment of revenues used as a basis for the preparation of these calculations and pages are not the division of revenue which appear on the books of the company and which were reported to the D. P. W. and Tax Commission of the state of Washington and that no competent evidence has been produced showing that the division of such revenues is made from the books of the company and as reported were not the true and correct method of apportion-
[fol. 355] ment of such revenues as between interstate and intrastate operations.

"I also move to strike pages "1" to "27" and each of said pages of G. N.'s Ex. "11" upon the grounds that the same and each and all of such pages is based upon pure hearsay, and, therefore, is not competent but the basis of a special study concerning which the plaintiff was not given notice and not prepared to test the accuracy of the studies made and was based upon various reports and letters and other data of individuals who have not been produced to testify in this case and consequently, concerning the accuracy of whose statements it has been impossible for the State to test by cross examination" (St. 422).

The foregoing motion was thereupon denied (St. 422).

With respect to Def.'s Identifications "14", "15", "16", "18" and "19", it was thereupon stipulated between counsel that the tender of such identifications to plaintiff's counsel at this time will have the same effect as to the admissibility of the various documents upon which they are based as though these particular identifications had been offered and received in evidence (St. 423-4).

STIPULATION

It was further stipulated that if William P. Maloney were called as a witness for defendant, he would have testified, if the court permitted him so to do, to the revenues that were stated by Mr. Burn and would produce the tariff to show that those were the revenues, it being understood that plaintiff would object to such testimony upon the ground that the evidence was immaterial, incompetent and irrelevant, and that it was not competent to attempt to prove the operating ratio as to a few specific items of switching service without proving the operating ratio on each individual service for the year in order to show the average. It being further understood that if the witness were here the Court would admit his testimony over all the objections stated by plaintiff's counsel. (St. 425-427).

[fol. 356] PLFF'S EX. 21

Great Northern Railway Company

Restatement of expenses incidental to Intrastate operations other than those directly applicable to Account 101—freight revenue, computed on assumption that intrastate freight traffic for 1933 was amount reported to Washington Department of Public Works. (Compare G. N. Ex. 11, p. 7)

1. Freight proportion of intrastate operating expenses, other than expenses applicable to account 101—Freight revenue:			
(a) Total freight revenue—Account 101—Intrastate (G.N. Ex. 11, p. 11)	$2,599.331		
(b) Total freight operating expenses applicable to freight revenue—Account 101—intrastate, and other accounts other than 110 (G. N. Ex. 11, p. 2, line 8)			$1,334,268
(c) Operating ratio (1-b divided by 1-a)		51.33%	
(d) Total intrastate operating revenues included in Account 110—Switching (G. N. Ex. 11, p. 11)		41,977	
(e) Operating expenses applicable to intrastate operating revenues included in Account 110—Switching (c x d)			*21,547
2. Passenger Proportion of Operating Expenses—Intrastate:			
(a) As computed by defendant (G. N. Ex. 11, p. 7, ln. 2-e)			888,967
3. Total railway operating expenses applicable to intrastate operations, freight and passenger (Sum of lns. 1-b, 1-e, and 2-a)			$2,244,782

* Defendant computed this item by applying freight operating ratio (1-c) to $154,372. Plaintiff contends that item should be only $21,547 as indicated. (See Manschreck's testimony, re G. N. Ex. 11, p. 7).

[fol. 357] PLFF.'s EX. 22

Great Northern Railway Company

Computation of taxes apportionable to Washington intrastate operations as deduced from defendant's figures on assumption that intrastate freight traffic for 1933 was amount reported to Washington Department of Public Works. (Compare G. N. Ex. 11, p. 9—Washington State Taxes)

		Freight	Passenger	Total freight and Passenger
(A)	Car miles (DPW, pp. 904–4.....	37,627,003	8,628,481	46,255,484
(B)	Locomotive miles (DPW, p. 904, lines 24, 28, 38, and 39).....	1,285,722	1,123,084	2,408,806
(C)	Total car and locomotive miles...	38,912,725	9,751,565	48,664,290
(D)	Ratio of passenger car and locomotive miles to total freight and passenger car and locomotive miles 9,751,565 ÷ 48,664,290 =	.....	.....	20.04%
(E)	Ratio of freight car and locomotive miles to total freight and passenger car and locomotive miles 38,912,725 ÷ 48,664,290 = ...	.....	.....	79.96%
(F)	Total taxes payable on G. N. operating property for 1933 (Plff's Ex. 37).....	.....	$1,250,860	
	Plus federal taxes paid (G. N. Ex. 11, p. 9, Line 5B).....	.....	9,593	
	Total.....	.....	$1,260,453	
(G)	Less net amount of Washington taxes on G. N. operating property contributed by tenant roads (G. N. Ex. 11, p. 9, Item 4)....	.....	12,556	
			$1,247,897*	
(H)	Net advalorem taxes payable by G. N. on Washington operating property for 1933.....	.....	.....	$1,247,978
(I)	Net Washington taxes for taxes chargeable to freight operations (E x H).....	.....	.....	997,883
(J)	Net taxes chargeable to passenger operations (D x H).....	.....	.....	250,095
(K)	Ratio of intrastate freight car miles to total of intra and interstate for test period 7,601,291 ÷ 37,627,003 (G. N. Ex. 11, p. 4, Item I-e).....	.....	20.2%	
[fol. 358]				
(L)	Taxes apportionable to intrastate freight operations. (K x I. .... (20.2% x $1,007,923	.....	.....	$201,572
(M)	Intrastate passenger revenues (G. N. Ex. 11, p. 11).....	.....	$551,845	.....
(N)	Total intra and interstate passenger revenues (G. N. Ex. 11, p. 11).....	.....	1,540,264	.....
(O)	Ratio of intrastate passenger revenue to total intra and interstate passenger revenue (M ÷ N)	.....	35.83%	.....

PLFF'S EX. 22—Continued

	Freight	Passenger	Total freight and Passenger
(P) Taxes apportionable to intrastate passenger service operations (O x J)	.....	.....	89,609
(Q) Total ad valorem taxes apportionable to intrastate freight and passenger operations (L+P)	.....	.....	$291,181
(R) Other taxes apportioned by defendant to Washington intrastate operations (G. N. Ex. 11, p. 9, Ln 5-f)	.....	.....	3,137
(S) Total of all taxes apportionable to Washington intrastate operations	.....	.....	$294,318

* Defendant's figure of $1, figure of $1,247,978 used.

[fol. 359] PLFF'S EX. 23

Great Northern Railway Company

Computation of Joint Facility Rents chargeable to Washington Intrastate operations for 1933 as deduced from defendant's figures, on assumption that intrastate freight traffic for 1933 was amount reported to Wsabington Department of Public Works (Compare G. N. Ex. "11" p. 9, Item 4)

	Freight	Passenger	Total freight and passenger
(A) Car miles operated on G. N. Seattle-Portland line during 1933 (information received from G. N. by phone Oct. 25, 1934)	4,086,564	1,231,114	5,317,678
(B) Ratio of passenger car miles in (A) to total freight and passenger miles (1,231,114÷5,317,678	.....	.....	23.15%
(C) Ratio of freight car miles in (A) to total freight and passenger miles (4,086,564÷5,317,678	.....	.....	76.85%
(D) Joint facility rents—net debit (G. N. Ex. 11, p. 9, Item 4–A)	.....	.....	$794,018
(E) Freight proportion of "D" (C x D)	.....	.....	610,203
(F) Passenger proportion of "D" (B x D)	.....	.....	183,815
(G) Revenue net ton miles hauled on Seattle-Portland line during week ended Nov. 21, 1933, as testified to by defendant's witness, Burn:			
(G–1) Total	.....	1,384,717	.....
(G–2) Interstate only	.....	1,096,184	.....
(G–3) Intrastate only	.....	288,533	.....
(G–4) Ratio of intrastate to total (G-3÷G-1)	.....	20.84%	.....
(H) Joint facility rents chargeable to intrastate freight operations (G-4 x E)	.....	.....	127,166
(I) Intrastate passenger revenues for 1933 (G. N. Ex. 11, p. 11)	.....	$551,845	.....

PLFF's Ex. 23—Continued

[fol. 358]

	Freight	Passenger	Total freight and Passenger
(J) Total intra and interstate passenger revenues for 1933 (G. N. Ex. 11, p. 11)	.....	1,540,264	.....
(K) Ratio of intrastate passenger revenues to total intra and interstate passenger revenues (I ÷ J)	.....	35.83%	.....
(L) Joint facility rents chargeable to intrastate passenger traffic (K x F)	.....	.....	65,861
(M) Total joint facility rents chargeable to intrastate freight and passenger operations for 1933. (L+H)	.....	.....	$193,027

[fol. 360] PLFF's Ex. 24

Great Northern Railway Company

Washington—Calendar Year 1933

Intrastate Operations

Plaintiff's restatement of operating revenues and expenses, and net railway operating income as deducted from defendant's figures on assumption that intrastate freight traffic for 1933 was amount reported to Washington Department of Public Works (Compare G. N. Ex. "11", p. 1).

	Amount
1. Gross Operating Revenues (G. N. Ex. "11," p. 11)	$3,305,548
2. Operating Expenses (Plff's. Ex. 21, Ln. 3)	2,244,782
3. Net Revenue from Railway Operations (ln. 1 less ln. 2)	$1,060,766
4. Railway tax accruals (Plff's. Ex. 22, ln. S)	294,318
5. Railway Operating Income (ln. 3—ln. 4)	766,448
6. Equipment rents—net debit (G. N. Ex. 11, p. 8, ln. 3-a plus ln. 3-b)	31,659
7. Joint facility rents—net debit (Plff's Ex. 23, ln. M.)	193,027
8. Net Railway Operating Income (Item 5—Items 6 & 7)	$541,762

[fol. 361] PLFF's Ex. 25

Great Northern Railway Company

Reduction in operating expenses as to Washington 1933 intrastate traffic if expense item for "Pensions" eliminated. Computation made on assumption that intrastate freight traffic for 1933 was amount reported to Washington Department of Public Works.

Expenses related solely to freight service (DPW, p. 707, ln. 247, Col. C)	$2,888,737	.....	.....
Expenses apportioned to freight service (DPW, p. 707, ln. 247, Col. E)	1,732,261	$4,620,998	$100.00%
Less 1933 expenses on Washington Intrastate freight traffic (Plff's Ex. 21, p. —, items B and E)	.....	1,355,815	29.34%
Railway operating expenses on Washington interstate freight traffic	.....	3,265,183	70.66%
Pensions:			
Freight (DPW, p. 707, ln. 238)	$45,373		
Passenger (DPW, p. 707, ln. 238)	24,432		
Total	$69,805		

PLFF's Ex. 25—Continued

Amount by which operating expenses incident to intrastate freight traffic should be reduced if pension charge eliminated—29.34% of $45,373:	.....	.....	$13,312
Percentage of railway operating expenses apportionable to Washington for 1933,—intrastate passenger traffic (Plff's Ex. 22, ln. "O")	.....	35.83%	.....
Amount by which operating expenses incident to intrastate passenger traffic should be reduced if pension charge eliminated—35.83% of $24,432:	.....	.....	8,754
Total deduction in railway operating expenses incident to Washington's 1933 intrastate traffic, both freight and passenger, resulting from elimination of pension expense item	.....	.....	$22,066

[fol. 362] PLFF's Ex. 26

Great Northern Railway Company

Washington—Calendar Year 1933

Intrastate Operations

Restatement of railway operating revenues and expenses incident to intrastate operations as deduced from defendant's figures on assumption that certain amount of traffic reported to Washington Department of Public Works as intrastate, was in fact interstate traffic. (Compare G. N. Ex. 11, p. "C.")

Railway Operating Revenues:

(A) Total intrastate freight railway operating revenue (G. N. Ex. 11, p. "B")	$1,622,644
(B) Total intrastate passenger railway operating revenue (G. N. Ex. 11, p. "B")	557,116
(C) Total intrastate railway opeating revenue ("A"+"B"	$2,179,760

Railway Operating Expenses:

(D) Freight operating revenues applicable to Acct. 101, "Freight" (G. N. Ex. 11, p. "B")	$1,502,153
(E) Freight operating ratio (G. N. Ex. 11, p. 7, ln 1-b)	51.33%

PLFF's Ex. 26—Continued

(F)	Railway operating expenses incident to all freight operating revenues other than Acct. No. 110 "Switching" ("E"×"D")	771,055
(G)	Switching revenues, Acct. 110 (G. N. Ex. 11, p. "B")	38,367
(H)	Freight operating ratio (Line "E")	51.33%
(I)	Railway operating expenses incident to account 110—"Switching" ("H"×"G")	19,694
(J)	Passenger operating expenses as computed by defendant (G. N. Ex. 11, p. "C", ln. 2-e)	897,458
(K)	Total operating expenses incident to intrastate operations (sum of lns. "F", "I", and "J")	$1,688,207

[fol. 363] PLFF.'s Ex. 27

Great Northern Railway Company

Computation of Taxes Apportionable to Washington Intrastate Operations as Deduced from Defendant's Figuures on Assumption that Certain Amount of Traffic Reported to Washington Department of Public Works as Intrastate, Was in Fact Interstate Traffic. (Compare G. N. Ex. 11, p. "C", subdiv. 4.)

(A)	Taxes apportionable to 1933 intrastate freight operations on assumption that intrastate freight traffic was as reported to Washington Department of Public Works (Plff.'s Ex. 22, ln. "L")	$201,572
(B)	1933 intrastate freight revenue as computed by defendant on basis of intrastate freight traffic as reported to Washington Department of Public Works (G. N. Ex. 11, p. 11)	2,753,703
(C)	1933 intrastate freight revenue as computed by defendant on theory that certain amount of 1933 intrastate freight traffic as reported to Department of Public Works was in fact interstate (G. N. Ex. 11, p. "B")	1,622,644

PLFF's Ex. 27—Continued

(D)	Ratio of line "C" to line "B" (C.÷B)	*58.93%
(E)	Intrastate freight proportion of 1933 taxes on defendant's theory that certain amount of 1933 intrastate freight traffic as reported to Department of Public Works was in fact interstate (D×A)	118,786
(F)	Taxes apportionable to intrastate passenger service operations as heretofore computed (Plff.'s Ex. 22, "P")	89,609
(G)	Total ad valorem taxes apportionable to intrastate freight and passenger operations on theory that certain amount of 1933 intrastate freight traffic as reported to Department of Public Works was in fact interstate (E+F)	208,395
(H)	Other taxes apportioned by defendant to Washington intrastate operations. (G. N. Ex. 11, p. 9, ln. 5+f)	3,137
(I)	Total of all taxes apportionable to Washington intrastate operations on theory that certain amount of 1933 intrastate freight traffic as reported to Department of Public Works was in fact interstate (G—H)	211,532

*The reduction in ton-miles and car-miles resulting from this assumed transfer of freight traffic from intrastate to interstate is not furnished by defendant. Hence, we are compelled to fall back on relative revenues as a basis for corresponding tax reduction as the only available figure.

[fol. 364] PLFF.'S EX. 28

Great Northern Railway Company

Computation of Joint Facility Rents Chargeable to Washington Intrastate Operations for 1933 as Deduced from Defendant's Figures on Assumption that Certain Amount of Traffic Reported to Washington Department of Public Works as Intrastate, Was in Fact Interstate Traffic. (Compare G. N. Ex. 11, p. "E".)

A. Joint facility rents chargeable to 1933 intrastate freight operations on assumption that intrastate freight traffic was as reported to Washington Department of Public Works (Plff.'s Ex. 23, ln. H)	$127,166
B. 1933 intrastate freight revenue as computed by defendant on basis of intrastate freight traffic as reported to Washington Department of Public Works (G. N. 11, p. 11)	2,753,703
C. 1933 intrastate freight revenue as computed by defendant on theory that certain amount of 1933 intrastate freight traffic as reported to Department of Public Works was in fact interstate (G. N. Ex. 11, page "B")	1,622,644
D. Ration of line "C" to line "B" (C÷B)	*58.93%
E. Intrastate freight proportion of joint facility rents chargeable to 1933 intrastate freight operations on defendant's theory that certain amount of 1933 intrastate freight traffic as reported to Department of Public was in fact interstate (D×A)	$74,939
F. Joint facility rents chargeable to 1933 intra-	

*The relative revenue ton-miles of intrastate and interstate freight hauled on the Seattle-Portland line resulting from this assumed transfer of freight traffic from intrastate to interstate is not shown by defendant. Hence, we are compelled to fall back on relative revenues as a basis for corresponding reduction in joint facility rents chargeable to intrastate freight operations, as the only available figure.

PLFF's Ex. 28—Continued

	state passenger service operations as heretofore computed (Plff.'s Ex. 23, ln. "L")	65,861
G.	Total of all joint facility rents chargeable to Washington 1933 intrastate operations on theory that certain amount of 1933 intrastate freight traffic as reported to Department of Public Works was in fact interstate ("F"+"E")	$140,800

[fol. 365] PLFF.'s Ex. 29

Great Northern Railway Company

Washington—Calendar Year 1933

Intrastate Operations

Plaintiff's Restatement of Operating Revenues and Expenses, and Net Railway Operating Income as Deduced from Defendant's Figures on Assumption that Certain Amount of Traffic Reported to Washington Department of Public Works as Intrastate, Was in Fact Interstate Traffic. (Compare G. N. Ex. 11, p. "A".)

1. Gross Operating Revenues (G. N. Ex. 11, p. "A", ln. 1)	$2,179,760
2. Operating expenses (Plff.'s Ex. 26, ln. K)	1,688,207
3. Net Revenue from Railway Operations (ln. 1—ln. 2)	$491,553
4. Railway Tax accruals (Plff.'s Ex. 27, ln. I)	211,532
5. Railway Operating Income (ln. 3—ln. 4)	$280,021
6. Equipment rents—Net debit (G. N. Ex. 11, p. "D"—Item 6)	19,966
7. Joint Facility Rent—Net debit (Plff.'s Ex. 28, Ln. G)	140,800
8. Net Railway Operating Income (Item 5—Items 6 & 7)	$119,255

[fol. 366] PLFF.'s EX. 30

Great Northern Railway Company

Revenue Per Ton Mile of Freight Hauled in Washington in 1933 (1) Interstate, (2) Intrastate, and (3) Per Cent of Difference Between Interstate and Intrastate

(A) Ton miles revenue freight (intrastate only) (p. 906 DPW)		138,265,617
(B) Freight revenues on intrastate traffic only (p. 700 ln. 1, DPW Rep.)		$2,599,330.92
(C) Revenue per ton mile on intrastate freight traffic (B÷A)=		$0.01880
(D) Total ton miles in Washington (revenue freight)—inter and intrastate (p. 905 ln. 94 DPW)	598,601,059	
(E) Intrastate only (Line "A")	138,265,617	
(F) Interstate only (D—E)		460,335,442
(G) Freight revenue on interstate traffic only (p. 700 ln. 1 DPW)		$3,716,059.26
(H) Revenue per ton mile—interstate freight only (G÷F)=		$0.00807
(I) Percentage by which revenue per ton mile on intrastate freight exceeds revenue per ton mile on interstate freight (C—H)÷H=		132.96%

[fol. 367] PLFF's EX. 31

Great Northern Railway Company

Revenue per passenger mile on Washington passenger traffic in 1933 (1) interstate, (2) intrastate and (3) percent of difference between interstate and intrastate

(A) Revenue passenger miles (intrastate only) (p. 906 DPW)	13,059,677
(B) Passenger revenue—intrastate traffic only (p. 700 1n 2 DPW)	$306,520.59

PLFF'S EX. 31—Continued

(C) Revenue per revenue passenger mile on intrastate traffic (B ÷ A) =		$0.02348
(D) Total revenue passenger miles in Washington—inter and intrastate (p. 905 ln. 98 DPW)	42,283,478	
(E) Intrastate only (A)	13,059,677	
(F) Interstate only (D — E)		29,223,801
(G) Passenger revenue—interstate traffic only (p. 700 ln 2 DPW)		$558,052.35
(H) Revenue per passenger mile—interstate traffic only (G ÷ F) =		$0.01909
(I) Percentage by which revenue per revenue passenger mile on intrastate business exceeds revenue per revenue passenger mile on interstate (C — H) ÷ H =		23.00%

[fol. 368]

PLFF's Ex. 32, Page 1

Comparison of Aggregate Taxes Payable by Certain Interstate Railroad Companies Under Revenue Laws in Force Prior and Subsequent to 40-Mill and Other Limitation Acts—1932 Compared with 1933

Line No.		On Operating Property Of				
		N. P.	G. N.	O.-W.	Milw.	Total
A.	Total ad valorem taxes levied in 1932 payable in 1933	$2,464,986	$1,556,485	$750,535	$827,264	$5,599,270
B.	Equalized assessed valuations for (1) 1932	44,658,663(a)	30,710,723	18,293,038	16,649,871(b)	110,312,295
	(2) 1933	42,864,636	29,304,046	16,734,784	14,841,004	103,744,470
C.	Ratio of 1933 assessed value to 1932 assessed value (line B(2) + line B(1))	95.982802%	95.419590%	91.481710%	89.135850%	94.046153%(c)
D.	Total ad valorem taxes that would have been payable for 1933 on basis of 1932 millage rates (Ln A x line C)	2,365,963	1,485,192	686,602	737,389	5,275,146
E.	Total ad valorem taxes payable for 1933 levied under 40-mill and other limitation acts	2,005,014	1,250,860	608,327	648,440	4,512,641
F.	Total amount of occupational taxes payable for 1933 had same been imposed for entire year 1933	87,038	47,056	10,928	19,713	164,735
G.	Total ad valorem taxes plus occupational taxes, if imposed for entire year 1933, payable for 1933 (line E + line F)	2,092,052	1,297,916	619,255	668,153	4,677,376
H.	Net savings in total taxes, ad valorem and occupational, which said companies would thus have realized in 1933 under new tax plan (Ln D−Ln G)	$273,911	$187,276	$67,347	$69,236	$597,770

[fol. 369]

PLFF'S EX. 32 Page 2

Comparison of Aggregate Taxes Payable by Certain Interstate Railroad Companies Under Revenue Laws in Force Prior and Subsequent to 40-Mill and Other Limitation Acts—1932 Compared With 1933

Line No.		On Operating Property Of				
		N. P.	G. N.	O.-W.	Milw.	Total
I.	Ad valorem taxes for state purposes which would have been levied for 1933 under revenue laws in force prior to 40-mill and other limitation acts	$700,086	$460,684	$272,507	$238,705	$1,671,982
J.	Ad valorem taxes for state purposes actually levied for 1933 under 40-mill and other limitation acts	321,992	211,884	125,335	109,788	768,999
K.	Occupational taxes if levied for entire year 1933 (see line F above)	87,038	47,056	10,928	19,713	164,735
L.	Total ad valorem taxes for state purposes for 1933 under 40-mill and other limitation acts, plus total occupational taxes payable for 1933 had same been imposed for that entire year (ln J + ln K)	409,030	258,940	136,263	129,501	933,734
M.	Net savings in total taxes for state purposes, ad valorem and occupational, which said companies would thus have realized in 1933 under the new tax plan (line I—line L)	$291,056	$201,744	136,244	$109,204	$738,248

(a) Based on $105,000,000 full value as used in settlement.
(b) Actual reassessment value.
(c) 5,275,146 ÷ 5,599,270, equals 94.211317%.

[fol. 370] PLFF's Ex. "33", Page 1

Comparison of Aggregate Taxes Payable by Certain Interstate Railroad Companies Under Revenue Laws in Force Prior and Subsequent to 40-Mill and Other Limitation Acts—1932 Compared With 1934

Line No.		On Operating Property Of				
		N. P.	G. N.	O.-W.	Milw.	Total
A.	Total ad valorem taxes levied in 1932 payable in 1933	$2,464,986	$1,556,485	$750,535	$827,264	$5,599,270
B.	Equalized assessed valuations for:					
	(1) 1932	44,658,663(a)	30,710,723	18,293,038	16,649,871(b)	110,312,295
	(2) 1934	40,167,043	27,577,404	15,452,547	13,803,937	97,000,931
C.	Ratio of 1934 assessed value to 1932 assessed value (line B (2) + line B (1))	89.942332%	89.797313%	84.472284%	82.907171%	87.933019%(c)
D.	Total ad valorem taxes which would be payable for 1934 on basis of 1932 millage rates (ln A × ln C)	2,217,066	1,397,682	633,994	685,861	4,934,603
E.	Total ad valorem taxes which would be payable for 1934 under 40-mill and other limitations acts, on basis of 1933 millage rates.	1,878,833	1,177,157	561,716	603,128	4,220,834
F.	Total amount of occupational taxes which would be payable for 1934 on assumption that companies' revenues will be same in 1934 as in 1933	87,038	47,056	10,928	19,713	164,735
G.	Estimated total ad valorem taxes plus occupational taxes payable on said assumption for 1934 (ln E + ln F)	1,965,871	1,224,213	572,644	622,841	4,385,569
H.	Estimated net savings in total taxes, ad valorem and occupational, which said companies would thus realize in 1934 under new tax plan (ln D − ln G)	$251,195	$173,469	$61,350	$63,020	$549,034

[fol. 371]

PLFF'S EX. "33", Page 2

Comparison of Aggregate Taxes Payable by Certain Interstate Railroad Companies Under Revenue Laws in Force Prior and Subsequent to 40-Mill and Other Limitation Acts—1932 Compared With 1934

Line No.		On Operating Property Of				
		N. P.	G. N.	O.-W.	Milw.	Total
I.	Ad valorem taxes for state purposes which would have been levied for 1934 under revenue laws in force prior to 40-mill and other limitation acts	715,244	471,728	273,610	241,343	1,701,925
J.	Ad valorem taxes for state purposes actually levied for 1934 under 40-mill and other limitation acts	298,738	197,028	114,279	100,802	710,847
K.	Occupational taxes for 1934 if same as for 1933 (see line F above)	87,038	47,056	10,928	19,713	164,735
L.	Total ad valorem taxes for state purposes for 1934 under 40-mill and other limitation acts, plus total occupational taxes payable for 1934 if revenues the same in 1934 as in 1933 (line J + line K)	385,776	244,084	125,207	120,515	875,582
M.	Estimated net savings in total taxes for state purposes, ad valorem and occupational, which said companies would, on this assumption, realize in 1934 under new tax plan (line I—line L)	$329,468	$227,644	$148,403	$120,828	$826,343

(a) Based on $105,000,000 full value as used in settlement.
(b) Actual reassessment value.
(c) 4,934,603 ÷ 5,599,270, equals 88.129399%.

[fol. 372] PLFF's Ex. 34

Computation of millages on 1933 State Board of Equalization's aggregate assessed valuation of all taxable property necessary to raise monies required for state purposes

Name of fund	Amount	Mills
Current School Fund	$ 7,520,572	6.656
University of Washington	1,702,265	1.506
Washington State College	1,012,900	0.896
Bellingham Normal School	301,333	0.267
Cheney Normal School	254,811	0.226
Ellensburg Normal School	185,028	0.164
General Fund	3,178,395	2.813
Veterans' Compensation Bond Retirement	1,129,926	1.000
Total of above funds	$15,285,230	13.528
Plus seventh year delinquencies	464,873	0.411
Total	$15,750,103	13.939

[fol. 373] PLFF's Ex. 35

Computation of millages on 1934 State Board of Equalization's aggregate assessed valuation of all taxable property necessary to raise monies required for state purposes

Name of fund	Amount	Mills
Current School Fund	$ 7,376,545.00	6.794
University of Washington	1,702,299.00	1.568
Washington State College	1,012,810.00	0.933
Bellingham Normal School	301,087.00	0.277
Cheney Normal School	254,766.00	0.234
Ellensburg Normal School	185,284.00	0.170
General Fund	4,343,113.00	4.000
Veterans' Compensation Bond Retirement	1,085,778.00	1.00
Total of above funds	$16,261,682.00	14.976
Plus seventh year delinquencies	476,153.00	0.438
Total	$16,737,835.00	15.414

[fol. 374] PLAINTIFF'S EXHIBIT "36"

Is a work sheet used by witness, Manschreck, in the preparation of Plaintiff's Exhibits "32" and "33" and can be readily referred to by the court if believed necessary.

[fol. 375] PLAINTIFF'S EXHIBIT "37"

Is a letter from Fred Garing, Tax Agent of the G. N., to the Tax Commission, under date of October 9, 1934, reading as follows:

"Replying to your letter of October 8th:

"The total of ad valorem taxes levied against the operating property of the Great Northern Railway in the State of Washington for the year 1933 amounts to $1,250,860.49."

[fol. 376] DEFENDANT'S EXHIBIT "38"

Is a copy of the "Rules Governing the Separation of Operating Expenses between Freight Service and Passenger Service on Large Steam Railways," made by the I. C. C., Issue of 1920, and effective January 1, 1920. These rules may be referred to and quoted in the briefs where pertinent, and are therefore omitted.

[fol. 377] PLAINTIFF'S EXHIBIT "39"

Consists of six large sheets showing in detail, by accounts and account numbers, the G. N.'s Railway Operating Expenses in the State of Washington for each of the years 1931, 1932 and 1933 as reported to the Department of Public Works, and the average for the three years as to Maintenance of Way and Structures, Maintenance of Equipment, Traffic, Transportation-Rail Line, Miscellaneous Operations, General, and Transportation for Investment—Cr., and the Grand Totals.

These sheets are too large to embody in the Abstract and are therefore omitted.

[fol. 378] PLAINTIFF'S EXHIBIT "40"

Is a copy of the testimony of witness, A. S. Edmonds, called as a witness in rebuttal by the plaintiff in State of Washington vs. Northern Pacific Railway Company, and is in substance, as follows:

A. S. EDMONDS, called and sworn as a witness for plaintiff, testified as follows:

I reside in Portland and have been assistant traffic manager of the Union Pacific System for about 13 years. You ask if I have ever had occasion to study the problem of divisions between connecting carriers on inter-line shipments. In my present capacity and previously. You ask if I assisted in fixing the divisions of revenue in interline traffic as to the Union Pacific, the Oregon Short Line and the Oregon Washington Railroad. Yes. That is to say, before they were finally approved they were submitted to me for my approval and I then examined them and concurred in them. The Union Pacific consists of: The O-W. R. and N., Oregon Short Line, Union Pacific Railroad, Los Angeles and Salt Lake Railroad and, in some degree, the St. Jo and Grand Island. The O-W consists of a line from Seattle to Huntington on the border lines between Idaho and Oregon. From an east and west standpoint, that substantially corresponds roughly with the location of Spokane on the Great Northern and Northern Pacific. Then we have a line from Spokane to a connection with the main line at several points, Pendleton, Umatilla, Mesner and the various branches. You ask if this system corresponds roughly with the N. P. system west of Spokane, serving Oregon and parts of Washington. Oh, substantially so, yes. They don't serve the same territory in detail by any manner of means. You say you are speaking of the east and west locations and the character of service as to the territory covered. That is about right. The Oregon Short Line consists mainly of the main line running from Huntington, Oregon, to Granger, Wyoming, with a north and south line running from Butte, [fol. 379] Montana, to Salt Lake City and Ogden, Utah and various branches. The Union Pacific Railroad Company consists of a main line approximately 1000 miles long from Council Bluffs to Ogden with various branches. It goes to Ogden; and a main line from Kansas City out to Denver

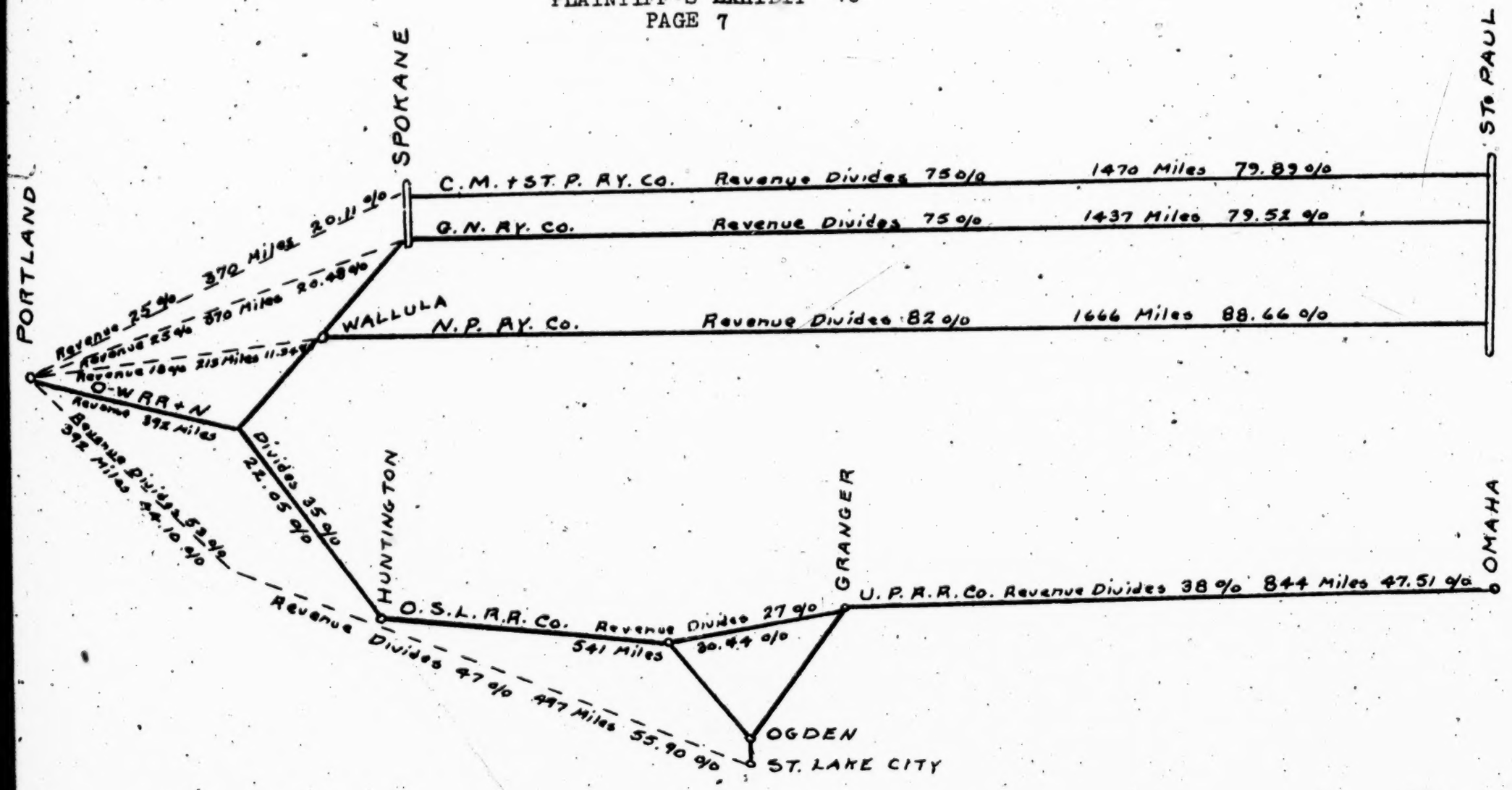
and various branches. The majority of the traffic is handled over the main line between Ogden and Council Bluffs. On a shipment of lumber from Portland to Chicago you ask what would be the ordinary routing of that shipment if the routing was controlled by the Union Pacific Company. Through Huntington, Granger, Council Bluffs, and there we deliver to our connection. Council Bluffs is on the west side of the Missouri River. You ask over what road we ship, say between Omaha or Council Bluffs and Chicago. Over the C. G. & W. the Burlington, Northwestern, and Illinois Central. The Northwestern is the preferred connection. You ask how the distance between Omaha and Chicago, as to shipments between Chicago and Portland over the Union Pacific system via the Northwestern say, with the shipments from Portland to Chicago via the Northern Pacific and St. Paul. About the same. It is approximately the same between St. Paul and Chicago and Omaha and Chicago. That depends on what line you use, either between the Twin Cities and Chicago or between Council Bluffs and Chicago. You ask whether, with respect to the 3 lines, 2 terminal lines and intermediate line, I would say there was any general principal in regard to the apportionment of interline revenue as between those lines of that kind, the connecting lines of that kind as to interline shipment. The bases most generally used has been a mileage pro rate with a minimum of 25% to any line, whether the terminal line or the intermediate line. The local rate is the maximum generally, yes. It might be less than 25%, depending on the agreement of the parties. These divisions [fol. 380] would apply both west and east, to traffic going in both directions. As a rule the short line would get the 25% minimum whether it received the traffic or originated the traffic. I would say generally that 100% of the Oregon Washington stock is controlled by the Short Line, and all but about 1500 shares of the Short Line is controlled by the Union Pacific Railroad. That has been true for a number of years, so far as I know. You ask me to give you the divisions on interline shipments between the O. W. and the Oregon Short Line (O. S. L.), both east and west. The Oregon Washington receives on their traffic interchange 53%, whether east or west bound, the short line 47%. The Oregon Washington proportion would include allowances made by us to Camas Prairie and any of the

water lines that operate, more particularly the line on the Snake River. The Camas Prairie Line extends between Reparia and Grangeville with a branch running to Stites, Idaho, and from there to a place known as Headquarters, north from Orphena. It extends into Washington at Riparia. The physical property of that road is largely owned share and share alike by the N. P. and O. W. If the O. W. received a shipment from some other line, say the N. P., at Portland or some other point, that line would receive a contribution out of the joint rate, which would generally be deducted before we prorated with our own system lines on these percentages that we are talking about. We would first pay them and then apportion the balance 53 and 47. The same thing would generally be true if the shipment originated on the O. S. L. from some other line other than the U. P. You ask what the divisions are between the O. W. the O. S. L. and the U. P. The O. W. 35%, O. S. L. 27%, and U. P. 38%. In other words, on a shipment between Portland and Omaha, the O. W. would receive 35%, of the revenue, the O. S. L. 27% and the U. P. 38%. Roughly, the distance from Portland to Huntington is 390 miles approximately, from Huntington to Granger, 541 miles, and between Granger and Omaha, about 840 or 844. The distance from Huntington to Portland is about 20 miles in [fol. 381] excess of the distance between Portland and Spokane. Those divisions apply whether eastbound or westbound; in whichever direction the business goes. Those divisions were effective about September 1, 1923. The 35% to the O. W. is no more than it got as an independent company. When I concurred in them I stated they were substantially as high as I could negotiate if we were an independent carrier. You ask if the division results in the O. W. receiving more than a mileage prorate. On the average I would say we do not. You must remember, for example, that we get not only 35% on business originating in Portland; we likewise get 35% on business originating in Seattle or destined to Seattle. Similarly we get 53% on business originating at Weiser and coming to Portland where it is nothing like 53% or, indeed, 30% of the mileage. On the other hand, on our lumber business originating at Baker and going to points on the Short Line, Salt Lake and Ogden, where we had considerable movement, we get nothing like 25%. We wouldn't get anything like 25%

under the old arrangement. We got more than 25% in that divisional base, of course. On business from Portland and Portland to Omaha we get considerably more than a mileage prorate. We would get about 30% on a mileage prorate from Seattle to Omaha. On shipments to Omaha, we would get slightly less on a mileage prorate, even on the longest haul, than under the present divisions. We would also get a good deal more on a mileage prorate in the lumber business we handled to Cheyenne, Laramie and Denver. You ask if there is not a particularly large volume of business flowing between Portland and Omaha and points east. No, not a great deal. If you eliminate perishables and lumber and even a substantial quantity of both of those is moving through the canal that we formerly handled. Our transcontinental tonnage, whether going to the Missouri [fol. 382] River or east thereof, is substantially lighter in both directions than it ever has been. You ask whether or not the lines, mileages between various points, and percentages indicated as to revenue and the various divisions indicated on plaintiff's Ex. "52" is correct. I didn't prepare the statements, but I would say they are substantially correct. The words "revenue 25%" on the line extending from Portland to Spokane and from Spokane to St. Paul via Chicago Milwaukee, means that the O. W.'s proportion of the revenue on traffic moving from Portland to St. Paul would be 25%, according to its divisions with the Milwaukee. (Questions by defendant's counsel.). You ask if I know whether those things are correct. I don't know that the mileage is correct. The divisions are. (Questions by plaintiff's counsel.) It is 368 and a fraction miles from Portland to Spokane over our line. I don't know whether Exhibit "52" is taken from our actual distance tables or from our mileage books. There would be some variations because the distances are between different terminals. You ask if the 20.11% indicates the relation between 370 miles and the total distance between Portland and St. Paul via the Milwaukee Road. I don't know as to that. I didn't make the figures, but that is the intention of it, certainly. It applies also as to the G. N. So far as divisions are concerned, those are the correct ones.

(Whereupon plaintiff's Ex. "52" was received in evidence. The witness then continued:)

PLAINTIFF'S EXHIBIT "40"
PAGE 7



238 (PLFF'S EX '32')

You ask if I really know whether the divisions between the O. W., O. S. L. and U. P. yield to the O. W. more or less than a mileage prorate. No, not as a whole. It would take millions and millions of calculations, because, to figure that out, you would have to take every pound of freight that moved from or to a point on the Oregon Washington [fol. 383] and figure the individual shipments on that individual road are getting from the Short Line a very much less revenue. It is one of the heaviest traffics we have.

Plaintiff's Exhibit "52" offered in evidence in State v. Northern Pacific Railway Company appears on the following page:

(Here follows 1 photo, folio 384.)

[fol. 385] A. S. EDMONDS, recalled in the present case for further cross-examination by defendant, testified as follows:

Among possible operating movements from west to east, appearing on Plff's Ex. "52," is a movement from Portland via the O. W. R. & N. to Spokane, and the Milwaukee from Spokane to St. Paul. On that movement I show a division of Portland-St. Paul revenue in the proportions of 25% to the O. W. R. & N. and 75% to the Milwaukee. You ask if we have some through rates from points in the Willamette Valley south of Portland via Portland and Spokane to St. Paul. Yes; not generally throughout the valley, but in some degree. In some cases. For instance, business originating on the S. P. south of Portland and then moving, as shown on this chart, from Portland to Spokane via the O. W. and the Milwaukee line from Spokane to St. Paul. In that particular business the S. P.'s proportion (St. 17) of the St. Paul revenue would be deducted and the remainder would be divided 25 and 75. You ask if it is not a fact that whether the O. W. was an originating or an intermediate carrier on business from Portland or south of Portland, it would get the same proportion of the earnings between Portland and St. Paul. The same percentage proportion, although it would not be as great. There would be less revenue for the O. W. and Milwaukee out of it if the business originated south of Portland. But

what there was to divide, the O. W. and Milwaukee would divide in just the same proportions as if the O. W. had originated the business (St. 18).

On redirect examination he further testified:

You ask if the reason for that is that we have to handle the business at the expensive Portland terminals. No, I think I can perhaps illustrate it a little bit better by a more specific and exact case. We handle, in connection with the G. N., a very considerable business through Spokane going to the northern tier of states and originating on the Mt. Hood Railroad. But obviously if we took our percentage proportion based on this mileage prorate which we are [fol. 386] talking about, and divided that gross revenue on that percentage basis we would receive less revenue in the operation finally (St. 18) as compared with the operation of deducting first the arbitrary or whatever division was allowed the Mt. Hood Railroad, and the participating in the remainder with the G. N. on the basis of the percentage division. To put it in another way, whatever percentage in the divisional rate accrues to each line to the extent that third connecting lines' revenues are deducted prior thereto, the lines handling that business participate about in that degree in that deduction. We retain the same divisions as between ourselves and the others.

It is only fair to say that there are some divisions, particularly on short haul traffic moving over, say, three lines, where there are cases that all three lines participate in that total, or that is, all lines take their percentage of total, of the whole revenue. But that is more or less of an exception and applies more particularly on short haul traffic. That happens on the O. W., O. S. L. and U. P.; we each take our proportion. You ask me what proportion the S. P. gets on such a haul as I have indicated. My recollection is that they get, south of Portland, 20% of the West of the Missouri River revenue. That is far more than a mileage prorate. They don't get quite the minimum of 25% (St. 19), because, in the main, their hauls are substantially shorter, and again there, that is largely a matter of argument. You ask if it doesn't have two or three times or more the mileage prorate. Well, I don't know. It has about twice as much as their maximum. I understand that the S. P. prorates south as far as the Oregon-California

line through Portland, so they have a very substantial mileage prorate. On an exact mileage prorate it would give them at least 14% or 15% on the Omaha business, for example. We do not have any substantial line of rates from points on the S. P. in connection with the G. N. (St. 20).

We got lumber shipments from the Long Bell Lumber Company at Longview before we absorbed the railroad there. We had divisions with that line. That line got an arbitrary of 3½ cents on lumber. You ask how long a haul [fols. 387-411] they had. Well, some of the lumber went through Olequah center or Vader, and some through Longview Junction. The Longview Junction haul was five miles and the Vader haul about twenty-three, but it should be remembered that the I. C. C., in tap line cases, would have allowed them 3½ cents through Vader. The through rate from Longview to Omaha on lumber is 62.5 cents (St. 21). Out of the 62.5 cents this five mile line or twenty-three mile line got 3½ cents (St. 22).

[fol. 412] APPEAL

On the 1st day of April, 1935, the plaintiff appealed from the judgment by giving oral notice thereof (Tr. 95). The transcript on appeal was prepared and filed in the office of the clerk of the superior court on the 19 day of April, 1935; the statement of facts was served on the 25 day of April, 1935; and the statement was settled and certified by the trial judge on the 6 day of May, 1935.

G. W. Hamilton, Attorney General; R. G. Sharpe, Assistant Attorney General, Attorneys for Plaintiff and Appellant.

Due and timely service of the within abstract by receipt of a true copy thereof acknowledged this 6th day of May, 1935.

Thomas Balmer, Attorney for Respondent.

[fol. 413] DEFENDANT'S EXHIBIT No. 11

Page No. "A"

Witness: W. M. Burn

Great Northern Railway Company

Washington—Calendar Year 1933

Intrastate Operations

Operating Revenues and Expenses, and Net Railway Operating Deficit

(Based upon Intrastate Revenue reported to Washington Department of Pubic Works after elimination of revenues received from Interstate and Foreign Commerce, as reported in amended answers to interrogatories.)

1. Gross Operating Revenues (Page "B")	$ 2,179,760
2. Operating Expenses (Page "C"—Item 3)	1,730,361
3. Net Revenue from Railway Operations	449,399
4. Railway Tax Accruals (Page "C"—Item 4)	335,247
5. Railway Operating Income	114,152
6. Equipment Rents—Net Debit (Page "D"—Item 6)	19,966
7. Joint Facility Rent—Net Debit (Page "E"—Item 8)	193,455
8. Total Rentals—Net Debit	213,421
9. Net Railway Operating Deficit (Item 8 minus Item 5)	99,269
10. Cost of Reproduction New, Less Depreciation, as of I. C. C. Valuation Date (June 30, 1915) plus Additions and Betterments to December 31, 1933, of Roadway Property and Equipment in Washington—Intrastate Proportion (Page "F"—Item 9-c)	$29,733,312
11. Annual Rate of Return Earned on above Reproduction Cost	Deficit
12. Interest on above Reproduction Cost @ 5.75% per Annum	1,709,665
13. Amount short of earning a return of 5.75% per Annum (Item 9 plus Item 12)	1,808,934

[fol. 414] EXHIBIT No. —

Page No. B

Witness W. M. Burn

Great Northern Railway Company

Washington—Calendar Year 1933

Intrastate Gross Operating Revenues as Reported on Page 11
(Restated)

	Account	Freight	Passenger	Total
(101)	Freight	$1,502,153	.....	$1,502,153
(102)	Passenger	.....	$306,621	306,621
(103)	Excess Baggage	.....	2,163	2,163
(105)	Parlor and Chair Car	.....	3,292	3,292
(106)	Mail	.....	131,721	131,721
(107)	Express	.....	36,780	36,780
(108)	Other Passenger Train	.....	1,746	1,746
(109)	Milk	.....	12,495	12,495
(110)	Switching	38,367	.....	38,367
(111)	Special Service Train	14	.....	14
(112)	Other Freight Train	434	.....	434
(131)	Dining and Buffet	.....	26,971	26,971
(132)	Hotel and Restaurant	.....	15,654	15,654
(133)	Station, Train and Boat Privileges	.....	318	318
(134)	Parcel Room	.....	2,611	2,611
(135)	Storage—Freight	2,010	.....	2,010
(136)	Storage—Baggage	.....	494	494
(137)	Demurrage	1,016	.....	1,016
(138)	Telegraph and Telephone	3,653	1,279	4,932
(142)	Rents of Buildings and other property	46,570	16,312	62,882
(143)	Miscellaneous	28,427	9,957	38,384
(151) (152)	Joint Facility—Net Debit	.....	(11,298)	(11,298)
	Total	$1,622,644	$557,116	$2,179,760

[fol. 415] EXHIBIT No. —

Page No. "C"

Witness: W. M. Burn

Great Northern Railway Company

Washington—Calendar Year 1933

Intrastate Operations

Basic data pertaining to Information Shown on Page "A"

1. Operating Expenses—Freight:
   (a) Freight Operating Revenues (Page "B") ..... $ 1,622,644
   (b) Freight Operating Ratio (Page 7) 51.33%

Page No. "C"—Continued.

(c) Freight Operating Expenses (a×b)	832,903
2. Operating Expenses—Passenger:	
(a) Passenger Operating Revenues (Page 11)	551,845
(b) Passenger Operating Expenses (Page 7)	888,967
(c) Passenger Operating Ratio (b÷a)	161.09%
(d) Passenger Operating Revenues (Page "B")	557,116
(e) Passenger Operating Expenses (d×c)	897,458
3. Total Operating Expenses (1c plus 2e)	$ 1,730,361
4. Railway Tax Accruals:	
(a) Per Cent. Taxes of Revenues (Page 9)—(Item 5c)	15.38%
(b) Gross Intrastate Operating Revenues (Page "B")	$ 2,179,760
(c) Taxes applicable to Item (b) ($2,179,760×15.38%)	$ 335,247

[fol. 416] Page No. "D"

5. Equipment Rents:

	Amount
Hire of Freight Cars:	
(a) Freight Car Hire Expenses Applicable to Intrastate Traffic (Page 8)	$ 28,571
(b) Freight Operating Expenses (Page 9)	1,413,507
(c) Per Cent. Item (a) of Item (b)	2.02%
(d) Freight Operating Expenses (Page "C")	832,903
(e) Freight Car Hire Expenses Applicable Intrastate Traffic — Restated (d×c)	16,825
Passenger Car Rentals:	
(f) Cost of Passenger Car Rentals Applicable to Intrastate Traffic (Page 8)	3,088
(g) Passenger Operating Expenses (Page 9)	888,967
(h) Per Cent. Item (f) of Item (g)	0.35%
(i) Passenger Operating Expenses (Page "C")	897,458
(j) Cost of Passenger Car Rentals Applicable to Intrastate Traffic — Restated (i×h)	3,141
6. Total Equipment Rents—Debit (5e+5j)	$ 19,966

[fol. 417] Page No. "E"

	Amount
7. Joint Facility Rent Income and Joint Facility Rents—Net Debit	
Freight Proportion:	
(a) Amount applicable to Intrastate Traffic (Page 9—Item 4-G)	$ 158,024
(b) Freight Operating Expenses (Page 9)	1,413,507
(c) Per Cent. Item (a) of Item (b)	11.18%
(d) Freight Operating Expenses (Page "C")	832,903
(e) Joint Facility Rent Expense—Restated (d×c)	$ 93,119
Passenger Proportion:	
(f) Amount applicable to Intrastate Traffic (Page 9—Item 4-h)	99,403
(g) Passenger Operating Expenses (Page 9)	888,967
(h) Per Cent. Item (f) of Item (g)	11.18%
(i) Passenger Operating Expenses (Page "C")	897,458
(j) Joint Facility Rent Expense—Restated (i×h)	100,336
8. Total Joint Facility Rentals—Debit 7e plus 7j	$ 193,455

[fol. 418] Page No. "F"

	Amount
9. Cost of Reproduction New Less Depreciation as of I. C. C. Valuation date (June 30, 1915) plus Additions and Betterments to December 31, 1933, of Roadway Property and Equipment in State of Washington—Applicable to Intrastate Traffic:	
(a) Ratio Reproduction Cost to Total Operating Expenses in Washington, Year 1933 (Page 10—Item 3)	17.1833
(b) Total Intrastate Operating Expenses (Page "C", Item 3)	$ 1,730,361
(c) Reproduction Cost applicable to Washington Intrastate Traffic—Restated (Item a × Item b)	$29,733,312

[fol. 419] Exhibit No. —

Page No. 1

Witness: W. M. Burn

Great Northern Railway Company

Washington—Calendar Year 1933

Intrastate Operations

Operating Revenues and Expenses, and Net Railway Operating Income or Deficit

	Amount	Amount
1. Gross Operating Revenues (Page 11)		$3,305,548
2. Operating Expenses (Pages 2 and 7)		2,302,474
3. Net Revenue from Railway Operations		$1,003,074
4. Railway Tax Accruals (Page 9)		511,530
5. Railway Operating Income		$491,544
6. Equipment Rents—Net Debit (Page 8)		$31,659
7. Joint Facility Rent—Net Debit (Page 9)		257,427
8. Total Rentals—Net Debit		$289,086
9. Net Railway Operating Income (Item 5 minus Item 8)		$202,458
10. Cost of Reproduction New, Less Depreciation, as of I. C. C. Valuation Date (June 30, 1915) plus Additions and Betterments to December 31, 1933, of Roadway Property and Equipment in Washington—Intrastate Proportion (Page 10)		$39,564,102
11. Annual Rate of Return Earned on above Reproduction Cost (9 divided by 10)		0.51%
12. Interest on above Reproduction Cost @ 5.75% per Annum		$2,274,936
13. Amount short of earning a return of 5.75% per Annum (12–9)		$2,072,478

[fol. 420] EXHIBIT No. —

Page No. 1-A

Witness W. M. Burn

Great Northern Railway Company

Comparative Revenue Net Ton Mile Statistics, Year 1933, and Test Period—7 Days Ended November 21, 1933—State of Washington

Item	Intrastate	Interstate	Total
Year 1933:			
1. Revenue Net Ton Miles	138,265,617	460,335,442	598,601,059
Per Cent	23.10%	76.90%	100.00%
Test Period—Seven Days Ended November 21, 1933:			
2. Revenue Net Ton Miles	4,155,692	8,691,505	12,847,197
Per Cent	32.35%	67.65%	100.00%
Revenue Net Ton Miles Per Day:			
3. (a) Based on Annual Revenue Net Ton Miles (Item 1 divided by 365)	378,810	1,261,193	1,640,003
(b) Based on Test Period Revenue Net Ton Miles (Item 2 divided by 7)	593,670	1,241,644	1,835,314
(c) Per Cent. Item 3-b of Item 3-a	156.72%	98.45%	111.91%
Month of November, 1933:			
Revenue Net Ton Miles	14,547,465	44,121,835	58,669,300
Per Cent. of Total	24.80%	75.20%	100.00%
Per Cent. of Year	10.52	9.58	9.80

[fol. 421] EXHIBIT No. —

Page No. 2

Witness W. M. Burn

Great Northern Railway Company

State of Washington—Calendar Year 1933

Cost of Handling Intrastate Freight Traffic

Based on Actual Study of Line Haul Operations During Seven Days Ended November 21, 1933, and of Yard Switching Operations During Seven Days Ended June 15, 1934.

Recapitulation

Item	Page No.	Item No.	Amount
1. Line Haul Costs, exclusive of Train Switching	3	6	$555,371
2. Train Switching Costs	3	9	89,763
3. Freight Car Repairs, Depreciation and Retirements	4	1-f	133,061
4. Train Supplies and Expenses	4	2-c	39,895
5. Wages of Station Employees, and Station Supplies, etc	5	3-f	246,950
6. Traffic Expenses	5	4-f	66,972
7. Yard Switching Expenses	5	5-b	202,256
8. Total Operating Expenses—Comparable with "Freight Revenue"—Account 101			$1,334,268

[fol. 422]

EXHIBIT No. —
Page No. 3
Witness W. M. Burn

Great Northern Railway Company

State of Washington—Calendar Year 1933

Cost of Handling Intrastate Freight Traffic Based on Actual Study of Line Haul Operations During Seven Days Ended November 21, 1933, and of Yard Switching Operations During Seven Days Ended June 15, 1934.

Line Haul Costs—Exclusive of Train Switching

Item	Through Freight Trains	Local Freight Trains	Mixed Trains (Frt. Prop.)	Total
1. Per Cent of Intrastate Revenue Net Ton Miles handled in each class of trains (See Page 6, Item 2-a)	51.72%	42.42%	5.86%	100.00%
2. Intrastate Revenue Net Ton Miles—Year 1933	71,510,977	58,652,275	8,102,365	138,265,617
3. Per Cent. Revenue Gross Ton Miles of Revenue Net Ton Miles (See Page 6, Item 2-b)	232.53%	199.75%	269.45%	.....
4. Revenue Gross Ton Miles—Year 1933 (Item 2 x Item 3)	166,284,475	117,157,919	21,831,822	305,274,216
5. Average Cost Per 100 Revenue Gross Ton Miles (See Page 6, Item 3)	$.12734	$.20795	$.45802	.....
6. Total Line Haul Cost—Exclusive of Train Switching (Item 4 x Item 5)	$211,747	$243,630	$99,994	$555,371
Line Haul—Train Switching Expense				
7. Train Switching cost per 1,000 Revenue net ton miles (See page 6, Item 9)	$.03024	$1.26488	$1.65550	.....
8. Intrastate Revenue Net Ton Miles—Year 1933 (See Item 2 above)	71,510,977	58,652,275	8,102,365	138,265,617
9. Train Switching Cost (Item 8 x Item 7)	$2,162	$74,188	$13,413	$89,763

[fol. 423]

EXHIBIT No. —
Page No. 4
Witness W. M. Burn

Great Northern Railway Company

State of Washington—Calendar Year 1933

Cost of Handling Intrastate Freight Traffic Based on Actual Study of Line Haul Operations During Seven Days Ended November 21, 1933, and of Yard Switching Operations During Seven Days Ended June 15, 1934

			Total Cost
1.	Freight Car Repairs, Depreciation and Retirements:		
(a)	Average cost per revenue freight car mile (Loaded and Empty) based on Annual Reports to Washington Department of Public Works for Years 1931—1932—1933	$.015065	
	Add Indirect proportion of Maintenance of Equipment Expenses—10.82% (See Page 14)	.001630	
	Total	$.016695	
	Add proportion of General Expenses—I. C. C. Accounts 451 to 462, inclusive—4.85% (See Page 14)	.000810	
(b)	Total	$.017505	
(c)	Loaded and Empty Freight Car Miles per 100 Revenue Net Ton Miles (See Page 6, Item 5)	5.4976	
(d)	Intrastate Revenue Net Ton Miles—Year 1933	138,265,617	
(e)	Car Miles required to handle 1933 Intrastate Freight Traffic, (Item 1-d x Item 1-c)	7,601,291	
(f)	Total Cost of Freight Car Repairs (Item 1-e x Item 1-b)		$133,061
2.	Train Supplies and Expenses:		
(a)	Average cost per 100 Revenue Freight Car Miles (Loaded and Empty)—Based on 1933 Annual Report to Washington Dept. of Public Works	$.40255	
	Add Indirect Proportion of Transportation Expenses—23.70%—(See Page 15)	.09540	
	Total	$.49795	
	Add proportion of General Expenses—I. C. C. Accounts 451 to 462, inclusive—5.40% (See Page 15)	.02689	
(b)	Total	$.52484	
(c)	Total cost of Train Supplies and Expenses (Item 1-e x Item 2-b)		$39,895

[fol. 424]

EXHIBIT NO. —

Page No. 5

Witness W. M. Burn

Great Northern Railway Company

State of Washington—Calendar Year 1933

Cost of Handling Intrastate Freight Traffic Based on Actual Study of Line Haul Operations During Seven Days Ended November 21, 1933 and of Yard Switching Operations During Seven Days Ended June 15, 1934

			Total Cost
3.	Station Service—Wages of Station Employees and Station Supplies, etc.		
(a)	Freight Proportion of charges to Accounts "Station Employees" and "Station Supplies and Expenses" for year 1933, as contained in Annual Report to Washington Department of Public Works	$310,297	
	Add Indirect Proportion of Transportation Expenses—23.70% (See Page 15)	73,540	
	Total	$383,837	
	Add Proportion of General Expenses—I. C. C. Accounts 451 to 462, inclusive—5.40% (See Page 15)	20,727	
(b)	Total	$404,564	
	Tons of Revenue freight handled in Washington during year 1933:		
	Interstate	1,997,401	
	Intrastate—1,564,758 tons—equated to equivalent Interstate tonnage if handled only once (x 2)	3,129,516	
(c)	Total	5,126,917	
(d)	Average cost per ton, if all Interstate freight (Item 3-b divided by Item 3-c)	$.07891	
(e)	Average cost per ton for handling intrastate freight (2 x $.07891)	$.15782	
(f)	Station Expense for handling Intrastate freight (1,564,758 tons x $.15782)		$246,950

4. Traffic Expenses:		
(a) Total Freight proportion of charges to Traffic Expenses—I. C. C. Accounts 351 to 359, inclusive, for calendar year 1933, as contained in Annual Report to Washington Department of Public Works	$144,644	
Add proportion of General Expenses—I. C. C. Accounts 451 to 462, inclusive—5.40% (See Page 15)	7,811	
(b) Total	$152,455	
(c) Total tons of Revenue freight handled in Washington during calendar year 1933—Interstate and Intrastate	3,562,159	
(d) Traffic expenses per ton of revenue freight (4-b divided by 4-c)	$.04280	
(e) Tons of Intrastate revenue freight handled in Washington—Year 1933	1,564,758	
(f) Traffic Expenses applicable to Washington Intrastate Traffic (4-e x 4-d)		$ 66,972
Yard Switching Expenses—At Terminals Where Yard Switch Engine Service is Maintained:		
5. Yard Switching cost per 1,000 Revenue Net Ton Miles (See Page 6, Item 10-b)	$1.46281	
(a) Intrastate Revenue Net Ton Miles—Year 1933	138,265,617	
(b) Yard Switching Cost (5 x 5-a)		$202,256

[fol. 425]

EXHIBIT No. —

Page No. 6

Witness W. M. Burn

Great Northern Railway Company

State of Washington

Averages and Other Pertinent Data Developed from Detailed Study to Determine Cost of Handling Intrastate Freight Traffic

Line Haul—Exclusive of Train Switching

	Through Freight Trains	Local Freight Trains	Mixed Trains (Frt. Prop.)	Total
1. Revenue Gross Ton Miles—Intrastate:				
Empty Movement:				
(a) Tare Weight Per Car (Tons)	22.53	20.70	24.17	.....
(b) Empty Car Miles	54,130	36,377	7,306	97,813
(c) Tare Ton Miles (b x a)	1,219,549	753,004	176,586	2,149,139
Loaded Movement	3,778,061	2,768,651	479,343	7,026,055
Revenue Gross Ton Miles	4,997,610	3,521,655	655,929	9,175,194
2. Revenue Net Ton Miles—Intrastate	2,149,254	1,763,007	243,431	4,155,692
(a) Per Cent. in each class of trains	51.72%	42.42%	5.86%	100.00%
(b) " " G. T. Miles of N. T. Miles	232.53%	199.75%	269.45%	.....
3. Average Cost Per 100 Gross Ton Miles (See Page 12, Item 11)	$.12734	$.20795	$.45802	.....
4. Freight Car Miles—Intrastate:				
(a) Loaded	72,308	48,582	9,760	130,650
(b) Empty (Item 1-b)	54,130	36,377	7,306	97,813
(c) Total	126,438	84,959	17,066	228,463
5. Freight Car Miles Per 100 Net Ton Miles (Item 4-c divided by Item 2)	.....	.....	.....	5.4976

Line Haul—Train Switching

6. Average cost per car handling in revenue service, Interstate and Intrastate (See Page 13, Item 10)	$.787	$.904	$.863	.....
7. Intrastate Revenue Cars Handled:				
Loaded	47	1,411	267	1,725
Empty (74.87% of Loaded)	35	1,056	200	1,291
(a) Total	82	2,467	467	3,016
8. Total Switching Cost (7 a x 6)	$65	$2,230	$403	$2,698
9. Train Switching Cost per 1,000 Revenue Net Ton Miles (8 divided by 2)	$.03024	$1.26488	$1.65550	.....

Yard Switching Costs—At Terminals Where Yard Switch Engine Service Is Maintained

10. Cost of Switching Intrastate Carload Traffiic—7 Days (See Page 18) =	$5,553
" " " " L. C. L. " —7 " " " 20) =	526
(a) Total	$6,079
(b) Yard Switching Cost per 1,000 Revenue Net Ton Miles (10-a divided by 2)	$1.46281

[fol. 426]

EXHIBIT No. —
Page No. 7
Witness: W. M. Burn

Great Northern Railway Company

Washington—Calendar Year 1933

Expenses Incidental to Intrastate Operations Other Than Those Directly Applicable to Account 101—Freight Revenue

			Total Cost
1. Freight Proportion of Intrastate Operating Expenses, Other Than Expenses Applicable to Account 101—Freight Revenue:			
(a) Total Freight Revenue—Account 101—Intrastate (Page 11)		$2,599,331	
(b) Total Freight Operating Expenses Applicable to Freight Revenue—Account 101—Intrastate (Page 2)		1,334,268	
Operating Ratio (1-b divided by 1-a)		51.33%	
Total Intrastate Operating Revenues—Freight Proportion (Page 11)	$2,753,703		
Less: Intrastate Freight Revenue—Acct. 101 (Page 11)	2,599,331		
		154,372	
(c) Operating Expenses Applicable to Intrastate Revenues (Freight Proportion) other than Account 101 ($150,554 x 51.33%)			$79,239
2. Passenger Proportion of Operating Expenses—Intrastate:			
(a) Passenger proportion of operating Revenues Intrastate and Interstate (Page 11)			$1,540,264
(b) Passenger proportion of operating expenses—Interstate and Intrastate—as reported to W. D. P. W.			$2,481,136
(c) Operating Ratio			161.09%
(d) Intrastate Operating Revenues Passenger proportion (Page 11)			$551,845
(e) Intrastate Operating Expenses—Passenger proportion (d) x (c)			$888,967

[fol. 427]

EXHIBIT No. —
Page No. 8
Witness: W. M. Burn

Great Northern Railway Company

Washington—Calendar Year 1933

Expenses Incidental to Intrastate Operations Other Than Those Directly Applicable to Acct. 101—Freight Revenue

		Total Cost
3. Equipment Rentals—Intrastate Hire of Freight Cars:		
Loaded and Empty Freight Car Miles—System—Year 1933	336,767,017	
Loaded and Empty Freight Car Miles—Washington—Year 1933	37,627,003	
Per Cent. Washington of System	11.17%	
Net Cost of Freight Car Hire—System—Year 1933	$1,266,243	
Net Cost of Freight Car Hire—Washington—Year 1933 11.17% of $1,266,243		$141,439

Page No. 8—cont.

		Total Cost
Washington Intrastate Freight Car Miles Applicable to Year 1933 (Per Study)—Page 4, Item 1-e	7,601,291	
Per Cent. Intrastate Freight Car Miles of Total—Washington	20.20%	
(a) Freight Car Hire Expense Applicable to Intrastate Traffic (20.20% of $141,439)		$28,571
Passenger Car Rentals:		
Passenger Car Miles—System—Year 1933	49,070,552	
Passenger Car Miles—Washington—Year 1933	8,628,481	
Per Cent. Washington of System	17.58%	
Net Cost of Passenger Car Rentals—System—Year 1933	$56,874	
Net Cost of Passenger Car Rentals—Washington—Year 1933 (17.58% of $56,874)	$9,998	
Cost of Passenger Car Rentals applicable to Washington Intrastate Traffic—Year 1933—based on Revenue Passengers carried one mile 30.89%		
(b) (See Page 7) x $9.998		$3,088

Note.—"Locomotive Rentals" and "Work Equipment Rentals" have not been included, owing to fact that Debit items in these accounts are practically offset by Credit items applicable thereto.

[fol. 428]

EXHIBIT No. —

Page No. 9

Witness: W. M. Burn

Great Northern Railway Company

Washington—Calendar Year 1933

Expenses Incidental to Intrastate Operations Other Than Those Directly Applicable to Freight Revenue—Account 101

4. Joint Facility Rent Income and Joint Facility Rents—Net Debit:		Total Cost
Washington—Intrastate and Interstate:		
Account 541—Joint Facility Rents—Debit		$859,089
" 508—Joint Facility Rent Income—Credit	$77,627	
Less Taxes Included	12,556	
		$65,071
(a) Net Debit		$794,018
Operating Expenses—Intrastate and Interstate:		
(b) Freight Proportion	$4,620,998 =	65.06%
(c) Passenger Proportion	2,481,135 =	34.94%
Total	$7,102,133 =	100.00%
(d) Freight Proportion of Item 4-A (65.06%)		$516,588
(e) Passenger Proportion of Item 4-A (34.94%)		277,430

Operating Expenses—Intrastate	Freight Proportion	Passenger Proportion
Applicable to Account 101 (Freight Revenue) Page 2	$1,334,268	0
Other....Page 7, Items 1-c and 2-e	79,239	$888,967
(f) Total	$1,413,507	$888,967
Not Expense of Joint Facility Rents Applicable to Intrastate Operations:		
(g) Freight Proportion ($1,413,507 Item f) divided by ($4,620,998 Item b) 50.59% x ($516,588 Item d)		$158,024
(h) Passenger Proportion ($888,967 Item f) divided by ($2,481,135 Item c) 35.8 % x ($277,430 Item e)		$ 99,403

Page No. 9—cont.

		Total Cost
5. Washington State Taxes:		
(a) Gross Operating Revenues—Intrastate and Interstate—1933 (Page 11)		$8,114,351
(b) Washington Taxes Paid ($1,238,385) and Proportion of Federal Taxes ($9,593)		$1,247,978
(c) Per cent (b) of (a)		15.38%
(d) Intrastate Revenues (Page 11)		$3,305,548
(e) Intrastate Taxes (d) x (c)	$508,393	
(f) Inspection Fee	3,137	
		$511,530

[fol. 429]

EXHIBIT No. —
Page No. 10
Witness: W. M. Burn

Great Northern Railway Company

State of Washington

			Amount
1. Cost of Reproduction New, Less Depreciation, as of I. C. C. valuation date (June 30, 1915) plus Additions and Betterments to December 31, 1933, of Roadway Property and Equipment in State of Washington		$122,038,008	
2. Total Operating Expenses, Freight and Passenger, in Washington, Year 1933—Intrastate and Interstate		7,102,133	
3. Ratio Item No. 1 of Item No. 2		17.1833	
4. Intrastate Operating Expenses—1933			
Freight Proportion:			
Page 2, Item 8	$1,334,268		
Page 7, Item 1-c	79,239		
(a) Total	$1,413,507		
Passenger Proportion:			
(b) Page 7, Item 2-e	$888,967		
5. Reproduction Cost of Property Applicable to Washington Intrastate Operations:			
Freight Proportion (Item 4-a x 17.1833)			$24,288,715
Passenger Proportion (Item 4-b x 17.1833)			15,275,387
Total			$39,564,102

(Here follow tables, side folios 430, 431, 432 and 433.)

[fols. 430 & 431]

268A

EXHIBIT No. —
Page No. 11
Witness: W. M. Burn

Great Northern Railway Company

State of Washington

Year 1933

Gross Operating Revenues

Account	Intrastate			Interstate			Total Intrastate and Interstate		
	Freight	Passenger	Total	Freight	Passenger	Total	Freight	Passenger	Total
(101) Freight	$2,599,331	.....	$2,599,331	$3,716,059	.....	$3,716,059	$6,315,390	.....	$6,315,390
(102) Passenger	.....	$306,621	306,621	.....	$558,052	558,052	.....	$864,673	864,673
(103) Excess Baggage	.....	2,163	2,163	.....	3,938	3,938	.....	6,101	6,101
(105) Parlor and Chair Car	.....	3,292	3,292	.....	2,725	2,725	.....	6,017	6,107
(106) Mail	.....	131,721	131,721	.....	294,697	294,697	.....	426,418	426,418
(107) Express	.....	36,780	36,780	.....	82,287	82,287	.....	119,067	119,067
(108) Other Passenger Train	.....	1,746	1,746	.....	3,431	3,431	.....	5,177	5,177
(109) Milk	.....	12,495	12,495	.....	1,998	1,998	.....	14,493	14,493
(110) Switching	41,977	.....	41,977	69,197	.....	69,197	111,174	.....	111,174
(111) Special Service Train	14	.....	14	1,392	.....	1,392	1,406	.....	1,406
(112) Other Freight Train	434	.....	434	60	.....	60	494	.....	494
(131) Dining and Buffet	.....	26,971	26,971	.....	49,089	49,089	.....	76,060	76,060
(132) Hotel and Restaurant	.....	15,654	15,654	.....	.....	.....	.....	15,654	15,654
(133) Station train and boat privileges	.....	318	318	.....	578	578	.....	896	896
(134) Parcel Room	.....	2,611	2,611	.....	.....	.....	.....	2,611	2,611
(135) Storage—Freight	2,010	.....	2,010	894	.....	894	2,904	.....	2,904
(136) Storage—Baggage	.....	494	494	.....	899	899	.....	1,393	1,393
(137) Demurrage	1,016	.....	1,016	2,089	.....	2,089	3,105	.....	3,105
(138) Telegraph and Telephone	4,095	837	4,932	5,997	1,579	7,576	10,092	2,416	12,508
(142) Rents of Buildings and Other Property	52,205	10,677	62,882	.....	.....	.....	52,205	10,677	62,882
(143) Miscellaneous	52,621	10,763	63,384	24,696	6,502	31,198	77,317	17,265	94,582
(151) (152) Joint Facility—Net Debit	.....	(11,298)	(11,298)	.....	(17,356)	(17,356)	.....	(28,654)	(28,654)
Item "A" Total	$2,753,703	$551,845	$3,305,548	$3,820,384	$988,419	$4,808,803	$6,574,087	$1,540,264	$8,114,351

[fol. 432]

Exhibit No. —. Page No. 12. Witness: W. M. Burn

Great Northern Railway Company

State of Washington

Road Haul Cost of Transporting Intrastate Freight Traffic—Based on Study of Freight and Mixed Train Operations During 7 Days Ended November 21, 1933

Applicable to Interstate and Intrastate Traffic—Exclusive of Yard Switching—Washington Only

Item or Account	Through Freight Trains			Local Freight Trains			Mixed Trains (Frt. Propr'n)			Grand Total		
	Gross Ton Miles	Cost Per 100 G.T.M.	Total Cost	Gross Ton Miles	Cost Per 100 G.T.M.	Total Cost	Gross Ton Miles	Cost Per 100 G.T.M.	Total Cost	Gross Ton Miles	Cost Per 100 G.T.M.	Total Cost
1. Maintenance of Way and Structures, including Train Switching	22,321,929	$.0476	$10,617	9,194,096	$.0751	$6,909	1,059,113	$.1811	$1,918	32,575,138	$.0597	$19,444
Add Proportion of General Expenses—I. C. C. Accounts 451 to 462, inclusive—4.85% (See Page 14)	.....	.....	515	.....	.....	335	.....	.....	93	.....	.....	943
2. Total M. W. and S.	22,321,929	$.0499	$11,132	9,194,096	$.0788	$7,244	1,059,113	$.1899	$2,011	32,575,138	$.0626	$20,387
	Locomotive Miles	Cost Per Loco. Mile	Total Cost	Locomotive Miles	Cost Per Loco. Mile	Total Cost	Locomotive Miles	Cost Per Loco. Mile	Total Cost	Locomotive Miles	Cost Per Loco. Mile	Total Cost
3. Maintenance of Equipment—Excluding Train Switching:												
Locomotive Repairs	8,313	$.3070	$2,552	9,242	$.1937	$1,790	2,982	$.1643	$490	20,537	20,537	$4,832
Locomotive Depreciation	8,313	.2432	2,022	9,242	.1143	1,056	2,982	.0614	183	20,537	.1588	3,261
Locomotive Retirements	8,313	.....	.....	9,242	.0002	2	2,982	.0010	3	20,537	.0002	5
Total Direct Expenses	8,313	$.5502	$4,574	9,242	$.3082	$2,848	2,982	$.2267	$676	20,537	$.3943	$8,098
Add Indirect Proportion of M. of E. Expenses—10.82% (See Page 14)	.....	.....	495	.....	.....	308	.....	.....	73	.....	.....	876
Total	.....	.....	$5,069	.....	.....	$3,156	.....	.....	$749	.....	.....	$8,974
Add Proportion of General Expenses—I. C. C. Accounts 451 to 462, inclusive—4.85% (See Page 14)	.....	.....	246	.....	.....	153	.....	.....	36	.....	.....	435
4. Total Maintenance of Equipment	8,313	$.6394	$5,315	9,242	$.3580	$3,309	2,982	$.2632	$785	20,537	$.4581	$9,409
5. Transportation Expenses—Excluding Train Switching:												
Fuel for train locomotives	8,313	$.6663	$5,539	9,242	$.2729	$2,522	2,982	$.1868	$557	20,537	$.4196	$8,618
Water for train locomotives	8,313	.0056	47	9,242	.0068	63	2,982	.0070	21	20,537	.0064	131
Lubricants for train locomotives	8,313	.0089	74	9,242	.0041	38	2,982	.0044	13	20,537	.0061	125
Other supplies for train locomotives	8,313	.0023	19	9,242	.0016	15	2,982	.0013	4	20,537	.0018	38
Enginehouse Expenses—Train	8,313	.0585	486	9,242	.0633	585	2,982	.0533	159	20,537	.0599	1,230
6. Total	8,313	$.7416	$6,165	9,242	$.3487	$3,223	2,982	$.2528	$754	20,537	$.4938	$10,142
	Train Hours	Cost Per Train Hour	Total Cost	Train Hours	Cost Per Train Hour	Total Cost	Train Hours	Cost Per Train Hour	Total Cost	Train Hours	Cost Per Train Hour	Total Cost
Wages of Train Enginemen and Motormen, excluding Train Switching	312.88	$4.5704	$1,430	481.86	$2.7062	$1,304	115.88	$3.2447	$376	910.62	$3.4152	$3,110
Wages of Trainmen, excluding Train Switching	312.88	5.0851	1,591	481.86	4.2398	2,043	115.88	3.8488	446	910.62	4.4805	4,080
7. Total	312.88	$9.6555	$3,021	481.86	$6.9460	$3,347	115.88	$7.0935	$822	910.62	$7.8957	$7,190
Total Direct Transportation Expenses (Item 6 plus Item 7)	.....	.....	$9,186	.....	.....	$6,570	.....	.....	$1,576	.....	.....	$17,332
Add Indirect Proportion of Transportation Expenses—23.70% (See Page 15)	.....	.....	2,177	.....	.....	1,557	.....	.....	374	.....	.....	4,108
Total	.....	.....	$11,363	.....	.....	$8,127	.....	.....	$1,950	.....	.....	$21,440
Add Proportion of General Expenses—I. C. C. Accounts 451 to 462, inclusive—5.40% (See Page 15)	.....	.....	614	.....	.....	439	.....	.....	105	.....	.....	1,158
8. Total Transportation Expenses	.....	.....	$11,977	.....	.....	$8,566	.....	.....	$2,055	.....	.....	$22,598
9. Grand Total—Sum of Items 2, 4 and 8	.....	.....	$28,424	.....	.....	$19,119	.....	.....	$4,851	.....	.....	$52,394
10. Revenue Gross Ton Miles (Item 2)	22,321,929	.....	.....	9,194,096	.....	.....	1,059,113	.....	.....	32,575,138	.....	.....
11. Average Cost Per 100 Revenue Gross Ton Miles (Item 9 Divided by Item 10)	.....	$.12734	.....	.....	$.20795	.....	.....	$.45802	.....	.....	$.16084	.....

[fol. 433]

Exhibit No. —. Page No. 13. Witness: W. M. Burn

Great Northern Railway Company

State of Washington

Road Haul Cost of Transporting Intrastate Freight Traffic Based on Study of Freight and Mixed Train Operations During 7 Days Ended November 21, 1933

Train Switching Expenses—Applicable to Interstate and Intrastate Traffic—Washington Only

Item or Account	Through Freight Trains			Local Freight Trains			Mixed Trains (Freight Proportion)			Grand Total		
	Locomotive Miles	Cost Per Loco. Mile	Total Cost	Locomotive Miles	Cost Per Loco. Mile	Total Cost	Locomotive Miles	Cost Per Loco. Mile	Total Cost	Locomotive Miles	Cost Per Loco. Mile	Total Cost
1. Maintenance of Equipment:												
Locomotive Repairs	206	$.3107	$64	2,426	$.1962	$476	434	$.1774	$77	3,066	$.2012	$617
Locomotive Depreciation	206	.1845	38	2,426	.1055	256	434	.0415	18	3,066	.1018	312
Locomotive Retirements	206	.....	.....	2,426	.....	.....	434	.0023	1	3,066	.0003	1
Total Direct Expenses	206	$.4952	$102	2,426	$.3017	$732	434	$.2212	$96	3,066	$.3033	$930
Add Indirect Proportion of M. of E. Expenses 10.82% (See Page 14)	.....	.....	11	.....	.....	79	.....	.....	10	.....	.....	100
Total	.....	.....	$113	.....	.....	$811	.....	.....	$106	.....	.....	$1,030
Add Proportion of General Expenses, I. C. C. Accounts 451 to 462, inclusive—4.85% (See Page 14)	.....	.....	6	.....	.....	39	.....	.....	5	.....	.....	50
2. Total Maintenance of Equipment	206	$.5777	$119	2,426	$.3504	$850	434	$.2558	$111	3,066	$.3522	$1,080
3. Transportation Expenses:												
Fuel for train locomotives	206	$.5971	$123	2,426	$.2712	$658	434	$.2166	$94	3,066	$.2854	$875
Water for train locomotives	206	.0049	1	2,426	.0070	17	434	.0069	3	3,066	.0068	21
Lubricants for train locomotives	206	.0097	2	2,426	.0041	10	434	.0046	2	3,066	.0046	14
Other supplies for train locomotives	206	.0048	1	2,426	.0017	4	434	.0023	1	3,066	.0020	6
Enginehouse Expenses—Train	206	.0631	13	2,426	.0688	167	434	.0484	21	3,066	.0655	201
4. Total	206	$.6796	$140	2,426	$.3528	$856	434	$.2788	$121	3,066	$.3643	$1.117
	Train Hours	Cost Per Train Hour	Total Cost	Train Hours	Cost Per Train Hour	Total Cost	Train Hours	Cost Per Train Hour	Total Cost	Train Hours	Cost Per Train Hour	Total Cost
Wages of Train Enginemen and Motormen	27.09	$4.2082	$114	337.63	$2.4732	$835	73.40	$2.0436	$150	438.12	$2.5084	$1,099
Wages of Trainmen	27.09	4.7250	128	337.63	3.8681	1,306	73.40	2.5068	184	438.12	3.6931	1,618
5. Total	27.09	$8.9332	$242	337.63	$6.3412	$2,141	73.40	$4.5504	$334	438.12	$6.2015	$2,717
6. Total Direct Transportation Expenses (Item 4 plus Item 5)	.....	.....	$382	.....	.....	$2,997	.....	.....	$455	.....	.....	$3,834
Add indirect Proportion of Transportation Expenses—23.7% (See Page 15)	.....	.....	91	.....	.....	710	.....	.....	108	.....	.....	909
Total	.....	.....	$473	.....	.....	$3,707	.....	.....	$563	.....	.....	$4,743
Add Proportion of General Expenses—I. C. C. Accounts 451 to 462, inclusive—5.4% (See Page 15)	.....	.....	26	.....	.....	200	.....	.....	30	.....	.....	256
7. Total Transportation Expenses	.....	.....	$499	.....	.....	$3,907	.....	.....	$593	.....	.....	$4,999
8. Grand Total—Train Switching Expense—(Item 2 plus Item 7)	.....	.....	$618	.....	.....	$4,757	.....	.....	$704	.....	.....	$6,079
9. Total Revenue Cars Switched—Loads and Empties	.....	.....	785	.....	.....	5,262	.....	.....	816	.....	.....	6,863
10. Train Switching Cost Per Car (Item 8 divided by Item 9) =	.....	.....	$.787	.....	.....	$.904	.....	.....	$.863	.....	.....	$.886

[fol. 434] Exhibit No. —. Page No. 14. Witness: W. M. Burn

Great Northern Railway Company

Indirect Proportion of Operating Expenses Included in Study to Determine Cost of Handling Intrastate Freight Traffic Exclusive of Yard Switching

State of Washington

Maintenance of Equipment Expenses (Freight Proportion):		
1. Annual average of three years ended December 31, 1933, applicable to Intrastate and Interstate Traffic		$1,171,129
2. Less charges applicable to direct accounts used in study:		
Freight car Repairs, Depreciation and Retirements	$538,281	
Freight locomotive Repairs, Depreciation and Retirements	518,550	1,056,831
3. Indirect Expenses		$114,298
4. Per Cent. Item 3 of Item 2		10.82%

Proportion of General Expenses—I. C. C. Accounts 451 to 462—Applicable to M. of W. and S. and M. of E. Expenses

5. Total Operating Expenses (Freight) exclusive of General Expenses—Annual average of three years ended December 31, 1933, excluding yard switching costs (Freight Proportion) charged to M. of W. and S. and Maintenance of Equipment Accounts, applicable to Intrastate and Interstate Traffic	$4,770,654
6. General Expenses (Freight Proportion)—Annual average of three years ended December 31, 1933, excluding amount applicable to Yard Switching costs charged to M. of W. & S. and Maintenance of Equipment (Freight)	$231,490
7. Per Cent. Item 6 of Item 5	4.85%

[fol. 435] Exhibit No. —. Page No. 15. Witness: W. M. Burn

Great Northern Railway Company

Indirect Proportion of Operating Expenses Included in Study to Determine Cost of Handling Intrastate Freight Traffic

Exclusive of Yard Switching

State of Washington

Transportation Expenses (Freight Proportion)		
1. Total for calendar year 1933, applicable to Intrastate and Interstate Traffic		$1,786,380
2. Less charges applicable to direct accounts used in study:		
Wages of train enginemen and motormen	$194,287	
Wages of trainmen	260,209	
Fuel, water, lubricants and other supplies for train locomotives	462,631	
Enginehouse expenses—train	77,168	
Train supplies and expenses	139,576	
Station employees	291,016	
Station supplies and expenses	19,281	1,444,168
3. Indirect expenses		$342,212
4. Per Cent. Item 3 of Item 2		23.70%

Proportion of General Expenses—I. C. C. Accounts 451 to 462—Applicable to Transportation and Traffic Expenses

5. Total Operating Expenses (Freight) exclusive of General Expenses, for calendar year 1933, excluding yard switching costs (Freight Proportion) charged to Transportation Expenses	$3,747,649
6. General Expenses (Freight Proportion) for calendar year 1933, excluding amount applicable to Yard Switching Costs charged to Transportation Expenses	$202,474
7. Per Cent. Item 6 of Item 5	5.40%

[fol. 436] Exhibit No. —. Page No. 16. Witness: W. M. Burn

Great Northern Railway Company

Terminal Cost Studies (Service Performed by Yard Switch Engines Only)
June 9, 1934, to June 15, 1934

Summary of Cost Per Element to Determine Switching Costs Per Loaded Car

State of Washington—Intrastate Carload Traffic

Item	Movement of Traffic From	To	Elements of Switching Service Performed	Cost Per Car	No. of Cars	Total Costs
	Hillyard-Spokane Terminal:					
	G. N. Line Haul Cars Terminated					
1.	Hillyard Class Yd.	Spokane Industries	1-2-3-6-6-3-1	$6.91	2	$13.82
2.	Hillyard Class Yd.	Spokane Team Track	1-3-2-8-8-2-3-1	5.79	10	57.90
3.	Hillyard Class. Yd.	Hillyard Industries	1-5-5-1	3.43	15	51.45
4.	Hillyard Class Yd.	Hillyard Team Track	1-8-8-1	3.66	1	3.66
	G. N. Line Haul Cars Switched to Connecting Lines					
5.	Hillyard Class. Yd.	Spokane Interchange Tracks	(Loaded = 1-3-2-9-4	$2.91	58	$168.78
			(Empty = 4-2-3-1	2.25	55	123.75
6.	Hillyard Class. Yd.	Spokane Interchange Tracks	1-3-2-4-4-2-3-1	4.51	25	112.75
7.	Hillyard Class. Yd.	Spokane Interchange Tracks	1-3-2-9-4-4-2	4.08	1	4.08
8.	Spokane Class. Yd.	Spokane Interchange Tracks	2-4-4-2-3-1	3.42	17	58.14
9.	Spokane Class. Yd.	Spokane Interchange Tracks	2-4-4-2	2.34	7	16.38
	G. N. Line Haul Cars Switched from Connecting Lines					
10.	Spokane Interchange Tracks	Spokane Class. Yd.	4-2	$1.17	3	$3.51
11.	Spokane Interchange Tracks	Spokane Class Yd.	2-4-4-2	2.34	11	25.74
12.	Spokane Interchange Tracks	Spokane Class. Yd.	(Empty = 2-4	1.17	7	8.19
			(Loaded = 4-2	1.17	18	21.06

For explanation of above Code numbers under "Elements of Switching Service Performed" and switching cost per element of service, see Page 21.

271

Item	Movement of Traffic From	To	Elements of Switching Service Performed	Cost Per Car	No. of Cars	Total Costs
13.	Spokane Interchange Tracks	Hillyard Class. Yd.	(Empty = 1-3-2-4	2.25	2	4.50
			(Loaded = 4-2-3-1	2.25	3	6.75
	G. N. Line Haul Cars Passing Through Terminal (Loads)					
14.	Hillyard Class. Yd.	Hillyard Class. Yd.	1-9	$1.21	17	$20.57
	Hillyard Class. Yd.	Hillyard Class. Yd.	-1-	.56	12	6.72
	Total			....	...	$707.75
	Appleyard-Wenatchee Terminal:					
	G. N. Line Haul Cars Terminated					
			(Loaded = 1-2-12	$2.38	59	$140.42
			(Loaded = 1-4-2-12	3.17	4	12.68
1.	Appleyard Class. Yd.	Wenatchee Industries	(Empty = 1-12-	1.45	36	52.20
			(Empty = 12-2-1	2.38	27	64.26
	G. N. Line Haul Cars Originated					
			(Empty = -12-	$1.45	35	$50.75
			(Empty = 1-2-12	2.38	42	99.96
2.	Wenatchee Industries	Appleyard Class. Yd.	(Loaded = 12-2-1	2.38	46	109.48
			(Loaded = 12-2-4-1	3.17	31	98.27
	G. N. Line Haul Cars Passing Through Terminal (Loads)					
			(-1-	$.43	202	$86.86
			(1-4	1.21	21	25.41
3.	Appleyard Class. Yd.	Appleyard Class. Yd.	(1-5	1.17	2	2.34
			(1-7	1.3	4	5.20
	Total			....	...	$747.83

For explanation of above Code numbers under "Elements of Switching Service Performed" and switching cost per element of service, see Page 21.

[fol. 437] Exhibit No. —. Page No. 17. Witness: W. M. Burn

Great Northern Railway Company

Terminal Cost Studies (Service Performed by Yard Switch Engines Only)
June 9, 1934, to June 15, 1934

Summary of Cost Per Element to Determine Switching Costs Per Loaded Car

State of Washington—Intrastate Carload Traffic

Item	Movement of Traffic From	To	Elements of Switching Service Performed	Cost Per Car	No. of Cars	Total Costs
Delta-Everett Terminal:						
G. N. Line Haul Cars Terminated						
1.	Delta Class. Yd.	Industries	(1-2-12-12-2-1	$5.44	316	$1,719.04
			(1-2-12-12-2-7-1	6.07	37	224.59
2.	Lowell Yard	Industries	(2-1-2-12-12-2-1	6.11	12	73.32
			(2-1-4-2-12-12-2-1	6.82	5	34.10
G. N. Line Haul Cars Originated						
3.	Industries	Delta Class. Yd.	1-2-12-12-2-1	$5.44	3	$16.32
4.	Industries	Lowell Yard	1-2-12-12-2-1-2	6.11	4	24.44
G. N. Line Haul Cars Passing Through Terminal (Loads)						
5.	Delta Class. Yd.	Bayside and Lowell	1-2	$1.02	61	$62.22
6.	Delta Class. Yd.	Delta Class. Yd.	-1-	.35	3	1.05
7.	Lowell Yard	Interchange Tracks	2-1-3	1.69	15	25.35
8.	Interchange Tracks	Delta Class. Yard	3-1	1.02	4	4.08
	Total			....	...	$2,184.51

For explanation of above Code numbers under "Elements of Switching Service Performed" and switching cost per element of service, see Page 22.

18—573

273

Item	Movement of Traffic From	To	Elements of Switching Service Performed	Cost Per Car	No. of Cars	Total Costs
	Interbay-Seattle Terminal: G. N. Line Haul Cars Terminated					
1.	Interbay Class. Yd.	Smith Cove	1-3-10-10-3-1	$3.32	68	$225.76
2.	Interbay Class. Yd.	Seattle Interchange Tracks	(Loaded = 1-2-5	1.76	114	200.64
			(Empty = 5-2-1	1.76	83	146.08
3.	Interbay Class Yd.	N. P. Railway-Interbay	(Loaded = 1-6	1.07	32	34.24
			(Empty = 6-1	1.07	17	18.19
4.	Interbay Class. Yd.	N. P. Railway-Interbay	1-20-1-6-6-1	1.99	1	1.99
5.	Interbay Class. Yd.	Ballard	1-4-12-12-4-1	$6.87	2	$13.74
6.	Interbay Class. Yd.	Seattle Interchange	1-20-2-5	2.26	18	40.68
7.	Interbay Class. Yd.	Seattle Industries—Fifth Avenue	1-2-9-9-2-1	5.57	9	50.13
8.	Interbay Class. Yd.	Seattle Industries—Fifth Avenue	1-20-1-2-9-9-2-1	6.49	1	6.49
9.	Interbay Class. Yd.	Seattle Team Track	1-21-21-2-14-14-2-1	4.82	1	4.82
10.	Interbay Class. Yd.	Seattle Team Track	1-2-14-14-2-1	3.56	1	3.56
11.	Interbay Class. Yd.	Smith Cove	1-3-3-1	1.60	1	1.60
12.	Interbay Class. Yd.	Smith Cove—thence to N. P.—Interbay	1-3-3-1-6	2.26	1	2.26
13.	Seattle Yard	Seattle Industries—Fifth Avenue	(Loaded = 1-9	2.24	3	6.72
			(Empty = 9-1	2.24	1	2.24
	G. N. Line Haul Cars Originated					
14.	Seattle Frt. Hs. Track	Interbay Class. Yd.	(Empty = 1-2-13	$1.48	4	$5.92
			(Loaded = 13-2-1	1.48	6	8.88
15.	Seattle Interchange	Interbay Class. Yd.	(Empty = 1-2-5	1.76	26	45.76
			(Loaded = 5-2-1	1.76	43	75.68
16.	Seattle Interchange	Seattle Yard	5-1	1.21	19	22.99
17.	Seattle Interchange	Interbay Class. Yd.	5-2-20-1	2.26	3	6.78
18.	Seattle Industries—2nd and Occidental Aves.	Interbay Class Yd.	8-2-1	2.57	1	2.57
19.	Seattle Team Track	Interbay Class. Yd.	1-2-14-14-2-1	3.56	1	3.56
20.	Smith Cove Industries	Interbay Class. Yd.	10-2-1	1.82	1	1.82
21.	Ballard	Interbay Class. Yd.	12-4-20-1	3.94	1	3.94
	G. N. Line Haul Cars Passing Through Terminal (Loads)					
22.	Interbay Class. Yd.	Interbay Class. Yd.	1-1	$.83	151	$125.33
	Total			....	...	$1,062.37

For explanation of above Code numbers under "Elements of Switching Service Performed" and switching cost per element of service, see Page 21.

[fol. 438] Exhibit No. —. Page No. 18. Witness: W. M. Burn

Great Northern Railway Company

Terminal Cost Studies (Service Performed by Yard Switch Engines Only)
June 9, 1934, to June 15, 1934

Summary of Cost Per Element to Determine Switching Costs Per Loaded Car

State of Washington—Intrastate Carload Traffic

Item	Movement of Traffic From	To	Elements of Switching Service Performed	Cost Per Car	No. of Cars	Total Costs
Tacoma Terminal:						
G. N. Line Haul Cars Terminated						
1.	Classification Yard	Industries and Interchange	(Loaded = 1–12	$2.17	50	$108.50
			(Loaded = 1–4–12	3.77	1	3.77
			(Empty = –12–	1.39	11	15.29
			(Empty = 12–1	2.17	16	34.72
G. N. Line Haul Cars Originated						
			(Empty = –12–	$1.39	7	$9.73
2.	Industries and Interchange	Classification Yard	(Loaded = 12–1	2.17	19	41.23
			(Loaded = 12–4–1	3.77	2	7.54
G. N. Line Haul Cars Passing Through Terminal (Loads)						
3.	Classification Yard	Classification Yard	1–7	$2.75	1	$2.75
	Classification Yard	Clasification Yard	–1–	.78	7	5.46
	Total			....	...	$228.99

For explanation of above Code numbers under "Elements of Switching Service Performed" and switching cost per element of service, see Page 22.

Exhibit No. —. Page No. 18 Witness: W. M. Burn—Continued

Item	Movement of Traffic From	To	Elements of Switching Service Performed	Cost Per Car	No. of Cars	Total Costs
Bellingham Terminal:						
G. N. Line Haul Terminated						
1.	Classification Yard	Industries	1-4-12-12-1	$2.65	8	$21.20
	Classification Yard	Industries	1-12-12-1	2.37	38	90.06
	Classification Yard	Industries	1-12	1.19	1	1.19
2.	Classification Yard	Interchange Track	1-3-3-1	1.58	3	4.74
G. N. Line Haul Cars Originated						
3.	Industries	Classification Yard	1-12-12-4-1	$2.65	41	$108.65
	Industries	Classification Yard	1-12-12-1	2.37	19	45.03
4.	Interchange Track	Classification Yard	3-1	$.79	1	.79
5.	Interchange Track	Classification Yard	1-3-3-4-1	1.86	1	1.86
	Total			....	....	$273.52

G. N. Line Haul Cars Passing Through Terminal (Loads)

BLANK

(Handled by Road Trains)

Grand Total—Intrastate Carload Traffic
Yard Switching Cost = $5,204.97*

*(a)	Intrastate Revenue Net Ton Miles Applicable to foregoing analysis—from Way Bill records during 7-day study period, November, 1933	3,862,343
(b)	Intrastate Revenue Net Ton Miles—from Conductor's reports for actual train movements during same study period in November, 1933	4,120,736
(c)	Per Cent (b) of (a)	106.69%
(d)	Yard Switching cost applicable to revenue ton miles in actual train movement ($5205 x 106.69%)	$5,553

For explanation of above Code numbers under "Elements of Switching Service Performed" and switching cost per element of service see Page 22.

Exhibit No. —. Page No. 19. Witness: W. M. Burn

Great Northern Railway Company

Terminal Cost Studies (Service Performed by Yard Switch Engines Only)
June 9, 1934, to June 15, 1934

Summary of Costs Per Element to Determine Switching Costs Per Loaded Car

State of Washington—L. C. L. Traffic

Item	Movement of Traffic From	To	Elements of Switching Service Performed	Cost Per Car	No. of Cars	Total Costs
	Hillyard—Spokane Terminal:					
	G. N. Line Haul Cars Terminated					
1.	Spokane Class. Yard	Spokane Frt. House	2-7-7-2	$2.27	11	$24.97
2.	Spokane Class. Yard	Spokane Frt. House	2-7	1.13	10	11.30
3.	Spokane Class. Yard	Spokane Frt. House	2-7-7-2-3-1	3.35	1	3.35
4.	Spokane Class. Yard	Spokane Frt. House	4-2-7	1.77	1	1.77
5.	Hillyard Class. Yard	Spokane Frt. House	1-3-2-7	2.22	9	19.98
	G. N. Line Haul Cars Originated					
6.	Spokane Frt. House	Spokane Class. Yd.	2-7-7-2	$2.27	9	$20.43
7.	Spokane Class. Yd.	Spokane Frt. House	1-3-2-7-7-2	3.35	4	13.40
8.	8. Spokane Interchange and Frt. House	Spokane Class Yd.	4-2-7-7-2	2.90	1	2.90
9.	Spokane Frt. House	Hillyard Class. Yd.	2-7-7-2-3-1	3.35	9	30.15
10.	Spokane Frt. House	Hillyard Class. Yd.	1-3-2-7-7-2-3-1	4.43	4	17.72
11.	Spokane Frt. House	Hillyard Class. Yd.	4-2-7-7-2-3-1	3.98	1	3.98
12.	Spokane Frt. House	Hillyard Class. Yd.	7-2-3-1	2.22	1	2.22
13.	Hillyard Freight House	Spokane Frt. House and Interchange	1-7-7-1-2-2-7-7-4	5.19	2	10.38
	Total					$162.55

For explanation of above Code numbers under "Elements of Switching Service Performed" and switching cost per element of service, see Page 21.

277

Exhibit No. —. Page No. 19 Witness: W. M. Bnrn—Continued

Item	Movement of Traffic From	To	Elements of Switching Service Performed	Cost Per Car	No. of Cars	Total Costs
Appleyard—Wenatchee Terminal:						
G. N. Line Haul Cars Terminated						
1.	Classification Yd	Freight House	Loaded = 1-2-10	$2.13	39	$83.07
	Freight House		Empty = -10-	1.19	5	5.95
	Freight House	Class. Yard	Empty = 10-2	1.70	7	11.90
	Freight House	Class. Yard	Empty = 10-2-1	2.13	7	14.91
G. N. Line Haul Cars Originated						
2.	-0-	Freight House	Empty = -10-	$1.19	2	$2.38
	Classification Yd	Freight House	Empty = 1-2-10	2.13	10	21.30
	Freight House	Classification Yd	Loaded 10-2-1	2.13	12	25.56
G. N. Line Haul Cars Passing Through Terminal (Loads)						
3.	Classification Yd	Classification Yd	-1-	$ .43	24	$10.32
	Total			....	...	$175.39
Delta-Everett Terminal:						
G. N. Line Haul Cars Originated						
1.	Freight House	Class. Yard	1-2-10-10-2-1	$4.23	5	$21.15
	Freight House	Class. Yard	1-2-10-2	2.79	2	5.58
	Freight House	Class. Yard	10-2-1	2.12	8	16.96
G. N. Line Haul Shipments Passing Through Terminal (Loads)						
2.	Class. Yard	Freight House	1-2-10	$2.12	2	$4.24
3.	Class. Yard	Lowell	1-2	1.02	24	24.48
	Total			....	...	$72.41

For explanation of above Code numbers under "Elements of Switching Service Performed" and switching cost per element of service, see Page 21.

[fol. 440]

Exhibit No.—. Page No. 20. Witness: W. M. Burn

Great Northern Railway Company

Terminal Cost Studies (Service Performed by Yard Switch Engines Only)
June 9, 1934, to June 15, 1934

Summary of Costs Per Element to Determine Switching Costs Per Loaded Car

State of Washington—L. C. L. Traffic

Item	Movement of Traffic From	To	Elements of Switching Service Performed	Cost Per Car	No. of Cars	Total Costs
	Interbay—Seattle Terminal					
	G. N. Line Haul Cars Terminated					
1.	Interbay Class. Yd.	Seattle Frt. House	(Loaded = 1-2-13	$1.48	30	$44.40
			(Empty = 13-2-1	1.48	9	13.32
2.	Interbay Class. Yd.	Seattle Interchange	1-2-5-5-2-1	3.51	1	3.51
3.	Seattle (Holgate St.)	Seattle Frt. Ho	(Loaded = -13-	.52	7	3.64
			(Empty = -13-	.52	1	.52
	G. N. Line Haul Cars Originated					
4.	Seattle Freight Ho	Seattle Yard	(Empty = 1-21-21-2-13	$2.73	18	$49.19
			(Loaded = -13-	.52	25	13.00
5.	Seattle Freight Ho	Seattle Yard	13-13	1.04	1	1.04
6.	Seattle Freight Ho	Interbay Class. Yd	(Empty = 1-2-13	1.48	5	7.40
			(Loaded = 13-2-1	1.48	41	60.68
	G. N. Line Haul Shipments Passing Through Terminal					
7.	Interbay Class. Yd.	Interbay Class. Yd	1-1	$.83	8	$6.64
	Total			....	...	$203.29

For explanation of above Code numbers under "Elements of Switching Service Performed" and switching cost per element of service, see Page 22.

279

Exhibit No. —. Page No. 20 Witness: W. M. Burn—Continued

Item	Movement of Traffic From	To	Elements of Switching Service Performed	Cost Per Car	No. of Cars	Total Costs
Tacoma Terminal:						
G. N. Line Haul Cars Terminated						
1.	Classification Yd.	Freight House	(Loaded = 1–10	$2.89	11	$31.79
			(Empty = –10–	2.11	2	4.22
G. N. Line Haul Cars Originated						
2.	Freight House	Classification Yd.	(Empty = 1–10	$2.89	2	$5.78
			(Loaded = 10–1	2.89	4	11.56
	Total			....	...	$53.35
Bellingham Terminal:						
G. N. Line Haul Cars Terminated						
1.	Classification Yd.	Freight House	1–10–10–1–	$2.00	3	$6.00
2.	Classification Yd.	Freight House	1–10	1.00	1	1.00
G. N. Line Haul Cars Originated						
3.	Freight House	Classification Yd.	1–10	1.00	2	2.00
	Total			....	...	$9.00

Grand Total L. C. L. Traffic

Yard Switching Cost..... $675.99
*Amount chargeable to Intrastate L. C. L. Traffic—
77.78% of $675.99 = $525.79

For explanation of above Code numbers under "Elements of Switching Service Performed" and switching cost per element of service see Page 22.

* Based on number of tons of Intrastate L. C. L. traffic contained in cars loaded with both Intrastate and Interstate L. C. L. shipments

[fol. 441]

Exhibit No.—. Page No. 21. Witness: W. M. Burn

Great Northern Railway Company

Statement Showing Output per Engine Hour (Measured in Cars) and Cost per Car for the Various Elements of Switching Service

Terminal Study June 9, 1934 to June 15, 1934

Item No.	Description of Service	Total hours	Total cars	No. cars handled per hour	Cost per engine hour	Cost per car
	Hillyard-Spokane Terminal					
1.	Classification—Hillyard	189.25	4,207	22.23	$12.34	$ .555
2.	Classification—Spokane	49.50	1,137	22.97	12.34	.537
3.	Transfer Service—Between Hillyard and Spokane	60.58	1,413	23.32	12.34	.529
4.	Interchange—Spokane (All Lines)	62.75	1,225	19.52	12.34	.632
5.	Industrial Swg.—Hillyard	34.00	362	10.65	12.34	1.159
6.	Industrial Swg.—Spokane	11.75	71	6.04	12.34	2.043
7.	Freight House Switching	33.83	700	20.69	12.34	.596
8.	Team Track Switching	6.50	63	9.69	12.34	1.273
9.	Weighing Cars	16.33	308	18.86	12.34	.654
	Appleyard-Wenatchee Terminal					
1.	Classification	54.08	1,656	30.62	$13.21	$.431
2.	Transfer Service	18.50	484	26.16	13.21	.505
4.	Weighing Cars	2.25	38	16.89	13.21	.782
5.	Icing Cars	23.83	429	18.00	13.21	.734
7.	Swg. Shop Repair Tracks	5.50*	84	15.27	13.21	.865
10.	Freight House Switching	7.50	83	11.07	13.21	1.193
12.	Industrial Switching	57.92	529	9.13	13.21	1.447
	Delta-Everett Terminal					
1.	Classification	52.67	1.877	35.64	$12.40	$.348
2.	Transfer Service	49.17	907	18.45	12.40	.672
3.	Handling Cars at Connections	6.83	127	18.59	12.40	.667
4.	Weighing Cars	7.42	129	17.39	12.40	.713
7.	Swg. Shop Repair Tracks	14.92	295	19.77	12.40	.627
10.	Freight House Switching	2.83	32	11.31	12.40	1.096
12.	Industrial Switching	75.50	551	7.30	12.40	1.699

* Excludes 2.92 hours for Store Dept. Switching, which is included in Item 7—Page 27.

Note.—For data shown in first three columns above, see Pages 25 and 27. For "cost per engine hour" see Page 24.

Great Northern Railway Company

Statement Showing Output per Engine Hour (Measured in Cars) and Cost per Car for the Various Elements of Switching Service

Terminal Study June 9, 1934 to June 15, 1934

Item No.	Description of Service	Total hours	Total cars	No. cars handled per hour	Cost per engine hour	Cost per car
	Interbay-Seattle Terminal					
1.	Classification	172.58	4,853	28.12	$11.64	$.414
2.	Transfer—Btw. Interbay and Seattle	57.25	1,223	21.36	11.64	.545
3.	Transfer—Btw. Interbay and Smith Cove	8.67	261	30.10	11.64	.387
4.	Transfer—Btw. Interbay and Ballard	10.67	73	6.84	11.64	1.702
5.	Interchange—Seattle (All Lines)	23.58	345	14.63	11.64	.796
6.	Interchange—Interbay (N. P.)	6.08	108	17.76	11.64	.655
8.	Industrial—Seattle (Second and Occidental Aves.)	25.25	182	7.21	11.64	1.614
9.	Industrial—Seattle (Fifth Ave.)	40.50	258	6.37	11.64	1.827
10.	Industrial—Smith Cove	18.83	255	13.54	11.64	.860
12.	Industrial—Ballard	14.25	126	8.84	11.64	1.317
13.	Freight House—Seattle	27.25	610	22.39	11.64	.520
14.	Team Track	22.75	322	14.15	11.64	.823
20.	Weighing Cars	10.92	253	23.17	11.64	.502
21.	Shop Repair and Store Tracks	2.58	48	18.60	11.64	.626
	Bellingham Terminal					
1.	Classification	10.58	334	31.57	$8.55	$.271
3.	Handling cars at connections	2.50	41	16.40	8.55	.521
4.	Weighing Cars	2.00	62	31.00	8.55	.276
10.	Freight House Switching	.17	2	11.76	8.55	.727
12.	Industrial Switching	31.00	290	9.35	8.55	.914
	Tacoma Terminal					
1.	Classification	19.86	272	13.70	$10.68	.780
4.	Weighing cars	2.24	15	6.70	10.68	1.594
7.	Swg. Shop Repair Tracks	.74	4	5.41	10.68	1.974
10.	Freight House and Team Trk. Swg	5.34	27	5.06	10.68	2.111
12.	Industrial and Interchange Swg.	25.30	194	767	10.68	1.392

Note.—For data shown in first three columns above, see Pages 26 and 27. For "Cost per Engine Hour" see Page 24.

[fol. 443] Exhibit No. —. Page No. 23. Witness: W. M. Burn

Great Northern Railway Company

Terminal Cost Study

June 9, 1934, to June 15, 1934 (Seven Days)

Statement of Engine Hour Costs by Stations

Account No.	Description	Hillyard-Spokane Washington	Appleyard-Wenatchee Washington	Delta-Everett Washington	Interbay-Seattle Washington	Tacoma Washington	Bellingham Washington
	Maintenance of Way and Structures						
201	Superintendence	$75.68	$37.25	$33.41	$54.44	$8.56	$3.75
	Structures						
202	Roadway Maintenance	88.05	14.83	13.28	25.76	6.61	1.97
208	Bridges, Trestles and Culverts	.....	.32	3.57	3.41	.....	.....
212	Ties	131.74	132.29	85.89	152.73	21.39	17.61
214	Rails	24.58	3.67	10.62	20.66	3.86	.55
216	Other Track Material	62.44	32.46	36.58	65.75	4.72	1.91
218	Ballast	.....	.....	.12	Cr.- .46	.....	.....
220	Track Laying and Surfacing	185.23	98.46	67.83	105.98	31.82	6.83
227	Stations and Office Buildings	6.18	1.24	1.75	4.00	.15	.06
231	Water Stations	5.82	1.29	.57	.44	.27	.22
233	Fuel Stations	1.61	1.32	4.13	.81	.04	.03
235	Shops and Engine Houses	93.23	16.68	40.54	33.72	.70	1.25
249	Signals and Interlockers	15.85	.....	6.51	29.42	.....	.....
274	Injuries to Persons	11.94	.588	5.27	8.59	1.35	.59
275	Insurance	3.25	1.60	1.44	2.34	.37	.16
276	Stationery and Printing	.72	.35	.32	.52	.08	.04
277	Other Expenses	.85	.42	.38	.61	.10	.04
	Total	$707.17	$348.06	$312.21	$508.72	$80.02	$35.01
	Maintenance of Equipment						
301	Superintendence	$38.67	$11.27	$13.12	$24.47	$8.85	$1.85
302	Shop Machinery	8.18	2.39	2.78	5.18	1.87	.39
308	Steam Locomotives—Repairs	749.71	226.61	259.16	463.85	157.69	34.72
309	Steam Locomotives—Depreciation	184.43	45.66	57.86	127.34	56.22	10.09
310	Steam Locomotives—Retirements	.....	.....	.....	.....	.....	.....
332	Injuries to Persons	4.04	1.18	1.37	2.56	.92	.19
333	Insurance	3.58	1.04	1.21	2.26	.82	.17
334	Stationery and Printing	.46	.13	.16	.29	.11	.02
335	Other Expenses	.19	.06	.06	.12	.04	.02
	Total	$989.26	$288.34	$335.72	$626.07	$226.52	$47.45

[fol. 444] Exhibit No. —. Page No. 24. Witness: W. M. Burn

Great Northern Railway Company

Terminal Cost Study

June 9, 1934, to June 15, 1934 (Seven Days)

Statement of Engine Hour Costs by Stations

Account No.	Description	Hillyard-Spokane Washington	Appleyard-Wenatchee Washington	Delta-Everett Washington	Interbay-Seattle Washington	Tacoma Washington	Bellingham Washington
	Maintenance of Way and Transportation						
371	Superintendence	$168.44	$51.05	$57.07	$119.71	$22.12	$9.46
377	Yardmasters and Yard Clerks	1,025.42	376.61	338.11	723.77	41.79	.....
378	Yard Conductors and Brakemen	1,576.40	463.20	535.85	1,177.10	256.90	128.35
379	Yard Switch and Signal Tenders	25.19	10.88	20.53	19.31	4.56	9.13
380	Yard Enginemen	1,071.05	323.10	361.05	754.50	168.70	86.55
382	Fuel for Yard Locomotives	1,030.67	309.10	356.18	685.96	182.30	56.38
385	Water for Yard Locomotives	33.41	9.89	11.33	24.60	5.51	2.62
386	Lubricants for Yard Locomotives	22.97	6.99	8.01	13.17	3.64	1.41
387	Other Supplies for Yard Locomotives	15.95	4.82	5.53	9.80	1.66	.10
388	Enginehouse Expenses—Yard	396.59	117.95	140.06	285.86	44.26	17.28
389	Yard Supplies and Expenses	30.26	14.85	16.21	19.13	.....	1.17
404	Signal and Interlocker Operation	154.65	.....	37.45	72.97	.....	.....
405	Crossing Protection	19.70	.....	.17	42.19	.....	.50
406	Drawbridge Operation	.....	.....	.....	9.76	.....	.....
410	Stationery and Printing	14.21	4.31	4.82	10.10	1.87	.80
411	Other Expenses	9.88	3.00	3.35	7.02	1.30	.56
414	Insurance	7.19	2.18	2.44	5.11	.94	.40
	Total	$5,601.98	$1,697.93	$1,898.16	$3,980.06	$735.55	$314.71

	General						
451	Salaries and Expenses of General Officers	$45.49	$14.53	$15.86	$31.89	$6.48	$2.48
452	Salaries and Expenses of Clerks and Attendants	147.01	47.03	51.30	103.05	21.00	8.00
453	General Office Supplies and Expenses	10.26	3.30	3.58	7.18	1.47	.56
454	Law Expenses	47.58	15.22	16.60	33.36	6.79	2.59
455	Insurance	.66	.21	.23	.46	.09	.03
458	Stationery and Printing	8.45	2.69	2.94	5.93	1.19	.46
460	Other Expenses	110.51	34.91	38.30	77.71	15.53	6.06
	Total	$369.96	$117.89	$128.81	$259.58	$252.55	$20.18
	Summary						
	M. of W & S	707.17	$348.06	$312.21	$508.72	$80.02	35.01
	M. of E	989.26	288.34	335.72	626.07	226.52	47.45
	Transportation	5,601.98	1,697.93	1,898.16	3,980.06	735.55	314.71
	General	369.96	117.89	128.81	252.55	52.55	20.18
	Grand Total	$7,668.37	$2,452.22	$2,674.90	$5,374.43	$1,094.64	$417.35
	Net Engine Hours*	621.50	185.67	215.67	461.83	102.50	48.83
	Engine-Hour Costs	$12.34	$13.21	$12.40	$11.64	$10.68	$8.55

*For details see Pages 25, 26 and 27.

[fol. 445] Exhibit No. —

Page No. 25

Witness: W. M. Burn

Great Northern Railway Company

Hillyard-Spokane, Washington

June 9, 1934, to June 15, 1934

Engine Hours For Each Element of Switching Service

Elements of service	Engine hours
1. Classification—Hillyard	189.25
2. " —Spokane	49.50
3. Transfer—Between Hillyard and Spokane	60.58
4. Interchange—Spokane (All Lines)	62.75
5. Industrial—Hillyard	34.00
6. " —Spokane	11.75
7. Freight House	33.83
8. Team Track	6.50
9. Weighing Cars	16.33
10. Icing Cars	10.00
11. Swg. Shop and Store Dept. Tracks	74.25
12. Swg. Car Repair Tracks	14.67
13. Work for M. of W. Dept.	.42
14. All Passenger Work	52.75
15. Helping Road Trains (Freight)	1.42
16. Swg. Co. Fuel Docks, Etc. (Road Prop.)	3.50
Other Service:	
Waiting for Engine	13.83
Fuel and Water	14.33
Lunch	28.00
Swg. Co. Fuel Docks, Etc. (Yard Prop.)	1.17
Total Other Service	57.33
Grand Total—All Elements	678.83
Number of Crews	84
*Net Engine Hours (Productive Time)	621.50

* Items 1 to 16, Inclusive.

[fol. 446] Exhibit No. —

Page No. 26

Witness: W. M. Burn

Great Northern Railway Company

Interbay-Seattle, Washington

June 9, 1934, to June 15, 1934

Engine Hours For Each Element of Switching Service

Elements of service	Engine hours
1. Classification	172.58
2. Transfer—Between Interbay and Seattle	57.25
3. " — " " " Smith Cove	8.67
4. " — " " " Ballard	10.67
5. Interchange—Seattle (All Lines)	23.58
6. Interchange—Interbay (N. Pacific Ry.)	6.08
7. Interchange—Ballard (N. P. and P. N. T.)	.25
8. Industrial—Seattle (Second and Occidental Aves.)	25.25
9. " —Seattle (Fifth Avenue)	40.50
10. " —Smith Cove	18.83
11. " —Interbay	–0–
12. " —Ballard	14.25
13. Freight House—Seattle	27.25
14. Team Track	22.75
15. Repair Tracks—Interbay	9.67
16. Passenger Work	1.75
17. Helping Road Trains	3.83
18. Helping Transfers	–0–
19. Work Train Service	2.00
20. Weighing Cars	10.92
21. Shop Repair and Store Dept. Tracks	2.58
22. Swg. Company Fuel Docks, Etc. (Road Prop.)	3.17

Other Service:

Elements of service	Engine hours
Waiting for Engine	6.50
Fuel and Water	11.33
Lunch	19.67
Swg. Company Fuel Dockets, Etc. (Yard Prop.)	.67
Total Other Service	38.17
Grand Total—All Elements	500.00
Number of Crews	59
*Net Engine Hours (Productive Time)	461.83

* Items 1 to 22, Inclusive.

[fols. 447-448]

Exhibit No. —. Page No. 27. Witness: W. M. Burn

Great Northern Railway Company

Engine Hours for Each Element of Switching Service
June 9, 1934 to June 15, 1934

Element of Service	Appleyard Wenatchee Wash.	Delta-Everett Wash.	Tacoma Wash.	Bellingham Wash.
1. Classification	54.08	52.67	19.86	10.58
2. Transfer Service	18.50	49.17	.....	.....
3. Handling Cars at Connections	.....	6.83	.....	2.50
4. Weighing Cars	2.25	7.42	2.24	2.00
5. Icing Cars	23.83	.....	.....	.....
6. Swg. Co. Fuel Docks (Road Prop.)	1.75	.17	.....	.....
7. Swg. Shop Repair and Store Dept. Tracks	8.42	14.92	.74	.....
8. Work for M. of W. Dept.	.75	1.33	.....	1.83
9. All Passenger Work	9.50	1.75	41.43	.....
10. Freight House Switching	7.50	2.83	5.34	.17
11. Team Track Switching	.....	3.08	.....	.75
12. Industrial Switching	57.92	75.50	25.30	31.00
13. Helping Road Trains (Freight)	1.17	.....	7.59	.....
Other Service:				
Waiting for Engine	5.00	1.00	3.50	1.50
Fuel and Water	1.75	4.33	1.33	1.00
Lunch	8.33	9.34	4.67	2.00
Cleaning Fire	.....	.....	.....	.....
Tie Up Time	.....	.....	.....	.....
Helper Service—Yard	.....	.....	.....	.....
Swg. Co. Fuel Docks—Yard Prop.	.25	.08	.....	.....
Total Other Service	15.33	14.75	9.50	4.50
Grand Total—All Elements	201.00	230.42	112.00	53.33
Number of Crews	25	2[illegible]	14	6
*Net Engine Hours (Productive Time)	185.67	215.67	102.50	48.83

*Items 1 to 13, inclusive.

[fol. 449] IN SUPREME COURT OF WASHINGTON

Title of Action

No. 25683

STATE OF WASHINGTON, Appellant, Plaintiff,

vs.

GREAT NORTHERN RY. CO., a Corp., Respondent, Defendant

Attorneys: G. W. Hamilton. R. G. Sharpe. Thomas Balmer. Edwin C. Matthias.
Nature of Action: Thurston Co. #15417. Wright, J.

DOCKET ENTRIES

Date 1935	Proceedings had
Apr. 19.	Transcript.
May 10.	Statement of Facts.
10.	Exhibits—Package in pouch.
May 3.	Ent'd Set May 28—En Banc.
24.	Appellant's abstract of Record (8 Vols.) on shelf.
24.	25 Brief of Appellant—Part II (in #25684 also).
25.	25 Brief of Appellant—Part I (in #25684 also).
27.	25 Brief of Respondent & service.
June 12.	25 Reply brief (in #25684 also).
17.	Additional authority (in #25684 also) letter.
Aug. 13.	Opinion—reversed Per Curiam.
Sep. 13.	Judgment.
13.	Petition for appeal.
13.	Assignment of Errors, etc.
13.	Cost & Supersedeas Bond.
13.	Order allowing appeal.
13.	Citation & service.
13.	Acknowledgment of service of petition, etc.
13.	Statement as to jurisdiction on appeal.
13.	Ent'd judgment 34-46.
Oct. 16.	Præcipe of respondent.
18.	Supplemental præcipe to omit summons.
18.	Appellant's præcipe for transcript.

[fol. 450] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

APPELLEE'S PRÆCIPE FOR TRANSCRIPT ON APPEAL—Filed Oct. 18, 1935

To the Clerk of the Supreme Court of the State of Washington:

In preparing the transcript on the appeal of the above case to the Supreme Court of the United States, as provided by Rule 10 of the Supreme Court of the United States, please incorporate in said transcript the following additional portions of the record:

(1) Rule XVI of the "Rules of Pleadings, Procedure and Practice" adopted by the Supreme Court of the State of Washington pursuant to Chapter 118, Laws of 1925, Extraordinary Session, and effective April 1, 1931;

(2) Rules VI and VII, and Rule VIII, subdivisions 1 and 2, of the Rules of the Supreme Court of the State of Washington, and also Amendment to Rule VI which became effective March 1, 1935;

(3) Appellant's Abstract of the Record;

(4) Brief of Appellant;

(5) All entries in Appearance Docket of Supreme Court of the State of Washington relating to Appeal No. 25,683 therein;

(6) Pages 12 to 27 inclusive, of Defendant's Exhibit "11";

[fol. 451] (7) Appellee's Præcipe for Transcript on Appeal.

G. W. Hamilton, Attorney General; R. G. Sharpe, Assistant Attorney General, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 452] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 453] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND PARTS OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF—Filed Nov. 7, 1935

Appellant intends to rely upon the following points as ground for the reversal of the judgment of the Supreme Court of the State of Washington, from which this appeal is taken:

(1) The Supreme Court of the State of Washington having found that appellant is engaged in both intrastate commerce and interstate commerce, and having held that as a matter of law it cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(2) The Supreme Court of the State of Washington having found that appellant's interstate business and intrastate business in Washington is inextricably commingled, and that as a matter of fact and as a practical matter appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of 1933, does not violate Article I, Section 8 of the Constitution of the United States.

(3) The Supreme Court of the State of Washington having found that appellant's intrastate business is conducted at a loss which must be borne by the income from its interstate business, erred in deciding that the tax imposed by Chapter 191, Laws of 1933, does not violate Article I, Sec-
[fol. 454] tion 8 of the Constitution of the United States.

(4) The Supreme Court of the State of Washington having found that appellant's intrastate business is conducted at a loss which must be borne by income from its interstate business or income earned or received in other states, erred in refusing to hold that Chapter 191, Laws of 1933, violates the due process clause of the 14th Amendment to the Constitution of the United States.

(5) The Supreme Court of the State of Washington having found that appellant's intrastate business is conducted

at a loss which must be borne by income from its interstate business, erred in holding Chapter 191, Laws of 1933, and the tax imposed thereby, does not violate Article I, Section 8 of the Constitution of the United States, for the stated reason that appellant has not exhausted its remedy (by writ of review) to obtain intrastate rate increases and because that circumstance is immaterial, not supported by and is contrary to the facts found in Finding 18.

(6) The Supreme Court of the State of Washington for each of the reasons contained in the preceding points erred in reversing the judgment of the Superior Court of Thurston County and in rendering judgment in favor of the State of Washington against appellant for the tax imposed by Chapter 191, Laws of 1933, in the sum of $12,988.35.

Appellant thinks the following parts of the record are necessary for the consideration of said points and requests that said parts of the record be printed:

Part of record to be printed	Pages of Washington Supreme Court Clerk's Transcript
1. Complaint	1–8
2. Answer	9–28
3. Defendant's Supplemental Answer Amending Fourth Affirmative Defense	29–38
4. Reply	39–56
5. Interrogatories Propounded by Plaintiff to the Defendant	57–60
[fol. 455] 6. Defendant's Answers to Interrogatories	61–67
7. Defendant's Amended Answers to Interrogatories	68–71
8. Findings of Fact and Conclusions of Law	72–95
9. Judgment of the Superior Court	96
10. Notice of Appeal to the Supreme Court of the State of Washington	97
11. Assignments of Error in Appellant's Brief Filed in Office of the Clerk of the Supreme Court, May 24, 1935	98–102
12. Opinion in Cause No. 25683	103
13. Opinion in Cause No. 25684	104–119
14. Judgment of the Supreme Court	120
15. Petition for Appeal	121–123

Part of record to be printed	Pages of Washington Supreme Court Clerk's Transcript
16. Assignment of Errors and Prayer for Reversal	124–126
17. Statement as to Jurisdiction on Appeal	127–137
18. Order Allowing Appeal	138–139
19. Cost and Supersedeas Bond	140–142
20. Acknowledgment of Service of Petition for Appeal, Order Allowing Appeal, Assignment of Errors and Prayer for Reversal, and Statement as to Jurisdiction	143
21. Citation, with Acknowledgment of Service	144–145
22. Præcipe for Transcript on Appeal	146–147
23. Supplemental Præcipe as to Pages "A" to "F" inclusive, and pages 1 to 11 inclusive of Defendant's Exhibit "11"	148–A
24. Pages "A" to "F" inclusive and pages 1 to 11 inclusive of Defendant's Exhibit "11"	

Dated this 28th day of October, 1935.

Thomas Balmer, Edwin C. Matthias, Office Address: 404 Union Street, Seattle, Washington; F. S. Dorety, Office Address: 1120 Great Northern Building, St. Paul, Minnesota, Attorneys for Appellant.

[fol. 456] Service of a copy of the foregoing Statement acknowledged this 29th day of October, 1935.

G. W. Hamilton, R. G. Sharpe, Attorneys for Appellee. Office Address: Temple of Justice, Olumpia, Washington.

[fol. 457] [File endorsement omitted.]

[fol. 458] IN SUPREME COURT OF THE UNITED STATES

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD TO BE PRINTED, AS PROVIDED BY PARAGRAPH 9, RULE 13—Filed Nov. 7, 1935

Comes now the Appellee and designates in writing additional parts of the record which it thinks material, and which should be printed, in addition to those parts hereto-

fore designated by Appellant, which additional parts are as follows:

Part of record to be printed	Pages of Washington Supreme Court Clerk's Transcript
1. Appellee's præcipe for Transcript on appeal	
2. Rule XVI of the "Rules of Pleading, Procedure and Practice" of the Supreme Court (Item 1 of Appellee's Præcipe	153
3. Rules VI and VII, and Rule VIII, subdivisions 1 and 2, of the Rules of the Supreme Court of the State of Washington, and also Amendment to Rule VI which became effective March 1, 1935 (Item 2 Appellee's Præcipe)	149–153
4. All of the following portions of Appellant's Abstract of the Record (Item 3 of Appellee's Præcipe): Pages 1 to 3 inclusive, pages 41 to 146, inclusive, pages 166 to 241, inclusive, and page 266	154–420
5. All of the following portions of Appellant's Brief, Volume one, (Item 4 of Appellee's Præcipe): Pages 3 and 4, that part of page 12 containing title "Assignments of error"; all of pages 22 to 29 inclusive; the last four lines of page 190 and all of page 191	
6. All entries in Appearance Docket of Supreme Court of the State of Washington relating to Appeal No. 25,683 therein (Item 5 of Appellee's Præcipe)	
[fol. 459] 7. Pages 12 to 27 inclusive, of Defendant's Exhibit "11"	

Dated this 30th day of October, 1935.

G. W. Hamilton, Attorney General of State of Washington; R. G. Sharpe, Assistant Attorney General of State of Washington, Attorneys for Appellees.

[fol. 460] [File endorsement omitted.]

Endorsed on cover: File No. 40,127. Washintgon Supreme Court. Term No: 573. Great Northern Railway Company, Appellant, vs. The State of Washington. Filed November 7, 1935. Term No. 573, O. T., 1935.

FILE COPY

Office Supreme Court, U. S.
FILED
NOV 7 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 573

GREAT NORTHERN RAILWAY COMPANY, A CORPORATION,

Appellant,

vs.

STATE OF WASHINGTON.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

F. G. DORETY,
THOMAS BALMER,
EDWIN C. MATTHIAS,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction on appeal	1
Statutory provisions sustaining jurisdiction	1
Statute of the State, the validity of which is involved	2
Date of judgment and date of application for appeal	5
Nature of case and rulings below	6
Cases believed to sustain the jurisdiction	10

Table of Cases Cited.

Bryant v. Zimmerman, 278 U. S. 63, 67	10
Great Northern Ry. Co. v. Minnesota, 278 U. S. 503, 506	2, 10
Great Northern Ry. Co. v. Washington, 83 Wash. Dec. 52-66	8
Gulf Refining Co. v. U. S., 269 U. S. 125	5,
King Manufacturing Co. v. City Council of Augusta, 277 U. S. 100	10
Larson v. South Dakota, 278 U. S. 429, 432	2
Nashville, etc., Ry. v. White, 278 U. S. 456, 460	2
Pacific Telephone & Telegraph Co. v. City of Seattle, 291 U. S. 300	10
Puget Sound Power & Light Co. v. King County, 264 U. S. 22	5
Puget Sound Power & Light Co. v. City of Seattle, 291 U. S. 619	10
Sultan Ry. Co. v. Dept. of Labor, 277 U. S. 135	10
Weston v. City Council of Charleston, 27 U. S. 449	10

Statutes Cited.

Act of January 31, 1928, as amended by the Act of April 26, 1928; 45 Stat. 54; 45 Stat. 466 (28 U. S. Code, Sec. 861 a, 861 b)	2
Chapter 191, Session Laws 1933, Section 1	3
Section 2	3
Section 3	4
Section 6	4
Constitution of the United States, Article I, Section 8	7
14th Amendment	7
Emergency Railroad Transportation Act, 1933	6
Interstate Commerce Act, Section 1 (18 to 21)	6
Section 13	6
Section 15a	6
Section 19a	6
Judicial Code, Section 237 (a) (28 U. S. Code, Sec. 344)	2
Supreme Court Opinion	8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 573

GREAT NORTHERN RAILWAY COMPANY, A CORPORATION,

Appellant,

vs.

STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

MAY IT PLEASE THE COURT:

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Judicial

Code, Sec. 237 (a) (28 U. S. Code, Sec. 344), reading, to the extent relevant here, as follows:

> "Section 237 (a) A final judgment or decree in any suit in the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error * * *."

The remedy by writ of error under the foregoing section, has been abolished and an appeal substituted.

> Act of January 31, 1928, as amended by the Act of April 26, 1928; 45 Stat. 54; 45 Stat. 466 (28 U. S. Code, Sec. 861 a, 861 b);
>
> *Nashville, etc. Ry.* v. *White,* 278 U. S. 456, 460;
>
> *Great Northern Ry. Co.* v. *Minnesota,* 278 U. S. 503, 506;
>
> *Larson* v. *South Dakota,* 278 U. S. 429, 432.

B.

Statute of the State the Validity of Which is Involved.

The statute of the State of Washington, the validity of which has been sustained by the Supreme Court of the State of Washington, the highest court of said State, as not being violative of or repugnant to the provisions of the Constitution and Laws of the United States, is Chapter 191, Session Laws of 1933, State of Washington. The pertinent provisions thereof are:

> "CHAPTER 191.
>
> (S. H. B. 92.)
>
> Occupation Tax.
>
> An Act relating to taxation; imposing taxes upon the privilege of engaging in business activities and providing for the ascertainment, assessment, collection

and distribution thereof; providing for the administration and enforcement of this act; providing penalties, making appropriations; and declaring that this act shall take effect immediately.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. For the purposes of this act unless otherwise required by the context:

* * * * * * *

(6) The term 'gross income' means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without any deduction on account of losses; *Provided,* The term 'gross income' shall not include any payments received on accounts or notes outstanding at the time this act goes into effect.

* * * * * * *

SEC. 2 (2) From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows:

* * * * * * *

(e) Upon every person engaging or continuing within this State in the following businesses; as to such

persons the amount of tax of excise shall be equal to the gross income of the business multiplied by the rate set out after the business, as follows:

* * * * * * *

III. Steam railways: One and one-half per cent;

* * * * * * *

SEC. 3. If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function.

* * * * * * *

SEC. 6. The taxes imposed hereunder shall be due and payable in monthly installments on or before the fifteenth day of the month next succeeding the month in which the tax accrued. The taxpayer, on or before said fifteenth day of the month, shall make out a return, upon such forms and setting forth such information as the tax commission may require, showing his estimate of the amount of the tax for which he is liable for the preceding month, sign and transmit the same to the tax commission, together with a remittance for said amount in the form required by section 20 of this act. Whenever the total tax for which any person is liable under this act does not exceed the sum of ten dollars ($10.00) for any month, a quarter-yearly return and remittance in lieu of the monthly return may be made on or before the fifteenth day of the month next succeeding the end of the quarter-year for which the tax is due. Whenever the total tax for which any

person is liable under this act does not exceed the sum of ten dollars ($10.00) for any quarter-year an annual return and remittance in lieu of the quarterly return may be made as provided in section 7 of this act. The tax commission, for good cause shown, may extend the time for making and filing any monthly or quarterly return as required under this section, and may grant such reasonable additional time within which to make and file such return as it may deem proper; but the time for making and filing such return shall not be extended beyond the fifteenth day of the month next succeeding the regular date of the return."

C.

Date of Judgment and Date of Application for Appeal.

The date of the final judgment of the Supreme Court of the State of Washington sought to be reviewed is September 13, 1935.

The judgment of the Supreme Court of the State of Washington was a judgment reversing the judgment of the trial court holding the aforesaid Chapter 191 unconstitutional. The judgment of the Supreme Court of Washington directed the Superior Court to enter judgment in favor of appellee and against appellant for $12,988.35. This judgment of the Supreme Court of the State of Washington is a final judgment within the meaning of Judicial Code, Sec. 237.

Gulf Refining Co. v. *U. S.*, 269 U. S. 125.

The time for taking the appeal began to run on the date of such final judgment, to-wit, September 13, 1935. (See *Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, where the time for appealing from the judgments of the Supreme Court of the State of Washington is considered).

The date on which the application for appeal was presented and the appeal allowed is September 13, 1935.

D.

Nature of Case and Rulings Below.

The nature of the case and the rulings below which are deemed to bring the case within the jurisdictional provision relied on are as follows:

On February 28, 1934, appellee, State of Washington, brought suit against petitioner in the Superior Court for Thurston County, to recover $21,064.44 (and costs, interest and penalties), alleged to be the amount due as an occupation tax due plaintiff under the provisions of Chapter 191, Session Laws of Washington for 1933, for the period from August, 1933, to December, 1933, inclusive.

Appellant answered, denying that any amount was due, and affirmatively alleging that its railroad within the State of Washington was constructed long prior to enactment of said Chapter 191, at a cost of more than one hundred million dollars, to provide adequate facilities for both interstate business and intrastate business; that under the Constitution and laws of Washington and the acts of Congress regulating interstate commerce, particularly Section 1 (18) to (21), Section 13, Section 15 a, and Section 19 a of the Interstate Commerce Act, and the Emergency Transportation Act of 1933, it is compelled to do intrastate business, from which it cannot withdraw while continuing to carry on its interstate business; that the expense of doing intrastate business is in excess of the revenue received therefrom, and the intrastate business is necessarily conducted at a loss which must be borne by income from interstate business.

Appellant alleged that its interstate business and intrastate business is inseparably commingled and mutually dependent; that both classes of business are transported over

the same lines of railroad in the same trains, operated by the same employes and with the same facilities; that it is not possible, practically and economically or at all, to carry intrastate business separately from interstate business by different instrumentalities or employes; that in a typical year (1933) gross revenues from appellant's interstate and intrastate business in Washington totaled $8,114,350.47, of which $1,890,533 were intrastate; that abandonment of intrastate business in order to escape the tax would result in annual loss in Washington of $1,890,533 and the saving of not more than fourteen percent of that amount; that the entire burden of operating appellant's railroad in Washington would then fall entirely on interstate commerce, necessitating an increase of rates and fares greater than the same could bear, and causing the destruction of an essential instrumentality of interstate commerce and of the value of appellant's property to the amount of more than $100,000,000.

Appellant alleged that Chapter 191 as applied to it violates Article I, Section 8, and the due process clause of the 14th Amendment to the Constitution of the United States, and is null and void.

The Superior Court found the facts as alleged by appellant and concluded that Chapter 191, in its requirement of a license, making of reports and payment of a tax of 1½% of gross income from intrastate business for the privilege of engaging therein is, in practical operation and effect, to impose conditions and levy a tax upon the right to do both interstate business and local business and violates the commerce clause; and because the local business is conducted at a loss, the tax necessarily falls directly upon income from appellant's interstate and foreign business and income earned in other States, not subject to the tax, and therefore violates the due process clause of the 14th

Amendment as well as the commerce clause. Judgment was accordingly entered dismissing the action with prejudice.

The Supreme Court of Washington on August 13, 1935, filed its opinion in which it overruled and denied all appellant's contentions predicated on the stated provisions of the Federal Constitution, reversed the judgment below and ordered judgment in favor of the State and against appellant in the sum of $12,988.35. The opinion and judgment which the Supreme Court rendered and entered are not and could not have been rendered or entered without denying to appellant all of the rights asserted by it under said constitutional provisions and said opinion and judgment are not and cannot be rested upon any independent non-Federal grounds.

The opinion of the Supreme Court of Washington (83 Wash. Dec. 52-66) is in part as follows:

"• • • • • • •

"The next and, as we view it, the important and difficult question is whether the tax may be collected, even though the railway company, the respondent, may not be able to retire from its intrastate business without also discontinuing its interstate. In this connection, it will be assumed (a) that the respondent cannot, as a matter of law, retire from its intrastate business; (b) that it is impractical, as a matter of fact, for it to retire from its intrastate business without also retiring from its interstate; and (c) that the intrastate or local business is conducted at a loss which is taken care of by the receipts from the interstate business. Giving effect to these assumptions, inquiry must be directed then to whether the tax is valid, even though the railway company may not be able to retire from its intrastate business without retiring from its interstate, and that the intrastate business is conducted at a loss.

• • • • • • •

"Even though the respondent in this case cannot retire from its intrastate business without also retiring from its interstate business, we think that the excise tax imposed upon the gross income from the intrastate business is not such a direct burden upon interstate commerce as to require that the tax be held void.

* * * * * * *"

The dissenting opinion of Justice Steinert, concurred in by Justice Holcomb, contains the following:

"* * * * * * *

"The authorities cited in the prevailing opinion establish beyond question, as I view it, that the State may not impose a tax, no matter what its nature or variety may be, that has the effect of burdening or interfering with interstate commerce.

* * * * * * *

"* * * Under these cases, one of the essentials to the validity of a tax is that the one who is taxed could discontinue its intrastate business without also withdrawing from its interstate business.

* * * * * * *

"* * * That the action of the State will interfere with interstate commerce is, to me, very apparent.

* * * * * * *

"* * * It is, therefore, a burden upon, and interferes with, interstate commerce, and for that reason is invalid.

"I therefore dissent."

The final judgment of the Supreme Court of the State of Washington was entered on the 13th day of September, 1935.

E.

Cases Believed to Sustain the Jurisdiction.

The following cases are believed to sustain the jurisdiction of this Court:

Great Northern Ry. Co. v. *State of Minnesota*, 278 U. S. 503;

King Manufacturing Co. v. *City Council of Augusta*, 277 U. S. 100;

Sultan Ry. Co. v. *Dept. of Labor*, 277 U. S. 135;

Bryant v. *Zimmerman*, 278 U. S. 63, 67;

Puget Sound Power & Light Co. v. *City of Seattle*, 291 U. S. 619;

Pacific Telephone & Telegraph Co. v. *City of Seattle*, 291 U. S. 300;

Weston v. *City Council of Charleston*, 27 U. S. 449, 2 Pet. 449.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code.

Respectfully submitted,

F. G. Dorety,
Thomas Balmer,
Edwin C. Matthias,
Attorneys for Appellant.

FILE COPY

FILED

JAN 9 1936

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1935

No. 573

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

STATE OF WASHINGTON, Appellee.

Appeal From the Supreme Court of the State of Washington

Brief of Appellant

F. G. DORETY
1120 Great Northern Bldg., St. Paul, Minnesota

THOMAS BALMER,
EDWIN C. MATTHIAS,
404 Union Street, Seattle, Washington
Counsel for Appellant

MAIN 2279
94 Spring Street
SEATTLE, WN.

SUBJECT INDEX

	Page
Statement of the Case	1
Relevant Parts of Chapter 191, Laws 1933	3
Judgment Below	5
Facts As Found by Trial Court and Adopted by State Supreme Court	6
Conclusions of Law of Trial Court	13
Findings and Judgment of State Supreme Court	16
Specification of Errors Relied Upon	18
Summary of Argument	20
Argument	22
I. This Court will not review facts found by two lower courts	22
II. This Court will determine federal constitutional questions upon its own judgment of the effect of a tax imposed by state law, irrespective of its form and characterization by state legislature and state court	23
III. Appellant cannot withdraw from intrastate business in Washington while continuing its interstate. Tax imposed by state statute is a burden on interstate commerce	33
IV. Appellant's intrastate business in Washington was done at a loss. Tax imposed by state statute is a burden upon interstate commerce because, if paid, it must be paid out of interstate earnings	56
V. The tax imposed by state statute is not rendered constitutional by fact appellant did not secure permission to raise intrastate rates	61
VI. The state statute also violates due process clause of 14th Amendment	65
VII. The tax imposed by state statute is not rendered constitutional by reduction of ad valorem taxes	66

CASES CITED

Page

Aetna Life Ins. Co. v. Dunken, 266 U. S. 389 23
Allen v. Pullman, 191 U. S. 171 ..... 37, 56, 57, 61
Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203 ..... 32, 66
Anglo-Chilean Nitrate Sales Corporation v. Alabama, 288 U. S. 218 ..... 57, 58
A. T. & S. F. Ry. v. O'Connor, 223 U. S. 280 ..... 26, 33
Atlantic Coast Line R. R. v. Daughton, 262 U. S. 413 55

Baker v. Druesedow, 263 U. S. 137, 142 69
Baldwin v. Seelig, 79 L. Ed. 525 33
Barrett v. New York, 232 U. S. 14 ..... 40, 46
Bowman v. Continental Oil Co., 256 U. S. 642 ..... 40, 46
Boyle v. St. L. & S. F. R. Co., 222 Fed. 539, 550 8

California v. C. P. R. Co., 127 U. S. 1 51
C. M. & St. P. v. Wisconsin, 238 U. S. 492 64
Colorado v. United States, 271 U. S. 153 ..... 44, 55, 60
Cooney v. Mountain States T. Co., 294 U .S. 384, 79 L. Ed. 498 ..... 36, 47, 52
Crew-Levick v. Pennsylvania, 245 U. S. 292 24
Crutcher v. Kentucky, 141 U. S. 47 35
Cudahy Packing Co. v. Minnesota, 246 U. S. 450 53

Dayton-Goose Creek R. Co. v. U. S., 263 U. S. 456 55
Dawson v. Kentucky D. & W. Co., 255 U. S. 288 32
Denny v. Wooster, 175 Wash. 272; 27 Pac. (2d) 328 68

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465 ..... 46, 52
Educational Films Corporation v. Ward, 282 U. S. 379 24
Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265 24

Fargo v. Hart, 193 U. S. 490 66
Fiske v. Kansas, 274 U. S. 380 23
Florida v. United States, 282 U. S. 194 63
Fox v. Standard Oil Co., 79 U. S. Supreme Court Advance Opinions, 1934-1935, page 339 ..... 31, 45
Fox Film v. Doyal, 286 U. S. 123 24

Galveston, Houston & San Antonio Ry. v. State of Texas, 210 U. S. 217 ..... 28, 32, 51
Great Northern v. State, 147 Wash. 630; 267 Pac. 506 ..... 34, 36
G. N. v. Minnesota, 278 U. S. 503 ..... 53, 60
Greene v. Louisville, etc., R., 244 U. S. 499, 518 69
Gregg Dyeing Co. v. Query, 286 U. S. 472, 479, 480 69

International Paper Co. v. Massachusetts, 246 U. S. 135 28
Interstate Buses v. Holyoke, 273 U. S. 45 ..... 41, 57

Kansas City Railroad v. Botkin, 240 U. S. 227 ..... 24, 53

CASES CITED (Continued)

Page

LaCoste v. Department of Conservation, 263 U. S. 545 24
Leloup v. Port of Mobile, 127 U. S. 640 ..... 26, 27, 33, 56
Love v. King County, 81 Washington Decisions 405; 44 Pac. (2d) 175 68
Ludwig v. W. U. T. Co., 216 U. S. 146 ..... 41, 66

Macallen Co. v. Massachusetts, 279 U. S. 620 ..... 24, 29, 32
Meyer v. Wells Fargo & Co., 223 U. S. 298 ..... 26, 33, 67
Minnesota v. Barber, 136 U. S. 324 45
Minnesota v. Blasius, 290 U. S. 1 ..... 26, 33
Missouri ex rel. S. W. Bell T. Co. v. P. S. Commission, 262 U. S. 276 60

New York v. U. S., 257 U. S. 591 55
North Bend Stage Line v. Denney, 153 Wash. 439; 279 Pac. 752 62
N. P. v. Adams County, 1 Fed. Supp. 163 50
N. P. R. Co. v. North Dakota, 236 U. S. 585 60
Northern Pacific Railroad v. State, 84 Wash. 510, 523, 525; 147 Pac. 45 ..... 34, 50

Ohio Tax Cases, 232 U. S. 576 53
Omaha v. Omaha Water Co., 218 U. S. 180 61

Page v. Arkansas Natural Gas Corp., 286 U. S. 269 22
Pacific Tel. & Tel. Co. v. Kuykendall, 265 U. S. 196 63
Pickard v. Pullman Southern Car Co., 117 U. S. 34 37
Postal Telegraph & Cable Co. v. Richmond, 249 U. S. 252 ..... 57, 61
Postal Telegraph Co. v. Fremont, 255 U. S. 124 62
Prentis v. Atlantic Coast Line, 211 U. S. 210 62
P. S. E. Ry. Co. v. R. R. Commission, 65 Wash. 75; 117 Pac. 739 62
Pullman Co. v. Adams, 189 U. S. 420 ..... 34, 36, 61

R. R. Commission v. C. B. & Q. R. Co., 257 U. S. 563 ..... 43, 53, 55, 56 60
Rowland v. Boyle, 244 U. S. 106 ..... 8, 60

St. L. S. W. R. Co. v. Arkansas, 235 U. S. 350 ..... 24, 29, 32, 53
Shaffer v. Carter, 252 U. S. 37 ..... 32, 66
Smyth v. Ames, 169 U. S. 466 60
Southern R. Co. v. Kentucky, 274 U. S. 76 61
Sprout v. South Bend, 277 U. S. 163 45
Standard Oil Co. v. Graves, 249 U. S. 389 ..... 24, 29, 32
State v. Great Northern, 83 Wash. Dec. 66; 48 Pac. (2d) 938 ..... 2, 16, 24
State v. Northern Pacific, 83 Wash. Dec. 52; 48 Pac. (2d) 931 ..... 2, 16, 23
State of Minnesota v. Barber, 136 U. S. 313 ..... 31, 45

CASES CITED (Continued)

Page

State v. Northern Express Co., 76 Wash. 636; 136 Pac. 1160; 80 Wash. 308; 141 Pac. 757 ---- 36
State ex rel. Stiner v. Yelle, 174 Wash. 402; 25 Pac. (2d) 91-7, 57
State ex rel. Tacoma Eastern Ry. Co. v. N. P. R. Co., 104 Wash. 405; 176 Pac. 539 ---- 62
United States Glue Co. v. Oak Creek, 247 U. S. 321, 329 ---- 27
Vance Lumber Co. v. King County, 84 Wash. Decisions, 330 (Not yet reported Pacific Reporter) ---- 68
Wallace v. Hines, 253 U. S. 66 ---- 66
Welton v. Missouri, 91 U. S. 275 ---- 31
Western Trunk Line Class Rates, 204 I. C. C. 595, 645, 647 ---- 60
Western Union Telegraph Co. v. Kansas, 216 U. S. 1 ---- 24, 27, 30, 32, 38, 45, 56, 58, 66

STATE STATUTES CITED

Chapter 117, Laws 1911 (Remington's Revised Statutes, Chapter 1, Title 72) ---- 13
Chapter 130, Laws 1925, p. 227 (Remington's Revised Statutes, Sections 11157 (4), 11165) ---- 50
Chapter 4, Laws 1933 (Remington's Revised Statutes of Washington 1933 Supplement, Section 11238-1) ---- 66
Chapter 53, Laws 1933 (Remington's Revised Statutes of Washington 1935 Supplement, Sections 11273-1a et. seq.) 68
Chapter 191, Laws 1933 ---- 3-5 inc.
Chapter 2, Laws 1935 (Remington's Revised Statutes, Sec. 11230-1a) ---- 68
Chapter 166, Laws 1935 (Remington's Revised Statutes, 1935 Supplement, Sec. 11273-1B) ---- 68
Chapter 180, Laws 1935 (Remington's Revised Statutes, 1935 Supplement, Section 8370-36 et. seq.) ---- 51
Sec. 10428 Remington's Compiled Statutes of Washington (Same Section Remington's Revised Statutes) ---- 63

FEDERAL CONSTITUTION AND STATUTES CITED

Commerce Clause of Article I, Section 8-2, 15, 18, 19, 20, 21, 56, 61
Due Process Clause of 14th Amendment ---- 2, 15, 19, 22, 56, 65
Chapter 1, Title 49, U. S. C. A. (Sections 1 (18), 1 (20), 13 (4), 15A (2), 15A (3) ---- 54
Chapter 7, Title 49, U. S. C. A. (1934 Supplement), Sections 251 et. seq. ---- 54

INDEX TO APPENDIX

Page

Findings and Conclusions of Trial Court 72

Washington Forty Mill Limit Law 104

Washington Ad Valorem Tax Statute with reference to assessment and valuation of railroad property 105

Washington statute with reference to court review of order of Department of Public Works establishing rates 107

Part of Washington Statute (Chapter 180, Laws 1935), increasing Occupation Tax from 1½% to 3% 108

THIS CASE BELOW

State of Washington v. Northern Pacific Railway Company, 83 Washington Decisions 52; 48 Pac. (2d) 931 .....

State of Washington v. Great Northern Railway Company, 83 Washington Decisions 66; 48 Pac. (2d) 938 .....

Supreme Court of the United States

OCTOBER TERM, 1935

No. 573

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

STATE OF WASHINGTON, Appellee.

Appeal From the Supreme Court of the State of Washington

Brief of Appellant

STATEMENT OF THE CASE

This is a companion case to Northern Pacific Railway Company v. State of Washington, also submitted at this term of court (No. 529). The Great Northern case was tried immediately following the Northern Pacific case. The two cases were argued at the same time before the Supreme Court of the State of Wash-

ington (Rec. 84). While the two cases involve a consideration of the same statute and raise the same questions of law, some difference in the facts requires a complete statement of the Great Northern case. Like the Northern Pacific case, this is an action by the State of Washington, appellee here, to recover from the Railway Company, appellant in this court, an occupation tax of 1½% of gross *intrastate* revenue accrued from August to December, 1933, inclusive, imposed by Chapter 191, Laws of 1933, for the privilege of engaging in the business of a steam railway in the State of Washington.

The trial court made findings of fact and concluded that the act, as applied to appellant, violates the Commerce Clause of Article I, Section 8, and the due process clause of the Fourteenth Amendment to the Constitution of the United States. (Rec. 76.)

Judgment of dismissal was entered. (Rec. 77.) On an appeal by the State, the Supreme Court of the State of Washington adopted the facts found by the trial court, but reversed on questions of law, holding that, on the facts found, Chapter 191 does not violate the Constitution of the United States. *State v. Great Northern*, 83 Washington Decisions 66, 48 Pac. (2) 938; *State v. Northern Pacific*, 83 Washington Decisions 52, 48 Pac. (2) 931. (Rec. 84.)

RELEVANT PARTS OF CHAPTER 191.

Section 2 (1) describes business subject to the tax, distributed into five principal classifications, namely, extractive function; manufacturing and producing function; wholesaling and jobbing; retail distribution; performing and rendering services.

Section 2 (2) provides that from the first day of August, 1933, and until the 31st day of July, 1935, "there is hereby levied an annual tax or excise for the privilege of engaging in business activities * * * measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be * * * "

Section 2 (2) (a) imposes a tax of varying percentages of gross income for the several kinds of business.

Section 2 (2) (e) is in part as follows:

"Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business as follows: * * *

III—Steam Railway Companies: 1½%."

Section 3 provides:

"If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly ob-

tained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

Section 5 provides in part:

"In computing the amount of any tax imposed under subdivisions * * * 2 (e) * * * of Section 2 of this act there shall be excepted from gross proceeds of sales or gross income, so much thereof as is derived * * * from business which the State of Washington is prohibited from taxing under the Constitution of the State, or the Constitution or laws of the United States. * * * "

Section 6 requires payment of the tax in monthly installments and reports upon forms prescribed by the Tax Commission.

Section 7 requires an annual return for the entire year, verified by oath, and accompanied by payment of the balance, if any, of the tax due for the year.

Section 9 provides that the taxpayers shall keep a record of gross income for five years. Section 10, that if the taxpayer fails to make return, the Commission shall make the assessment, adding a penalty of 10% and a further penalty of 1% per month. Section 15, that if any tax or penalty be not paid within fifteen days after it is due, the Commission shall issue a

warrant to the sheriff, commanding him to levy upon and sell real and personal property of the taxpayer sufficient to pay the amount, together with the penalty of 1% for each thirty days after the date of the warrant, and further provides for the filing of the warrant with the Clerk of the Superior Court, and that when said warrant is so filed it shall become a lien upon the real and personal property of the taxpayer against whom it is issued, in the same manner as a judgment in a civil action, and with like effect.

Section 16 provides that the tax and penalty shall be a debt due the State of Washington and may be collected by the State the same as other debts. Section 17 that any person may be enjoined "from engaging and/or continuing in any business for which a privilege tax is required * * * until such tax shall have been paid."

Section 23 provides that it shall be unlawful to fail or refuse to obtain the license, or fail or refuse to make a return, or to make any false return, etc. Any person violating any of the provisions of the section shall be guilty of a gross misdemeanor.

JUDGMENT BELOW

Appellant made no return, paid no tax and received no license. Thereupon the State brought this action to recover the tax due for the months of August to

December, 1933, inclusive. While the trial court found the act unenforceable, because contrary to the Constitution of the United States, it found that if a tax were due under the act for this period, it amounted to the sum of twelve thousand nine hundred eighty eight and 35/100 dollars ($12,988.35). (Rec. 59.) In reversing the trial court the State Supreme Court directed that judgment be entered in this amount together with costs taxed at $732.85. (Rec. 97.)

FACTS AS FOUND BY TRIAL COURT AND ADOPTED BY STATE SUPREME COURT

The facts as found by the trial court and accepted by the Supreme Court of the State of Washington, may be summarized as follows:

Appellant is a Minnesota corporation. Its line of railroad extends from St. Paul and Duluth in Minnesota, through the intervening states, to Seattle and Tacoma in Washington, Portland in Oregon, Bieber in California and Vancouver in the Province of British Columbia, Canada. Appellant's railroad was constructed more than 35 years ago, and in order to provide adequate facilities for the transportation of both *interstate* and *intrastate* commerce appellant has invested therein over one hundred million dollars. As a common carrier by railroad of both intrastate and interstate commerce, appellant is subject to state and national regulatory laws. (Finding II, Rec. 58.)

Appellant's railroad comprises 10541 miles of track, of which 1450 miles are in the State of Washington. Appellant's railroad is taxed in the State of Washington on its fair market value as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature. (Finding III, Rec. 59.)

Ad valorem taxes levied and paid in 1933 amounted to $1,250,860.49. The tax imposed by Chapter 191 is not a property tax, nor in lieu—either in whole or in part—of a property tax, nor is it a supervision tax, but it is an excise tax imposed on appellant solely for the privilege of doing a "steam railway business" in the State of Washington. (The Supreme Court of Washington had previously held this to be an excise tax. *State ex rel Stiner v. Yelle*, 174 Wash. 402, 25 Pac. (2) 91). (Finding III, Rec. 59.)

Computed at the rate named in the statute, the tax due from appellant to appellee, if the statute is valid, for the period from August to December, 1933, amounts to $12,988.35. (Finding IV, Rec. 59.)

Intrastate transportation in the State of Washington is much more expensive per unit of freight and in proportion to revenue than interstate, due, among others, to the following causes:

The much shorter average haul of the intrastate business, the lesser traffic density, especially on branch lines most largely used locally, much less tonnage per train, more frequent stops and double terminal expense due to the fact that intrastate freight is both originated and terminated in the state, whereas interstate freight incurs at most but one terminal handling in the state. (Finding V, Rec. 60.) (In this connection see *Rowland v. Boyle*, 244 U. S. 110; *Boyle v. St. L. & S. F. R. Co.*, 222 F. 539, 550.)

A special study was made by appellant to determine the financial result of operating its railway line in intrastate commerce in the State of Washington for the year 1933. No such original study was made by appellee. Based upon this study, the operating revenues, operating expenses, net railway operating deficit and other results of appellant's intrastate operations in the State of Washington for the year 1933, were as follows:

1. Gross Operating Revenues	$ 2,179,760
2. Operating Expenses	1,730,361
3. Net Revenue from Railway Operations	449,399
4. Railway Tax Accruals	335,247
5. Railway Operating Income	114,152
6. Equipment Rents—Net Debit	19,966
7. Joint Facility Rent—Net Debit	193,455
8. Total Rentals—Net Debit	213,421
9. Net Railway Operating Deficit	99,269
10. Cost of Reproduction New, Less Depreciation, as of I. C. C. Valuation Date (June 30, 1915) plus	

Additions and Betterments to December 31, 1933, of Railway Property and Equipment in Washington—Intrastate Proportion	$29,733,312
11. Annual Rate of Return Earned on Above Reproduction Cost	Deficit
12. Interest on above Reproduction Cost at 5.75% per Annum	1,709,665
13. Amount Short of Earning a Return of 5.75% per Annum	1,808,984

(Finding VI, Rec. 60, 61.)

The formula used in making the cost study is explained in detail in findings which will be found in the appendix. (See Finding VII, Rec. 62.)

Appellant's *intrastate* and *interstate* business are inseparably commingled and mutually dependent. For one of the test periods used in the cost study—the seven days ending November 21, 1933—intrastate revenue net ton miles were 4,155,692, or 32.35%, and interstate revenue net ton miles were 8,691,505, or 67.65%. For the month of November, 1933, intrastate revenue net ton miles were 14,547,465, or 24.80%, and interstate revenue net ton miles were 44,121,835, or 75.20%. For the entire year 1933 intrastate revenue net ton miles were 138,265,617 or 23.10% and interstate revenue net ton miles were 460,335,442, or 76.90%. Both interstate and intrastate business, eastbound and westbound respectively, were largely transported by appellant over the same lines of railroad, in the same trains, by means of the

same employees, and with the same facilities. It is not possible, practically and economically, or at all, to carry intrastate freight separately from interstate freight by different lines of railroad, in different trains, or by means of different facilities and employees. Similar facts were found as to passenger traffic. (Finding XI, Rec. 72.)

If appellant could and should abandon its intrastate freight business, and continue to do interstate freight business, it could and would somewhat reduce its train service and its car mileage and save some direct expense applicable to its freight business in the State of Washington, but it would thereby lose its entire gross revenue from intrastate freight business of $1,622,644. Also some reduction in passenger train service could be effected if intrastate passenger business were to be discontinued, which would result in a further saving in direct expense, but the result would be the loss by appellant of its entire gross revenue from intrastate passenger business, which for the year 1933 amounted to $557,116. The net result of abandonment by appellant of its intrastate passenger and freight business, in order to escape the tax imposed by Chapter 191, Laws 1933, would be the loss of $2,179,760, and the saving of not more than 14% of that amount. (Finding XII, Rec. 72.)

Appellant's local or intrastate business in the State of Washington is conducted at a loss, and was conducted at a loss during the entire year 1933, and the tax imposed by Chapter 191, Laws of 1933, if paid, will have to be paid out of appellant's earnings from interstate and foreign commerce and from the income of its property located outside the State of Washington. (Finding VIII, Rec. 69.) If appellant could and should abandon its intrastate freight and passenger business, the entire burden of maintaining and operating its interstate system of railroad in Washington, constructed and equipped to handle both interstate and local commerce, would fall entirely on interstate commerce and would necessitate an increase of rates and fares greater than the same could bear, as a practical matter or at all, and would result in the destruction of an essential instrument of interstate commerce, and of the value of appellant's property in the State of Washington to the amount of more than one hundred million dollars. (Finding XII, Rec. 72.)

Appellant's railroad is well located and economically managed, and serves the principal cities and towns of the State of Washington. Its continued operation in intrastate business is essential to the people of the state and of the United States. Most of appellant's local rates cannot be raised because of compe-

tition from other kinds of transportation. Under the state law, such rates cannot be raised without the consent of the Department of Public Works. Appellant has heretofore applied for an increase of local rates, but the application was denied by the Department by the order attached to appellant's supplemental answer as Exhibit "A" and made a part of the findings. The court found that the appellant, as a practical matter, has been unable to increase its revenues from local business, and that whether it can do so in the future is a matter attended with great uncertainty. Any increase could be accomplished only after long and expensive litigation, and, if obtained, would have no bearing upon appellant's income in the year 1933, or for many years subsequent thereto. The court found that appellant "has done all it can do to increase its revenue, but is unable to do so." Exhibit "A" is an order made by the Department in the matter of application for an extension of the increase in freight rates in connection with the order of the Interstate Commerce Commission extending increases allowed in Ex Parte 103. The Department denied the increase, upon findings in substance that to do so would result in discrimination in violation of state law, and because "it is a matter of common knowledge that the present level of rail rates is too high to permit freedom of movement by rail."

To extend the increase, said the Department, would be of no benefit from the standpoint of revenue, because it would drive traffic to motor vehicles and other competing agencies, thus resulting in greater loss than gain. (Finding XIII, Rec. 73, Exhibit "A", Rec. 21, 23.)

CONCLUSIONS OF LAW OF TRIAL COURT

The trial court concluded that appellant, a common carrier by railroad subject to the provisions of the state Public Service Commission Law, Chapter 117 of the Washington Session Laws of 1911, Remington's Revised Statutes, Chapter 1, Title 72, and to the acts of Congress regulating interstate commerce, could not, as a matter of law, retire from local or intrastate business while continuing to transact interstate business, stating that although the measure of the tax is the gross income received from intrastate steam railway business, "the privilege or occupation upon which the tax is laid is that of engaging in railroad business, which includes the transaction of both intrastate and interstate business. The penalty for failure to pay is liability to injunction proceedings and seizure and sale of the physical property of the railway, which would make it impossible to engage in either intrastate or interstate commerce * * * . A state may require payment of an

occupation tax from one engaged in both intrastate and interstate commerce, but a state cannot tax interstate commerce, or the privilege of engaging in it. Where conditions are prescribed, a license required and a tax is imposed on one engaged in both interstate and intrastate commerce, certain conditions must be met. One is that the party taxed must be free in law and in fact to withdraw from its intrastate business, while continuing to transact its interstate business free of the tax. Chapter 191, Laws of 1933, does not meet this condition." (Conclusions I and II, Rec. 74.)

The trial court concluded that appellant "was not and is not free, under the constitution and laws of the state, to withdraw from its intrastate business, while continuing to transact its interstate and foreign business. It performs an indispensable service for the people of the State of Washington, from which it cannot withdraw. Its continued performance of this service is compellable at the suit of the state and of the citizens of the state having an interest in such performance. * * *" The court further concluded that appellant cannot "as a matter of fact, or as a practical matter, withdraw from its intrastate business while continuing to transact its interstate and foreign business." (Conclusions III and V, Rec. 75, 76.)

That appellant's railroad "was constructed to handle both classes of business, and to abandon its intrastate business would throw the entire burden of maintaining and operating the interstate system on interstate commerce, and would create operating losses greater than such commerce could bear." That appellant's interstate business "would necessarily be destroyed and its property would be confiscated." (Conclusion V, Rec. 76.)

The court then concluded that the tax imposed by Chapter 191, Laws of 1933, on the pretext of being a tax or fee for the doing of local business in the State of Washington, is, in reality, a tax and burden upon interstate commerce and upon the gross revenues received by appellant therefrom, in that said tax, if paid, would have to be paid out of the earnings of appellant from its interstate business, and is a tax upon its business done and income earned in other states, and upon property of the appellant located outside the State of Washington, which tax it cannot avoid by withdrawing its property from use in local commerce within the State of Washington, and that said tax is in violation of the constitution of the United States for the reason, among others, that it imposes a burden upon interstate commerce in violation of Article I, Section 8 and the due process clause of the Fourteenth Amendment to the constitution of the United States. (Conclusion of Law VII, Rec. 76.)

FINDINGS AND JUDGMENT OF STATE SUPREME COURT

The Supreme Court of the State of Washington, in its opinion, 83 Washington Decisions 66, 48 Pac. (2) 938; 83 Washington Decisions 52, 48 Pac. (2) 931, (Rec. 84) holds that the tax applies only to income from intrastate business. Adopting the findings below, it states: "The interstate and intrastate business in this state is inextricably commingled, and the intrastate business is conducted at a loss, and it is necessary to make up this loss from the income from interstate commerce." It states the question for decision as follows:

> "The next, and as we view it, the important and difficult question is, whether the tax may be collected even though the railway company * * * may not be able to retire from its intrastate business without also discontinuing its interstate. In this connection, it will be assumed (a) that the respondent (appellant here) cannot, as a matter of law, retire from its intrastate business; (b) that it is impracticable, as a matter of fact, for it to retire from its intrastate business without also retiring from its interstate; and (c) that the intrastate or local business is conducted at a loss, which is taken care of by the receipts from the interstate business. Giving effect to these assumptions, inquiry must be directed then to whether the tax is valid, even though the railway company may not be able to retire from its intrastate business without retiring from its interstate, and that the intrastate business is conducted at a loss."

The opinion concedes that a tax imposed as a license to do *both* kinds of business, or a tax levied *directly*

upon an instrumentality used in both kinds of business would be void. But it distinguishes the case at bar on the ground that the tax is measured by *gross income* and "the income from the interstate business may be segregated from the gross income from the intrastate business and (the tax) be held valid." It denies the objection based on unprofitableness of the intrastate business, on the ground that appellant has "a remedy by application to the Department of Public Works (for an increase of rates), with the right of review by the Superior Court and an appeal to this court." And while, says the court, it appears that such an application has been made and denied, "it does not appear that respondent (appellant here) has exhausted the relief granted by the statute, and, until it does so, it cannot be said that even though the intrastate business is being conducted at a loss, it is such a burden upon interstate commerce as would justify holding the law unconstitutional." Presumably the Supreme Court relies solely on the fact that appellant did not take a writ of review to the Superior Court to reverse the Department's order, Exhibit "A", supra, denying increase in intrastate rates, because the appellate court does not disagree with the finding of the trial court that "most all defendant's (appellant here) local rates cannot be raised because of competition from other kinds of transportation

* * * that defendant, as a practical matter, has been unable to increase its revenues from local business, and * * * that whether it can do so in the future is a matter attended with great uncertainty, and could be accomplished only after long and expensive litigation, and such increases, if obtained, would have no bearing upon its income in the year 1933, or for many years subsequent thereto * * * that defendant has done all it can do to increase its revenue, but is unable to do so." (Rec. 73, 74, 84.)

On the 13th of September, 1935, the Supreme Court of Washington directed the entry of judgment in favor of the appellee and against the appellant in the sum of $12,988.35, with costs of the action taxed at $732.85. (Rec. 97.) This appeal was then taken.

SPECIFICATION OF ERRORS RELIED UPON

(1) The Supreme Court of Washington, having found that appellant is engaged in both intrastate and interstate commerce, and having held that as a matter of *law* it cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of 1933, does not violate Article I, Section 8, of the Constitution of the United States.

(2) The Supreme Court of Washington, having found that appellant's interstate and intrastate busi-

ness in Washington are inextricably commingled, and that as a matter of *fact*, and as a practical matter, appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that chapter 191, Laws of 1933, does not violate Article I, Section 8, of the Constitution of the United States.

(3) The Supreme Court of Washington, having found that appellant's intrastate business is conducted at a loss, which must be borne out of the income from its interstate business, erred in deciding that the tax imposed by Chapter 191, Laws of 1933, does not violate Article I, Section 8, of the Constitution of the United States.

(4) The Supreme Court of Washington, having found that appellant's intrastate business is conducted at a loss, which must be borne out of income from its interstate business, or out of income derived from property located outside the State of Washington, erred in refusing to hold that Chapter 191, Laws of 1933, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(5) The Supreme Court of Washington, having found that appellant's intrastate business is conducted at a loss, which must be borne out of income from its interstate business, erred in holding that Chapter

191, Laws of 1933, and the tax imposed thereby, does not violate Article I, Section 8, of the Constitution of the United States, for the stated reason that appellant has not exhausted its remedy (by writ of review) to obtain intrastate rate increases, and because that circumstance is immaterial, not supported by, and is contrary to, the facts found by the trial court in Finding of Fact XIII.

(6) The Supreme Court of Washington, for each and all of the reasons contained in the preceding assignments, erred in reversing the judgment of the Superior Court of Thurston County and in rendering judgment in favor of the State of Washington and against appellant for the tax imposed by Chapter 191, Laws of 1933, in the sum of $12,988.35, together with costs taxed at $732.85.

SUMMARY OF ARGUMENT

I.

This court will not review facts found by two lower courts.

II.

This court will determine questions raised under the Constitution of the United States upon its own judgment of the actual operation and effect of the tax imposed by Chapter 191, Laws of 1933, irrespective of the form it bears or how it is characterized by the

state legislature and state court. Chapter 191 violates Article I, Section 8, of the Federal Constitution, because its actual operation and effect is to impose a tax for the privilege of engaging in railway business in the State of Washington. Since appellant cannot abandon its intrastate and continue its interstate business, the tax, while measured by the gross income from, and ostensibly for the privilege of doing, intrastate business only, is in practical operation and effect a tax for the privilege of doing both intrastate and interstate business.

III.

Chapter 191, Laws 1933, as applied to appellant, violates Article I, Section 8, and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, because appellant's intrastate business, from which it cannot withdraw while continuing to do interstate business, is done at a loss, and the tax imposed by Chapter 191, if paid, must be paid out of income derived from appellant's interstate business, and from property located outside the State of Washington.

IV.

The tax imposed by Chapter 191, Laws of 1933, is not rendered constitutional by the fact the appellant did not obtain permission, either by writ of review

from the order of the Department of Public Works of the State of Washington, or otherwise, to raise rates which the state court has found, as a practical matter, cannot be raised.

V.

Chapter 191, Laws of 1933, violates the Due Process Clause of 14th Amendment to Constitution of United States.

VI.

The occupation tax imposed by Chapter 191, Laws of 1933, is not rendered constitutional by a general reduction of ad valorem taxes.

ARGUMENT

This Court Will Not Review Facts Found by Two Lower Courts

Appellant has not brought the evidence to this court because it has assigned no error to the findings of fact, and this court does not review findings approved by two lower courts except where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts,—circumstances not here present. *Page v. Arkansas Natural Gas Corp.*, 286 U. S. 269;

Fiske v. Kansas, 274 U. S. 380; *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389.

The appellee has, however, incorporated the evidence in the record and directed that it be printed. The Clerk's bill for this unnecessary printing has been paid by the appellant. Regardless of the outcome of this appeal appellant requests an order under Rule 13, paragraph 9, requiring the appellee to bear the expense of this unnecessary printing.

This court will determine questions raised under the Constitution of the United States upon its own judgment of the actual operation and effect of the tax imposed by Chapter 191, Laws of 1933, irrespective of the form it bears or how it is characterized by the state legislature and state court.

The State Court holds that the tax imposed by Chapter 191 is a tax upon gross intrastate revenues. Although not directly stated, it implies that the tax is imposed for the privilege of doing intrastate business in Washington. It further holds that the tax is valid, although appellant cannot, either as a matter of law or as a practical matter, withdraw from intrastate business and continue to carry on its interstate business, and although its intrastate business is conducted at a loss, so that the tax, if paid, must be met out of income from its interstate business, or from property located outside the State of Washington. *State v. Northern Pacific Railway Co.*, 83 Washing-

ton Decisions, 52; 48 Pac. (2d) 931; *State v. Great Northern Railway Co.*, 83 Washington Decisions, 66; 48 Pac. (2d) 938 (Rec. 84).

This court is not bound by the decision of the Washington court that the tax imposed by the statute in question is for the privilege of engaging in local business, and not a burden upon interstate commerce, if, as a matter of practical application, it is a tax for the privilege of engaging in both intrastate and interstate business, since one cannot be abandoned without the other, either as a matter of law, or as a matter of practical railroad management. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1; *St. L. S. W. R. Co. v. Arkansas*, 235 U. S. 350; *Kansas City Railroad v. Botkin*, 240 U. S. 227; *Crew-Levick v. Pennsylvania*, 245 U. S. 292; *Standard Oil Co. v. Graves*, 249 U. S. 389; *LaCoste v. Department of Conservation*, 263 U. S. 545; *Macallen Co. v. Massachusetts*, 279 U. S. 620; *Educational Films Corporation v. Ward*, 282 U. S. 379; *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265; *Fox Film v. Doyal*, 286 U. S. 123.

While we recognize the rule that this court accepts a state court's interpretation of a state statute, consideration will be given to the provisions of the statute in determining the question whether "the tax is

what, in form and by decision of the state court, it is declared to be."

The provisions of Chapter 191 (the material portions of which will be found under the heading "Statement of the Case") determine the operation and effect of the tax. The statute imposes a tax for the privilege of engaging in railroad business, which necessarily includes the transaction of both intrastate and interstate business. The measure of the tax is the intrastate earnings. The word "business" is defined as including "steam railroads" and "all activities engaged in with the object of gain, benefit or advantage", and the tax is for the privilege of engaging in such business. Interstate commerce comes within the terms of these provisions.

The penalty for failure to pay is liability to injunction proceedings, and sheriff's sale of the physical property of the railroad, which would make it impossible to engage in either intrastate or interstate commerce.

That portion of the statute which excludes interstate earnings from the computation of the tax merely provides that in computing the amount of the tax, revenues that cannot be taxed under the Constitution of the United States shall not be included (Section 5). It does not provide that the business for which

the tax is imposed shall exclude the transportation of interstate commerce, or that if the tax on intrastate earnings is not paid the physical property of the railroad shall not be sold or disturbed, and it may, nevertheless, continue to engage in interstate commerce. On the contrary, the statute specifically provides that the privilege of engaging in business for which the tax is imposed, includes all activities engaged in by the taxpayer with the object of gain, benefit or advantage.

Since interstate commerce comes within this classification and appellant cannot discontinue its intrastate and continue its interstate business, the appellant is required to pay a tax upon its local revenues for the privilege of engaging in both kinds of business. A tax for the privilege of engaging in interstate commerce, even though it is not paid out of earnings from such commerce, amounts to a regulation thereof, in violation of the Federal Constitution. *A. T. & S. F. Ry. v. O'Connor*, 223 U. S. 280; *Meyer v. Wells Fargo & Co.*, 223 U. S. 298; *Williams v. Talladega*, 226 U. S. 404; *Leloup v. Port of Mobile*, 127 U. S. 640; *Minnesota v. Blasius*, 290 U. S. 1. This court said in the latter case that "a state cannot tax interstate commerce either by laying a tax upon the business which constitutes such commerce, or the priv-

ilege of engaging in it, or upon the receipts as such, derived from it."

The State Court says in its opinion:

"The State has the authority to tax property which is used in interstate commerce and which is regularly and permanently located within its limits, where the ascertainment of the amount assessed is dependent upon the value of the property within the state as the property of other citizens is taxed."

Citing *Leloup v. Port of Mobile*, *supra*, and *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1. The reason for that rule is that interstate commerce is only indirectly affected by a tax on property.

But Chapter 191 imposes the tax on gross income. In *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 329, this court held such a tax a direct burden upon the business affected, saying:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected, and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably, it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce."

The State Court has held the tax imposed by Chapter 191 does not burden interstate commerce, and in effect that it is imposed upon intrastate income for the privilege of engaging in intrastate business. Nevertheless, the appellant cannot escape the tax by discontinuing its intrastate, unless it also discontinues its interstate, business. Its intrastate business is conducted at a loss, and therefore it must pay the tax out of its income from interstate business. If it does not pay the tax its physical property may be sold at sheriff's sale, the State thus effectively discontinuing appellant's interstate as well as its intrastate business.

Under these circumstances, can it be said that the tax imposed by Chapter 191 is not a direct burden upon, and a regulation of, interstate commerce? The purpose for which the statute was enacted is wholly immaterial if "either directly or by its necessary operation" it burdens interstate commerce. *International Paper Co. v. Massachusetts*, 246 U. S. 135. "If it depends upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." *Galveston, Houston & San Antonio Ry. v. State of Texas*, 210 U. S. 217.

"When the question is whether a tax imposed by a state deprives a party of rights secured by the Fed-

eral Constitution," this court has said: "the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the character of that scheme as adopted by the State Court." The regard is to "the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state." *St. L. S. W. R. Co. v. Arkansas, supra.*

In *Macallen Co. v. Massachusetts, supra,* this court said:

"The words of the act and the opinion of the state court as to the nature of the tax are to be given consideration and weight; but they are not conclusive. * * * This court must determine for itself, by independent inquiry, whether the tax here is what, in form and by the decision of the state court, it is declared to be, namely, an excise tax on the privilege of doing business, or, under the guise of that designation, is in substance and reality a tax on the income derived from tax exempt securities. If, by varying the form, that is to say, if, by using one name for a tax instead of another, or imposing a tax in terms upon one subject when another is in reality aimed at,—the substance and effect of the imposition may be changed, constitutional limitations upon powers of taxation would come to naught: The rule is otherwise."

Standard Oil Co. v. Graves, supra, is a case which also went up from the Supreme Court of the State of Washington, in which the court had sustained a state statute imposing inspection fees on oil intended for sale in the state, including oil brought into the State

of Washington from the State of California. The Oil Company contended that the statute was unconstitutional, in that it directly burdened interstate commerce by imposing inspection fees far in excess of the cost of inspection. The State Court held that it was not a property tax or a regulatory tax, but sustained it as an excise or occupation tax imposed for the privilege of selling oil within the state. Reversing the State Court and holding the statute invalid, this court said with respect to the effect of the state court decision:

"While this court follows the decisions of the highest court of a state as to the meaning of statutes in cases of this character, the name given to the statute is not conclusive. It must be judged by its necessary effect, and if that is to violate the constitution of the United States, the law must be declared void."

In *Western Union Telegraph Co. v. Kansas, supra,* this court said:

"The disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such burden being imposed, or as to the unconstitutionality of the statute, as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things."

Since the appellant cannot withdraw from intrastate commerce and continue its interstate business, and the tax imposed by Chapter 191, if paid, must be paid from income from interstate commerce, because intrastate business is done at a loss, it follows that if the tax is valid then a tax of 10% or even 50% may be imposed by Washington and other states; because, as said by this court in *State of Minnesota v. Barber*, 136 U. S. 313, quoting from *Welton v. Missouri*, 91 U. S. 275: "The power of the state could not be controlled, however unreasonable and oppressive its action". And, as said in *Fox v. Standard Oil Co.*, 79 U. S. Supreme Court Advance Opinions, 1934-1935, page 339, even if such "a tax should destroy a business, it would not be made invalid or require compensation on that ground alone. Those who enter upon a business take that risk."

The state court is on untenable ground in sustaining Chapter 191 for the reason that it is measured by a percentage of gross intrastate revenue. The tax is no less a burden on interstate commerce and a condition of appellant's right to engage therein because it is measured by a percentage of revenue than if measured by the number of cars, number of miles of track, or number of farm crossings. The states, realizing that a tax of a percentage of both intrastate and interstate revenue for the privilege of doing intra-

state business is invalid, resort to the device of measuring the tax by a percentage of revenue from intrastate business only. This measure does not reduce the tax, since the rate per cent is correspondingly increased. The exaction is called an occupation tax for the privilege of doing local business, though it is known to all, and judicially noticed, that railroads have no option. *W. U. T. Co. v. Kansas,* 216 U. S. 1. They cannot retire, as a practical matter, without ruin. In the State of Washington they cannot do so even as a matter of law. The state thus burdens interstate commerce and taxes property beyond its limits by the simple device of calling the exaction an occupation tax for the privilege of doing intrastate business. But this court has said that a tax will be judged by its practical operation and effect, rather than by its name or form. *Western Union Telegraph Co. v. Kansas, supra; St. L. S. W. R. Co. v. Arkansas, supra; Standard Oil Co. v. Graves, supra; Macallen v. Massachusetts, supra; Dawson v. Kentucky D. & W. Co.,* 255 U. S. 288; *G. H. & S. A. R. Co. v. Texas,* 210 U. S. 217; *W. U. T. Co. v. Kansas,* 216 U. S. 1; *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203; *Shaffer v. Carter,* 252 U. S. 37.

In the instant case the *reality* is that if appellant withdraw from its intrastate business its interstate business will be destroyed, its property confiscated,

and it will be made insolvent. (Conclusion of Law V, Rec. 76.) The alternative is to pay a tax for the privilege of rendering service which, as found below, is essential to the people of this state while being given at a loss. Under the facts found, the real nature of the exaction cannot be concealed by calling it a tax for the privilege of doing intrastate business. Compare *A. T. & S. F. Ry. v. O'Connor, supra; Meyer v. Wells Fargo Co., supra; Williams v. Talledega, supra; Leloup v. Port of Mobile, supra; Minnesota v. Blasius, supra; Baldwin v. Seelig*, 79 L. Ed. 525.

Appellant cannot withdraw from its intrastate business in Washington and at the same time continue its interstate business, either as a matter of law, or as a matter of fact, or as a practical matter. Therefore, under the decisions of this court the tax imposed by Chapter 191, Laws of 1933, is a burden upon, and a regulation of, interstate commerce, in violation of Article I, Section 8 of the Constitution of the United States.

In deciding the case at bar the Supreme Court of the State of Washington assumed that appellant cannot, under the laws of the State of Washington, abandon its local business while continuing its interstate business. (Finding of Fact IX, Conclusion of Law III, Rec. 70, 75; Opinion of Supreme Court, Rec. 84; 83 Washington Decisions 52, 66, 48 Pac. (2d) 931, 938.) This has been the rule in the State of Washington, at least since March 22, 1915, at which

time it was established in the case of *Northern Pacific Railroad v. State*, 84 Wash. 510, 523, 525; 147 Pac. 45. The rule was again approved on May 1, 1928 in *Great Northern v. State*, 147 Wash. 630; 267 Pac. 506.

While a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce the exaction, in order to be valid under the commerce clause, must be solely on account of the intrastate business done and the party taxed must be free, in *law* and *fact*, to withdraw from the intrastate business without withdrawing also from the interstate.

In *Pullman Co. v. Adams*, 189 U. S. 420, a Mississippi statute imposed "on each sleeping and palace car company carrying passengers from one point to another within the state a tax of $100, and 25c per mile for each mile of railroad track over which the company runs its cars * * * in this state."

Evidence offered to prove that intrastate business was done at a loss while the corporation was obliged to engage in such business by the state constitution was rejected. This court said:

"If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true

that the state constitution and the statute combined would impose a burden on commerce beween the states analogous to that which was held bad in Crutcher v. Kentucky, 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by Osborne v. Florida, 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce."

The act held bad in *Crutcher v. Kentucky*, 141 U. S. 47, required the agent of every express company to pay a small fee and obtain a license to transact *any* business for the company, and file a statement showing that the company had capital of a prescribed amount. The statute, as construed, applied to both interstate and intrastate business. The court said:

"We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

Nor, said the court, is the difficulty at all obviated because the express company,

"as incidental to its main business, (which is to carry goods between different states) does also some local business by carrying goods from one point to another within the state of Kentucky. This is probably quite as much for the accommodation of the people of that State as for the advantage of the company."

Certainly, no one will say that Chapter 191 would be valid if, in terms, it prescribed conditions for the privilege of doing *both* intrastate and interstate business, as in *Crutcher v. Kentucky*. Compare *Cooney v. Mountain States T. Co.*, 294 U. S. 384, 79 L. Ed. 498. (In the *Crutcher* case there was no claim that intrastate business was done at a loss.)

The Supreme Court of Washington, in the instant case, departed from this well established rule which it had previously followed and from which it may not recede, since it is a question of federal law. In *State v. Northern Express Co.*, 76 Wash. 636, 136 Pac. 1160, it had previously held that an occupation tax of a percentage of gross revenue from intrastate business for the privilege of doing that business, violates the commerce clause, because of the condition that the express company is not free, under state law, to withdraw from the intrastate business while continuing the interstate. Though the case was reversed on rehearing, 80 Wash. 308, 141 Pac. 757, that decision is based upon the point that the express company *is* free to withdraw from its intrastate business, following *Pullman Co. v. Adams*, *supra*, and like cases. Again, in *Great Northern v. State*, 147 Wash. 630, 267 Pac. 506, a license fee or tax measured by a percentage of authorized capital stock, imposed for the privilege of doing intrastate business,

was declared void on the ground that the railway company, a common carrier under the laws of the state, could not renounce its intrastate business while continuing to transact its interstate, distinguishing the second decision in the Express case, and following the rule of the *Crutcher* and *Pullman* cases. The decision in the case at bar is contrary to the decisions of this court and the three prior decisions of the state court, in that it is now held that such a tax does not burden interstate commerce even though the party taxed cannot withdraw from its intrastate business without also withdrawing from its interstate business.

Allen v. Pullman, 191 U. S. 171, considers two acts, one imposing a tax of $500 per car on sleeping car companies doing business in the state, making no distinction between cars used in intrastate commerce and interstate commerce, and the other imposing a flat tax of $3000 on sleeping car companies which carry one or more local passengers in the state. Following *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, the first statute was held invalid because it applied to the privilege of operating the cars in both intrastate and interstate commerce. It was argued by the Pullman Company that the tax of $3000 per annum imposed for carrying one or more local passengers was assessed upon such a small proportion of

the entire business within the state as to be but a thinly disguised attempt to tax the privilege of engaging in interstate commerce. The court said:

"If the payment of this tax was compulsory upon the company before it could do a carrying business within the state, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection. Upon this proposition we are unable to distinguish this case from Pullman Co. v. Adams, 189 U. S. 420, decided at the last term, wherein it was held that the privilege tax imposed by the state of Mississippi, upon each car carrying passengers from one point in the state to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit. It was urged, that under the Constitution of Mississippi, the Pullman Company was a common carrier, required to carry passengers, and therefore could not be taxed for the privilege of doing that which it was compelled to do; but in view of the decision of the Supreme Court of Mississippi, sustaining the tax, it was assumed that no such objection existed under the state constitution."

Other decisions of this court consider inability to withdraw from intrastate business as a practical matter. Thus, in *Western Union v. Kansas*, 216 U. S. 1, where a tax of a percentage of the entire capital stock of the Telegraph Company for the privilege of doing intrastate business was held invalid under both the commerce and due process clauses, it was contended

that, as the Telegraph Company might withdraw from its local business, it could not complain of the tax. The court observed that the Telegraph Company lawfully entered Kansas long before and was legally there when the act was passed. The state conceded its right to remain if it would pay the tax; and only because of its refusal sought the aid of the court to oust the company from its local business.

"The State," said this court, "knows that the telegraph company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of telegraphic business. Yet it seeks to enforce a regulation requiring the company by paying the 'fee' in question to assent to its interstate business being burdened and its property outside of Kansas being taxed in order that it may continue to conduct a business concededly beneficial to the public —a right lawfully acquired from the United States when Kansas was a territory, and exercised consistently with the statutes of the state for many years after Kansas was admitted as a state of the Union. * * "

"The telegraph company has expended in the state large sums of money, adequate for the purpose of enabling it to do both local and interstate business. The investment is there, and its magnitude, it is fair to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired; that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in

the state. It has been invested therein for the very purpose of doing local as well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place."

Findings XI, XII and XIII and Conclusion of Law V disclose facts to which the language quoted applies with full force. (Rec. 72, 73, 74.)

Barrett v. New York, 232 U. S. 14, holds invalid an ordinance requiring an express company to pay a license fee and give bond for each vehicle, conditioned for safe delivery of packages, on the ground that intrastate packages are handled by the same vehicles and employees that handle interstate packages.

Bowman v. Continental Oil Co., 256 U. S. 642, was a suit by the Oil Company to restrain enforcement of a New Mexico statute imposing a gallonage tax upon sale of gasoline in the state, and a tax of $50 for each station or place of business at which gasoline was handled and sold in both intrastate and interstate commerce. The gallonage tax was upheld, but the license fee of $50 was held invalid. The court said:

"No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition

of carrying on interstate or foreign commerce * * * But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence, it cannot be enforced at all."

So here, appellant necessarily transports both kinds of business by means of the same instrumentalities and employes, and cannot do otherwise. Therefore, a tax of a percentage of income from intrastate business, or a tax, however measured, for the privilege of doing intrastate business is, in reality, a tax for and condition of the right to do *both* kinds of business. Compare *Ludwig v. W. U. T. Co.*, 216 U. S. 146.

Interstate Buses v. Holyoke, 273 U. S. 45, was much relied on below, but not noticed by the State Supreme Court. It was a suit by a Bus Company to restrain a Street Railway Company and various public officials from enforcing a state statute forbidding the transportation of passengers within cities and towns of the State of Massachusetts without first obtaining a license and a certificate of public convenience and necessity. The lower court held that the statute was not shown to be a burden upon interstate

commerce because it was not shown that "the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's (Bus Company's) interstate passengers may not be carried efficiently and economically in buses used exclusively for that purpose, or that appellant's intrastate business is dependent in any degree upon the local business in question." The street railway had caused repeated arrests of the Bus Company's employes for failure to comply with the state law and obtain the certificate required for doing local business. The buses carried both local and interstate passengers. The State Supreme Court sustained the statute and its judgment was affirmed by this court. Upon the point here presented, the court used the following language:

"The burden is upon appellant to show that enforcement of the act operates to prejudice the interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying intrastate passengers without license over that part of its route which is parallel to the street railway. Its right to use the highways between Springfield and Hartford is not in controversy. While it appears that in Massachusetts both classes of passengers are carried in the same vehicles, it is not shown what part of the total number are intrastate or interstate. The record contains no information as to the number of persons, if any, traveling in interstate commerce on appellant's buses over the part of the route competing with the street railway. It is not shown that the two classes of business

are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried *efficiently* and *economically* in buses used exclusively for that purpose, or that appellant's interstate business is *dependent* in any degree upon the local business in question. Appellant may not evade the act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employes."

The case is in point, even though the statute was upheld, because the decision rests upon failure to prove the invalidating facts here found by both courts below. Findings XI, XII and XIII and Conclusion of Law V (Rec. 72, 73, 76). If we are correct in saying that the decision in the *Holyoke* case would have been against the statute had the invalidating facts been proved, it is controlling here.

Inseparability and mutual dependence of the two kinds of business, as conducted by rail carriers, are matters of common and judicial knowledge. In *R. R. Commission v. C. B. & Q. R. Co.*, 257 U. S. 563, the court said:

"Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent of the gross freight receipts of the railroads of the country are from intrastate traffic, and 50 per cent of the passenger receipts. * * * If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. * * *

"Effective control of the one must embrace some control over the other, in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them." * * *

Again, in *Colorado v. United States*, 271 U. S. 153, the court said:

"This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole."

Obviously, the courts below, could not have found the facts otherwise than as they did. Appellant's railroad was constructed in the State of Washington at a cost of over $100,000,000, to handle both kinds of business. Income from intrastate business is essential to its existence as a carrier of interstate commerce. Abandonment of appellant's intrastate business would have resulted in a loss in the year 1933 of $2,179,760 and a saving of not more than 14% of that amount. This is due to the fact that even though local service were discontinued it would be impossible to make much reduction in train service. In order to continue interstate service appellant would have to make a greater increase in its rates and fares than interstate commerce could bear. (Findings II, XI, XII, XIII, Rec. 58, 72, 73.)

Therefore, to require making of reports, taking out a license, and payment of a tax, for the privilege of doing intrastate business, is, in effect, to burden and regulate interstate commerce and to impose conditions upon the right to engage in it. As the amount of the tax, if valid, is a matter of state discretion, an essential instrumentality of interstate commerce may be destroyed by the state. This is made more apparent when we consider that, if the State of Washington can impose such a tax, all of the states through which appellant's line of railroad is constructed may do likewise. Compare *State of Minnesota v. Barber*, 136 U. S. 313; *Fox v. Standard Oil Co.*, 79 U. S. Supreme Court Advance Opinions, 1934-1935, page 339. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1. Quoting from the opinion of the court in the last case:

"It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each state would continue to meet its local expenses not only by exactions that directly burdened interstate commerce, but by taxation upon property situated beyond its limits."

Sprout v. South Bend, 277 U. S. 163, invalidates an ordinance prohibiting operation on the city streets of a motor bus unless it be licensed and payment made of a graduated fee based upon seating capacity. Sprout

operated between South Bend, Indiana, and Niles, Michigan. He was prosecuted and convicted for violation of the ordinance. Considering whether the ordinance could be sustained as imposing an occupation tax, the court said:

"A state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce * * *. But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; *and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.*" Citing Barrett v. New York, supra; Bowman v. Continental Oil Co., supra, and other cases.

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, sustains an Ohio statute imposing an occupation tax of a percentage of gross intrastate revenue for the privilege of doing intrastate business. The court quotes the language quoted above from *Sprout v. South Bend.* The opinion of the Supreme Court of Washington in the instant case says of the Ohio case that this court did not invalidate the tax, although

"the facts * * * make it plain that, if the Gas Company had withdrawn from its intrastate business, it would have completely destroyed its interstate business. And so that case sustains the holding in the case at bar that a tax upon gross income from intrastate business is valid, even though the Railway Com-

pany could not withdraw therefrom without also withdrawing from its interstate business."

The Company brought gas into the state in pipe lines where it was received at pressure reducing stations, thence passed into local distributing systems for delivery to consumers. This court held that interstate transportation ended at the local distributing system. Thereafter the Gas Company did only intrastate business for which the occupation tax was imposed. The interstate and intrastate business were done *consecutively* with *different* facilities; not, as here, *simultaneously* with the *same* facilities. The inseparability of the two kinds of business and dependency of the interstate upon the intrastate was not established in the Ohio case, as here. . Nor was there an obligation by state law to do intrastate business as a condition of doing interstate. The Ohio case is not authority for sustaining Chapter 191.

Cooney v. Mountain States T. & T. Co., 294 U. S. 384, 79 Law Ed. 498, condemns an occupation tax measured by number of telephone instruments. The act, as construed, imposes the tax for the privilege of doing both domestic and interstate business and therefore is invalid. The court again makes the above quotation from *Sprout v. South Bend* repeated in the *Ohio* case, and cites those cases. The Supreme Court of Washington in the instant case says of the *Cooney*

case that it was there distinctly pointed out that the tax was " 'not laid on revenue derived from monthly rates as distinguished from toll charges, nor imposed with respect either to the nature of the revenue, character of the service, or manner in which the charges are fixed.' " "From what is there said," says the Washington Supreme Court, "it would appear to be a reasonable inference that, if the tax were of the character described in the quotation just made from the opinion, the result might be different." The language quoted was used by this court in answering an argument made by defendants. It is not authority for saying that the tax would have been sustained had it been measured by gross revenue, even though imposed for the privilege of doing both local and interstate business. That point, though decided below, was not considered here. If the state court is right in its understanding of the *Cooney* case, *Crutcher v. Kentucky* and many like cases were overruled. Certainly, if the Washington court is right, the *Cooney* case is contrary to the *Pullman* and many other decisions of this court.

The language quoted by the State Court is immediately followed by the statement that the evidence shows that the same telephones, signaling apparatus, wires, etc., are used in common for both services. It was in this view, said this court, that the District

Court held it not feasible to provide separate statewide systems. But, said this court, "apart from that question," the telephone instruments are the means by which customers command service, whether intrastate or interstate. And, so far as the use of the instruments in interstate commerce is not excepted, the tax is laid indiscriminately regardless of their use. This court then said that while the state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce, it cannot tax interstate commerce nor the business which constitutes such commerce nor the privilege of engaging in it. And the fact that a portion of the business is intrastate, and therefore taxable, does not justify a tax either upon the interstate business or upon the whole business without discrimination. "There are," said this court, "sufficient modes in which the local business may be taxed without the imposition of a tax which covers the entire operation." Then follows the quoted language from *Sprout v. South Bend, supra.*

Certainly, there is nothing in the preceding language of the opinion to justify the statement that a tax which violates any of the four conditions precedent to validity stated in the *Sprout* case, repeated in the *Ohio* case and again in the *Cooney* case, will be sustained. The statement that there are "sufficient (other) modes of taxing the intrastate business," re-

minds us to say that the Railroad Revenue Act of Washington, Chapter 130, Laws of 1925, provides for taxing railroad property at its value as a *going concern*, including all franchises, rights and privileges, and all property whatsoever, tangible and intangible, used in operating the railroad. *Rem. Rev. St. Sec.* 11157 (4), (quoted in full in appendix). This statute has been so construed in *N. P. Ry. v. State*, 84 Wash. 510, 147 Pac. 45, and by the District Court for the Eastern District of Washington in *N. P. R. Co. v. Adams County*, 1 Fed. Supp. 163.

Finding VI (Rec. 60), shows that appellant's gross intrastate operating revenue in 1933 was $2,179,760 and the cost of reproduction of its property in Washington, new, less depreciation (according to I. C. C. valuation) is $29,733,312, while Finding No. II (Rec. 58) shows that appellant has invested in its railway line in Washington in excess of $100,000,000. Ad valorem taxes in Washington for 1933 were $1,238,385. Finding VII (e) (Rec. 64.) This suggests that ad valorem taxation, to say the least, is ample. The value on which those taxes are calculated includes the franchise and all intangibles, *including the privilege of doing business*, the very same privilege for which appellant is taxed by Chapter 191. Were it otherwise, the railroad would be taxed on the lesser aggregate value of the separate

parcels of real and personal property of which it is made up, not as a going concern. Compare *N. P. R. Co. v. State, supra.* This is a "sufficient mode in which the local business may be taxed," and marks the limit of the state's power to tax the business of the interstate transportation system. If this be not so these systems are at the mercy of the several states. If a tax of 1½% of gross revenue may be levied, why not 10% or 50%? And if Washington has the power claimed, so have the other states. Even before expiration of the period prescribed for Chapter 191 it was superseded by Chapter 180, Laws of 1935, Rem. Rev. St. 8370-36, raising the rate to 3%. *To uphold Chapter* 191 *will give to the states power of life and death over the interstate transportation system of the United States.*

The dissenting opinion below perceives the menace also adverted to by this court in *California v. C. P. R. Co.*, 127 U. S. 1, and by Mr. Justice Holmes in *Galveston, Harrisburg and San Antonio Ry. v. Texas*, 210 U. S. 217, where he said:

"The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt

or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce."

In his dissenting opinion in the case at bar Judge Steinert, citing *Bowman v. Continental Oil Co., supra, East Ohio Gas Co. v. Tax Commission, supra,* and *Cooney v. Mountain States Telephone & Telegraph Co., supra,* says in part:

"Under these cases, one of the essentials to the validity of a tax is that the one who is taxed could discontinue its intrastate business without also withdrawing from its interstate business.

"The majority seek to make a distinction between a tax imposed as a license to do business, or one upon the instrumentalities used and a tax on gross income, * * * The distinction is without substance, when the result in a given instance is to burden or interfere with interstate commerce * * *

"That the action of the state will interfere with interstate commerce is now very apparent. If the railroad companies or telephone companies should be permitted or be compelled to withdraw from their intrastate business, how many trains would continue to run and how many telephones would remain in place in this state, merely for the purpose of enabling their users to do an interstate business? Not only would all local service be discontinued, but with the exception, possibly, of one or two large cities, the people of the state would be without interstate service as well.

"If, as a matter of law, the companies may not withdraw from intrastate business, or if, as a matter of fact, it is wholly impracticable for them to do so, then such intrastate business must continue to be operated at the expense of the interstate business. If one state be permitted to impose burdens upon inter-

state commerce through the medium of taxation, then all states in which the companies operate may do likewise, and the accumulated burdens thus imposed would in the end result in complete strangulation of all their interstate commerce. The sum and substance of it all is that the tax imposed on intrastate business must be borne by the proceeds from interstate business. It is, therefore, a burden upon, and interferes with, interstate commerce, and for that reason is invalid."

We submit that state power to tax is *not* power to destroy, as applied to the interstate transportation system. Compare *R. R. Commission v. C. B. & Q. R. Co.*, 257 U. S. 563; *G. N. v. Minnesota*, 278 U. S. 503.

Appellee relied below most strongly on *Ohio Tax Cases*, 232 U. S. 576. This case is not noticed by the State Supreme Court. There the tax was for the privilege of exercising the corporate franchise granted by the state to a domestic corporation. *Kansas etc. v. Botkin*, 240 U. S. 227, is a similar case. *St. Louis etc. R. Co. v. Arkansas*, 235 U. S. 350, also relied upon below, sustains a *property* tax measured by percentage of the outstanding capital stock, as is recognized in *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450. Therefore, those cases, and others in the same category, are not in point. Besides, the facts here present were not present in those cases. The Supreme Court of the United States has never sustained a statute like Chapter 191 under the circumstances shown by this record.

By Sections 1 (18), 1 (20), 13 (4), 15A (2), 15A (3), Chapter 1, Title 49 U. S. C. A., and Sections 2 and 4 of the Emergency Railroad Transportation Act of 1933, (Chapter 7, Section 251, et. seq., Title 49, U. S. C. A.) Congress has imposed on the local business of interstate carriers obligations in the interest of the interstate transportation system, which are inconsistent with the power of the state to levy a privilege tax upon the local business. The state cannot impose an occupation tax upon an interstate carrier under the theory that if it desires to do local business in the state it must pay for that privilege, since the carrier is obligated by federal law to engage in the very occupation which the state presumes to tax.

Under these laws Congress has so taken possession of the local business, in so far as such business has a direct relation to interstate business, that there is not room for state power to license local business as a privilege which may be granted or denied at the will of the state, nor to take any action whatever which will disable or hamper the carrier in the performance of its duty to maintain an interstate system of transportation and economically and efficiently serve interstate commerce at reasonable rates.

It is therefore obvious that the exaction of a tax by the state for the privilege of carrying on local

commerce is a direct burden on, and a regulation of, interstate commerce, where, as here, both classes of commerce are carried over the same lines by the same employes, in the same trains, and by the use of the same instrumentalities, and the interstate business is absolutely dependent for its efficient and economical transaction upon the local business. Even if there could have been a doubt upon this point prior to the enactment of the Transportation Act, there can be none now, in view of the provisions of that act, and there is therefore controlling reason for the strict application of the rule in the *Allen*, *Adams* and other cases supra, in view of the amendments and additions to the Interstate Commerce Act by the Transportation Act of 1920. *Railroad Commission v. C. B. & Q. R. Co.*, 257 U. S. 563; *Colorado v. United States*, 271 U. S. 153; *New York v. U. S.*, 257 U. S. 591; *Dayton-Goose Creek R. Co. v. U. S.*, 263 U. S. 456; *Atlantic Coast Line R. R. v. Daughton*, 262 U. S. 413.

Quoting from *Atlantic Coast Line R. R. v. Daughton, supra*:

"Under the commerce clause it is essential that a state tax shall not directly burden interstate commerce, and that it shall not discriminate against interstate commerce. With these essentials the North Carolina act complies. It is not assessed on gross receipts."

Quoting from *Railroad Commission v. C. B. & Q. R. R., supra*:

"Congress, as the dominant controller of interstate commerce, may restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. In such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field."

Chapter 191 Laws of 1933, violates the Commerce Clause of Article 1, Section 8, and the Due Process Clause of the 14th Amendment to the Constitution of the United States because appellant's intrastate business, from which it cannot withdraw while continuing to do interstate business, is done at a loss, and the tax imposed by Chapter 191, if paid, must be paid out of income derived from appellant's interstate business, and from property located outside the State of Washington. The tax is not rendered constitutional by the fact appellant did not obtain permission, either by writ of review from the order of the Department of Public Works of the State of Washington, or otherwise, to raise rates which the State Court has found, as a practical matter, cannot be raised.

While this court has always held that *ad valorem* taxes may be imposed upon property used in interstate commerce, it has likewise always held that an excise or license tax which must be paid out of the receipts from interstate commerce is a burden on such commerce. *Leloup v. Port of Mobile, supra; Allen v. Pullman Co., supra; Western Union Telegraph Co. v.*

Kansas, 216 U. S. 1; *Postal Telegraph & Cable Co. v. Richmond*, 249 U. S. 252; *Interstate Buses v. Holyoke Street Ry., supra; Anglo-Chilean Nitrate Sales Corporation v. Alabama*, 288 U. S. 218.

In *State ex rel Stiner v. Yelle, supra*, and subsequent decisions interpreting Chapter 191, Laws of 1933 (including the decision in the case at bar), the Supreme Court of Washington has held the tax imposed by Chapter 191 is an excise rather than a property tax.

In *Allen v. Pullman Co., supra*, it was urged that a tax of $3,000 per annum for carrying one or more local passengers on cars operating within the State of Tennessee was a burden upon interstate commerce, to which argument this court replied that "if the payment of this tax was compulsory upon the company before it could do a carrying business within the state, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection."

In *Postal Telegraph & Cable Co. v. Richmond, supra*, a statute of Virginia required all telegraph companies doing business in the state to transmit all messages, both state and interstate, upon the payment of the usual charge. It was argued that this statute, to-

gether with an ordinance of the City of Richmond imposing a license tax for the privilege of engaging in business in the city, imposed a burden upon interstate commerce for the reason that the net receipts from its intrastate business were insufficient to pay the tax, and payment, if compelled, would have to be made from interstate receipts. Discussing this contention this court said: "If the facts were as thus asserted, it well might be that this tax would be invalid."

In *Western Union Telegraph Co. v. Kansas, supra,* the court said: "We are aware of no decision by this court holding that a state may, by any device or in any way, either by a license tax in the form of a 'fee' or otherwise, burden the interstate business of a corporation of another state." And in *Anglo-Chilean Nitrate Sales Corporation v. Alabama, supra,* it was said: "The power of the state to withhold from a foreign corporation permission to exercise its franchise to do business therein, does not enable it, when granting the privilege, to burden by taxation interstate commerce carried on by such corporation within the state."

Appellant's answer alleges, and both courts below have found, that appellant's intrastate business was conducted at a loss during the year 1933, and that

the tax imposed by Chapter 191, Laws 1933, if paid, will have to be paid out of appellant's earnings from interstate and foreign commerce and from the income from its property located outside the State of Washington. (Finding of Fact VIII, Rec. 69.)

See also opinion below 83 Washington Decisions 52, 66, 48 Pac. (2) 931, 938, Rec. 84.

Finding XIII (Rec. 73), is that appellant's railroad is economically managed and its operation in intrastate business is essential to the people of the state. Appellant cannot increase many intrastate rates because of competition of other kinds of transportation, and for economic reasons, nor can it do so under the laws of the state without consent of the Department of Public Service. Appellant applied for an increase of intrastate rates but the application was denied for the reasons stated in the Department's findings attached to the supplemental answer as Exhibit "A". Appellant, as a practical matter, has been unable to increase its revenue from intrastate business, and the court finds that it has done all it can, but without success. The application for increased rates, denied by the Department's order, was made in connection with an application to the Interstate Commerce Commission in Ex Parte 103, 191 I. C. C. 361, for an extension of the period during which increases were allowed. The application was denied

April 7, 1933. Chapter 191 was effective from August 1, 1933, to July 31, 1935, (Sec. 2 (2)). Necessity for reducing local short haul rates to meet truck competition is common knowledge. *Western Trunk Line Class Rates*, 204 I. C. C. 595, 645, 647. The deficit from intrastate business, exclusive of return on value, and exclusive of the occupation tax in question, was $99,269 for the year 1933 (Finding VI, Rec. 60.)

The carrying charge on the investment is no less an expense of the business than the cost of labor and materials. *Missouri ex rel. S. W. Bell T. Co. v. P. S. Commission*, 262 U. S. 276; *Rowland v. Boyle*, 244 U. S. 106; *N. P. R. Co. v. North Dakota*, 236 U. S. 585. The obligation of intrastate business under Transportation Act, 1920, to contribute a just proportion of operating expense, including return on value of the property, is declared in *R. R. Commission v. C. B. & Q. R. Co.*, 257 U. S. 563. Whether the burden on interstate commerce be due to inadequate intrastate rates, excessive taxation, excessive expenditures in the local interest, or otherwise, is without legal significance. Compare *Colorado v. United States*, 271 U. S. 153; *Smyth v. Ames*, 169 U. S. 466. Even ad valorem taxation (measured by a percentage of gross revenue), is subject to the restraint of the commerce clause. *G. N. R. Co. v. Minnesota*, 278 U. S. 503. Why,

then, not an occupation tax? In *Southern R. Co. v. Kentucky*, 274 U. S. 76, considering a franchise tax, the court said that "no intangible element of substantial amount over and above the value of its physical parts inheres in a railroad that cannot earn a reasonable rate of return on its bare-bones—as the mere tangible elements properly may be called, *Omaha v. Omaha Water Co.*, 218 U. S. 180." Certainly, no value inheres in the so-called privilege of being compelled to do intrastate business at a loss. *Allen v. Pullman Co., supra; Pullman Co. v. Adams, supra; Postal Telegraph Co. v Richmond, supra.* And if that phase of the carrier's business is done at a loss it is manifest that interstate commerce must really carry the burden of the tax, though nominally it may be imposed upon the local business.

The tax is not rendered constitutional by fact appellant did not secure permission to raise intrastate rates which, due to competitive and economic conditions, cannot be raised.

The state court distinguished the *Richmond* case, *supra*, on the ground that the legislature has provided a remedy by application to the Department for increased rates, "with right of review by the Superior Court and appeal to this court." From the findings, said the court, it appears that an application has been made and denied and that another is pending, but it does not appear "that the respondent has ex-

hausted the relief granted by the statute, and until it does so, it cannot be said that, even though the intrastate business is being conducted at a loss, it is such a burden upon interstate commerce as would justify holding the law unconstitutional." *Postal T. Co. v. Fremont*, 255 U. S. 124, is cited. The *Fremont* case is so different in its facts as to lack authority here, even had no application for increased intrastate rates been made and denied. The state court must mean that appellant did not seek review and reversal of the Department's order. Review, of course, would have been unavailing unless the order would have been reversed. Therefore, the state court assumed that it was erroneous, contrary to the well settled rule in the State of Washington. *P. S. E. Ry. Co. v. R. R. Commission*, 65 Wash. 75; 117 Pac. 739; *State ex rel Tacoma Eastern Ry. Co. v. N. P. R. Co.*, 104 Wash. 405; 176 Pac. 539; *North Bend Stage Line v. Denney*, 153 Wash. 439; 279 Pac. 752.

Court review is not, as in *Prentis v Atlantic Coast Line*, 211 U. S. 210, a part of the administrative machinery. The state superior and supreme courts, on writ of review, exercise a purely judicial function. Therefore, after the Department had finally denied the increase of rates applied for, appellant had exhausted its administrative remedy to avoid the uncompensatory rates under which it was compelled to ren-

der intrastate service. See *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196, where the nature of the remedy by writ of review of the Department's order is determined.

The *Kuykendall* case went up from the State of Washington. It involved the statutory provisions under which the Department of Public Works of Washington is charged with the duty of fixing the rates of public utility companies. Replying to a similar point as that made by the Supreme Court of Washington in the instant case, Chief Justice Taft, speaking for the court said:

"It is clear that the function to be performed by the Superior Court under this section (10428 Remington's Compiled Statutes of Washington) is judicial * * *. It is apparent from these provisions (Sec. 10428 Remington's Compiled Statutes of Washington, which will be found in the appendix) that after the commission finally denied the increase of rates applied for, the company had exhausted its administrative remedy to avoid the alleged confiscatory rates under which it was compelled to render the service."

Appellant lost no rights by acting upon the presumption of validity of the Department's order. *Pacific T. & T. Co. v. Kuykendall, supra.* But, even so, what would it avail appellant if the loss from diversion of traffic would be greater than the gain from increased intrastate rates? *Florida v. United States*, 282 U. S. 194, holds that an order of Interstate Com-

merce Commission under Sec. 13 (4) is void for lack of a finding that increased intrastate rates would, in fact, produce additional income, for, said the court, "the raising of rates does not necessarily increase revenue. It may, in particular localities, reduce revenue, instead of increasing it, by discouraging patronage." *C. M. & St. P. v. Wisconsin*, 238 U. S. 492, holds invalid under the due process clause a Wisconsin statute prohibiting letting down of an unengaged upper berth in a sleeping car when the lower berth in the same section is occupied. The Wisconsin Supreme Court said that "if compliance with this command imposes extra burdens, they are not of such an unusual nature as to be oppressive; and if it involves additional costs in the conduct of the business, then the defendant can readily be secured against such loss by having the rate adjusted to meet this burden." This court, reversing the Wisconsin court, said:

"But if the statute is not a reasonable exercise of the police power and yet operates to take property, such taking cannot be justified on the ground that the company *may* be able to secure an increase in rates. For, without considering any other question involved, it is sufficient to say that the taking and a fixed right to compensation must coincide, though in some cases the time for payment may be delayed. Sweet v. Rechel, 159 U. S. 380."

Not only is there no fixed right of compensation payable at the time of taking, but compensation will

never be received because increased rates, if obtained, will not apply retroactively. Even though the state court's position were otherwise well taken it is untenable under the Wisconsin case. We know of no precedent for sustaining an otherwise unconstitutional tax on the assumption that other presumptively valid state action is unconstitutional and will be set aside by a state court at the end of protracted and expensive litigation, even if indemnity for past loss would then be received. More especially, where it affirmatively appears that greater loss than gain will follow nominal success.

Chapter 191, Laws 1933, violates due process clause of 14th Amendment to Constitution of United States

It is, perhaps, unnecessary to add that, as the tax must be paid out of income derived from appellant's interstate business, and from property located outside the State of Washington, Chapter 191 violates the 14th Amendment, as well as the commerce clause. The trial court so found. (Finding of Fact VIII, Rec. 69; Conclusion of Law VII, Rec. 76.) The state Supreme Court found that appellant's intrastate business is conducted at a loss. The following authorities point to the invalidity of the statute under the 14th Amendment:

Western Union Telegraph v. Kansas, supra; Ludwig v. Western Union, 216 U. S. 146; *Fargo v. Hart*, 193 U. S. 490; *Wallace v. Hines*, 253 U. S. 66; *Alpha Portland Cement Co. v. Massachusetts, supra; Shaffer v. Carter*, 252 U. S. 37.

The Tax imposed by Chapter 191, Laws 1933, is not rendered constitutional by reduction of ad valorem taxes

The Supreme Court of the State of Washington mentions Chapter 4, Laws of 1933 (Remington's Revised Statutes of Washington, 1933 Supplement, Sec. 11238-1), Initiative Measure 64, limiting the aggregate of ad valorem taxes on real and personal property to 40 mills on the assessed value. It is said that by this law appellant's ad valorem taxes have been reduced approximately one-half. We need not stop to show that the court greatly overestimates the reduction. Why the 40 mill act is mentioned by the court is not apparent, except that it says: "having thus provided for a reduction of taxes upon real and personal property, it was necessary for the legislature to find other sources of revenue, and Chapter 191 was undoubtedly passed for this reason."

It is something new to intimate that an unconstitutional tax ought to be sustained because the state has not imposed a constitutional tax for as much as it might. In its brief below the State urged, and will

undoubtedly urge here, that since appellant's total tax bill under Chapter 191 and Initiative Measure 64 is somewhat less than appellant's ad valorem taxes imposed prior to the enactment of this legislation, the tax imposed by Chapter 191 does not constitute a burden upon interstate commerce. Such an argument amounts to this: If taxes imposed under a constitutional method are reduced, so that when added to the taxes imposed under a new and unconstitutional method, they are less than the total amount of lawful taxes formerly imposed, the aggregate result makes the unconstitutional method constitutional. If that argument is sound, then the constitutionality of a tax as a burden upon interstate commerce is determined, not by its effect upon that commerce, but by the extent to which a state may impose ad valorem taxes.

Meyer v. Wells Fargo & Co., 223 U. S. 298, was an action to enjoin the enforcement of a gross revenue statute of the State of Colorado, on the ground it was a burden upon interstate commerce. The state made a contention similar to that made in the case at bar with reference to the 40 mill act, which this court answered as follows:

"It was argued in some detail that taking into account the rest of the act and other statutes passed later at the same session, this really was a property tax. But the scope and purport of the act, so far as

it affects Express Companies, are too obvious to admit such a view. The tax is 'in addition to the taxes levied and collected upon an ad valorem basis' * * *. Therefore, this tax cannot be an attempt to reach the value of what is by the law to be valued and taxed in a different way."

Initiative 64 is a general law, applying to all real and personal property from which appellant received no special benefit. *Denny v. Wooster*, 175 Wash. 272; 27 Pac. (2) 328. It was strengthened, the limit still further reduced, and reenacted as Initiative 94, Chapter 2, Laws of 1935 (Remington's Revised Statutes of Washington, Sec. 11230-1a). *Love v. King County*, 81 Washington Decisions 405; 44 Pac. (2) 175. That the people of Washington, menaced by ever mounting delinquencies of ad valorem taxes, which they could not pay, took the law into their own hands may be inferred from the enactment of these measures, as well as from acts offering a premium for the payment of delinquent ad valorem taxes. See Chapter 53, Laws 1933, and Chapter 166, Laws 1935. The constitutionality of these statutes has been sustained by the Washington court. *Vance Lumber Co. v. King County*, 84 Wash. Decisions, 330. (Decided Nov. 13, 1935, and not yet reported in Pacific Reporter.)

Bearing in mind that the appellant is subject to ad valorem taxation on its value as a going concern (including its franchise to do business), whereas other

businesses, except telegraph companies, are not so valued, the new setup is far from conferring special benefits on appellant—rather is the contrary true. The only cases cited by the state in the court below as sustaining its contention that Chapter 191 and Initiative 64 must be construed together, in order to determine whether the tax is a burden upon interstate commerce, are *Baker v. Druesedow*, 263 U. S. 137, 142; *Greene v. Louisville etc. R.*, 244 U. S. 499, 518; *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 479, 480. The *Baker* case involved an ad valorem tax imposed upon the property of a Texas Railroad. Under the statutes of that state a separate tax was imposed upon tangible and intangible property. The tax imposed by each statute was nevertheless an ad valorem tax, and therefore within the power of the state. Under these facts this court said that "taxes on the two kinds of property are treated by this court as part of a single ad valorem tax on railroads."

In the *Greene* case property taxes were also involved, as evidenced by the following quotation: "The various boards whose united action is by law intended to effect a uniform assessment on all classes of property, are to be regarded as one tribunal."

The *Gregg* case involved the charge of unconstitutional discrimination against transactions in interstate commerce under a statute imposing a gallonage tax on gasoline purchased in other states and brought into South Carolina, and there stored to be used and consumed in South Carolina, when there was at the same time a similar statute imposing a tax of the same amount on gasoline sold by dealers within the state. The state court had held these two statutes were to be construed together. Obviously, in a case where discrimination is charged, that would be true. All this court held was that "when the Supreme Court has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves."

The Washington court has not held that these two statutes must be construed together, but by its reference to Initiative 64 has inferred that because appellant's ad valorem taxes were reduced the state could offset the reduction by a tax for the privilege of engaging in a business which the appellant does not have the right to renounce, either as a matter of state or federal law, and which it cannot, as a practical matter abandon in any event while continuing its interstate business.

Appellant submits that the judgment of the Supreme Court of the State of Washington is erroneous and prays for a reversal.

Respectfully submitted,

F. G. DORETY,
THOMAS BALMER,
EDWIN C. MATTHIAS,

Counsel for Appellant.

Address:
F. G. DORETY,
1120 Great Northern Bldg.,
St. Paul, Minnesota.

THOMAS BALMER,
EDWIN C. MATTHIAS,
404 Union Street, Seattle, Washington.

APPENDIX

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE TRIAL COURT

I.

This is an action by the State to recover from the Great Northern Railway Company a tax of 1½% of the gross intrastate revenues imposed by Chapter 191, Section 2(2) (e), Laws of 1933, for the months August to December, 1933, inclusive.

II.

Defendant is a Minnesota corporation. It owns and operates a system of steam railway having its eastern termini at St. Paul and Duluth in the State of Minnesota, and Superior in the State of Wisconsin, and extending westerly from said termini through the States of Minnesota, North and South Dakota, Iowa, Montana, Idaho, Washington, Oregon, California and the Dominion of Canada, with its western termini at Seattle and Tacoma in the State of Washington, Portland in the State of Oregon, Bieber in the State of California, and Vancouver in the Province of British Columbia, Dominion of Canada. Said line of railroad was constructed and equipped in the State of Washington more than thirty-five years ago,

long prior to the enactment of Chapter 81, Laws of 1905, and Chapter 191, Laws of 1933, and is now and for more than thirty-five years last past has been a public utility devoted to and used for the transportation of passengers and freight, both intrastate and interstate, and for the transportation of the United States mails, and has been and is now an instrumentality of interstate commerce and of the commerce of the Government of the United States, subject to the Act of Congress approved February 4th, 1897, entitled "An Act to Regulate Commerce," and the Acts amendatory thereof and supplemental thereto, including the Emergency Transportation Act of 1933, and also, in respect to intrastate transportation performed by it within the State of Washington, subject to the Constitution of said state and to the "Public Service Commission Law" of said state, consisting of Chapter 117 of the Washington Session Laws of 1911 and the acts amendatory thereof and supplemental thereto. Long prior to the enactment of Chapter 191, Laws of 1933, defendant had expended and now has invested in its said railway line in the State of Washington more than one hundred million dollars, in order to provide adequate facilities for the transportation of both interstate and intrastate commerce and the commerce of the Government of the United States, including the United States mails.

III.

Defendant's railroad system comprises approximately 10,541 miles of track, of which approximately 1,450 miles are and were in the State of Washington at the time said Chapter 191, Laws of 1933, became effective. Defendant's railroad is taxed in the State of Washington under and by virtue of Chapter 130, Washington Special Session Laws of 1925, on its fair market value considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. *Ad valorem* taxes have long been levied and paid thereon and for 1933 were $1,250,860.49. The tax of 1½% of gross revenue imposed by said Chapter 191, Laws of 1933, is not a property tax nor in lieu, either in whole or in part, of a property tax, nor is it a supervision tax, but it is an excise tax imposed on defendant solely for the privilege of doing a "steam railway business" in the State of Washington.

IV.

Defendant's gross revenue from intrastate "steam railway business" (on which the tax of 1½% is computed) for August to December, 1933, and the amount of the tax, are as follows:

Month	Gross Revenue	Tax
August	$168,256.60	$ 2,523.85
September	189,626.07	2,844.39
October	195,920.76	2,938.81
November	194,615.73	2,919.24
December	117,470.66	1,762.06
Total		$12,988.35

These are the amounts shown in defendant's amended answers to plaintiff's interrogatories.

It was stipulated in open court that, if plaintiff be entitled to recover anything, the judgment should be without prejudice to the right of either party to the adjustment and correction provided for by the Act. Subject to this stipulation, the court finds that if plaintiff were entitled to recover anything in this cause, the amount would be the said sum of $12,988.35.

V.

It has long been known and universally recognized that intrastate transportation in the State of Washington is much more expensive per unit of freight than interstate. Some of the reasons are the much shorter average haul of the intrastate business, the lesser traffic density, especially on branch lines most largely used locally, much less tonnage per train, more frequent stops, double terminal expense, due to the fact that intrastate freight is both originated and

terminated in the state, whereas interstate freight incurs at most but one of these handlings in the state. These and other peculiarities of intrastate business make it greatly more expensive per unit than interstate business. It is unnecessary to find the exact percentage of additional cost of intrastate business over interstate, but the court finds that such cost is greater in proportion to revenue than the cost of the interstate.

VI.

Defendant as a carrier subject to the Acts of Congress regulating interstate commerce keeps its system accounts as required by the Interstate Commerce Commission, but these accounts do not segregate or show the results of operations in individual states, nor do they divide revenues and expenses between interstate and intrastate business. Defendant also files annual reports with the Department of Public Works of Washington, showing certain statistics of its operations within the state, but such reports do not segregate interstate from intrastate expenses, and while they purport to segregate interstate from intrastate revenues, the court finds that such segregation has never been accurately made, for the reason that it was never a matter of importance either to the state or to the Railway Company prior to the imposition of the state occupation tax. For these

reasons, and because no accounts are kept currently of the expenses of intrastate business separately from interstate business within the State of Washington, a special study was required to determine the financial result of operating the defendant's railway line in intrastate commerce in the State of Washington for the year 1933. This study was made by defendant's witness, W. M. Burn, a railroad statistician and accountant of ability and experience. No original study of the subject was made by or in behalf of the plaintiff, but its witness, C. A. Manschreck, statistician for the State Tax Commission, undertook to point out certain alleged errors in Mr. Burn's study and to restate the defendant's exhibit based upon his (Mr. Manschreck's) correction of these alleged errors. Based upon the evidence of Mr. Burn and Mr. Manschreck and the other evidence in the record, the court finds that the operating revenues, operating expenses, net railway operating deficit and other results of the defendant's intrastate operations in Washington for the year 1933, are as follows:

Great Northern Railway Company—Washington—Calendar Year 1933

INTRASTATE OPERATIONS

1. Gross Operating Revenues	$2,179,760
2. Operating Expenses	1,730,361
3. Net Revenue from Railway Operations	449,399
4. Railway Tax Accruals	335,247

5. Railway Operating Income	114,152
6. Equipment Rents—Net Debit	19,966
7. Joint Facility Rent—Net Debit	193,455
8. Total Rentals—Net Debit	213,421
9. Net Railway Operating Deficit	99,269
10. Cost of Reproduction New, Less Depreciation, as of I. C. C. Valuation Date (June 30, 1915) plus Additions and Betterments to December 31, 1933, of Railway Property and Equipment in Washington — Intrastate Proportion	29,733,31[illegible]
11. Annual Rate of Return Earned on above Reproduction Cost	Deficit
12. Interest on above Reproduction Cost at 5.75% per Annum	1,709,665
13. Amount Short of Earning a Return of 5.75% per Annum	1,808,934

VII.

Gross operating revenues shown in the foregoing finding (No. VI.) are those actually earned by the defendant in intrastate commerce during the year 1933. The operating expenses and other charges shown are those actually incurred by the defendant in such commerce during the year 1933, as nearly as such expenses and other charges can be determined, and the court finds that they are substantially correct as shown. These expenses and other charges represent the direct cost incurred by the defendant in intrastate commerce in the state during the year 1933 plus an apportionment of certain expenses and charges commonly incurred in both interstate and intrastate commerce within the state, which apportion-

ment has been made on the basis of various use units. The use units so employed the court finds are in all cases suitable and comparable for the purpose of obtaining a reasonable division of expenses and charges with respect to property used in common. In further explanation of Finding No. VI. the court finds and states that the results there shown were reached by the following methods:

(a) *Terminal Costs.* The expense of switching in terminal and freight division points was ascertained by a special study made in a test week. The week used was that ending June 15th, 1934, after determining that that period was fair to the State and representative of conditions during the year 1933. The test week was, in fact, too favorable to plaintiff, in that the volume of traffic moving during that week was greater than that moving during an average week of 1933, being approximately 1/49th, instead of 1/52nd of the year's traffic, resulting in a lower cost per unit of traffic than the average of 1933, and therefore resulting, when applied to defendant's intrastate freight business for the entire year, in understating the cost. This study of terminal expense was made by an accepted and widely used method known as the "Coverston-Sauer Formula." This formula has often been used in important cases before the Interstate Commerce Commission and has the approval of that

body. It has been used and accepted in a number of court cases in this state. The basis is the engine-hour cost of switching in the several classes of switching work, as, for example, breaking up and assembling cars into trains, moving cars between breakup yards and industrial tracks, etc. The total cost of the work includes wages, supplies, maintenance of tracks and locomotives, and all applicable costs ascertained in detail and segregated by appropriate account numbers in accordance with the uniform system of accounts prescribed by the Interstate Commerce Commission. The details are too voluminous to be set out in these findings, but they are fully described in the testimony and explained in Great Northern Exhibit 11, pages 16 to 27, inclusive.

(b). *Road Haul Costs.* A special study was made of each train run on the defendant's line in the state during the test week ending November 21st, 1933, which was fairly representative of conditions during the entire year. This study was made to ascertain the car-miles, gross and net ton-miles and kind of freight, whether intrastate or interstate. The direct operating expense for wages, fuel, water and lubricants of the various trains during this period was ascertained. Indirect expenses, such as maintenance of way and structures, and maintenance of equipment, were applied to the intrastate business in proportion

to the use made of the property by that business, different appropriate use units being used for the various services. The details are shown on pages 12 and 13 of Exhibit 11.

(c). *Capital Charges.* The cost of reproduction new, less depreciation, of the defendant's railroad property in the state as of the Interstate Commerce Commission valuation date (June 30th, 1915), plus additions and betterments to December 31st, 1933, is $122,038,008. Of this the court finds that $29,733,-312 is applicable to the defendant's intrastate traffic. This figure was obtained by finding the relationship of intrastate operating expenses to total operating expenses in the state for the year 1933, and represents as nearly as may be found the value of the defendant's property devoted to intrastate commerce in the State of Washington at the time of the hearing of this cause.

(d). *Joint Facility Rents.* The defendant incurred a net debit of $794,018 for joint facility rents in the State of Washington in the year 1933. This expense the court finds is assignable to the defendant's intrastate business upon the basis of the relationship of intrastate operating expenses to total operating expenses within the state for the year 1933. The plaintiff's witness criticized this allocation, upon the

ground that the major part of the defendant's joint facility rental is paid for the joint use of the Northern Pacific Railway Company's railway line between Seattle and Vancouver, Washington, and that because the ratio of interstate to intrastate car-miles of the defendant on this line is higher than the ratio of defendant's interstate operating expense to intrastate operating expenses in the state, the joint facility rentals incurred on this line should have been divided between the defendant's interstate and intrastate business on the basis of the car-miles made in the two classes of service on the line. No effort was made by the plaintiff to localize any other line of the defendant in the state, either as to joint facility rentals, operating expenses or charges of any kind. On the contrary, state-wide averages were used by the plaintiff's witness in the computation of all other costs. The court finds that for the purpose of properly allocating joint facility rentals, the defendant's property in the state must be treated as a whole, because the traffic contributed by the Seattle-Portland line to the defendant's other lines in the state increases the volume of its business more than it increases the expense of handling, and thus operates to reduce the unit cost of its entire operations throughout the state. In addition, the court finds that the defendant has several lines in the state on which low-grade intrastate traffic predominates,

and that, if the expense of operating such lines were assigned to intrastate business on a car-mile basis, the total expense assigned to the defendant's intrastate traffic would be greater than the amount assigned thereto by the court's finding No. VI.

The court further finds that, by having joint use of said Seattle-Portland line through the payment of said joint facility rentals, the defendant is enabled to secure additional traffic for its lines in the state as a whole and thus to reduce its cost of operation per unit of traffic below the cost that would be incurred in the absence of said arrangement.

(e) *Taxes.* *Ad valorem* taxes paid by the defendant on its property in Washington for the year 1933, after deducting a small amount charged to other railway tenants of its property, were $1,238,385. The Federal taxes chargeable to Washington on the basis of the relation of Washington operating revenue to system operating revenue for the year 1933 amounted to $9,593, making total state and Federal taxes chargeable to the state of $1,247,978. This amounts to 15.38% of the defendant's gross operating revenues—intrastate and interstate—earned in the State of Washington in the year 1933. The court further finds that this amount should be charged to the intrastate and interstate business, respectively,

upon the basis of the gross revenues earned in the two classes of service in the state, and that the sum of $335,247 should thus be charged for state and federal taxes to the defendant's intrastate business in the year 1933.

Apportionment of taxes to intrastate business on the relation of gross interstate and intrastate revenue is a generally used basis, has been used in rate litigation heretofore occurring in this state, and is correct. The alternative method suggested by plaintiff, namely, the relation of freight car-miles plus passenger car-miles—intrastate to interstate—is without precedent, and is incorrect. It attempts to make a common denominator of the freight car-mile and the passenger car-mile, which are two entirely different things. The plaintiff further criticizes the gross revenue basis of apportionment, upon the ground that it assigns to the State of Washington only a mileage proportion of interstate revenues and that, because Washington is a terminal state, it is entitled to more than a mileage prorate of interstate revenues. Increasing the assignment of interstate revenue to the state proportionately reduces the assignment of taxes to the intrastate business.

The court finds, however, that the mileage prorate method is correct, for the following reasons:

(1). It is the method long prescribed by the Department of Public Works of Washington for railroad reports to that Department.

(2). It is the method used in reporting to the Railroad Commissions of all other states through which the defendant operates.

(3). While other methods have been suggested, none has ever been agreed upon, and the Interstate Commerce Commission, after holding extended hearings on the subject, failed to make any decision.

(4). Any different method would have to be agreed upon by all the states and the Interstate Commerce Commission, and no such agreement is obtainable, as demonstrated by the proceedings before the Interstate Commerce Commission in the case just mentioned.

(5). On the defendant's line, the interstate bridge traffic—meaning traffic that neither originates nor terminates in Washington, but moves through the state—is practically equal to the interstate traffic that originates or terminates in the state. In 1933, the total amount of bridge traffic handled by the Great Northern in the State of Washington amounted to 927,498 tons, which was almost equal to the total interstate traffic originated or terminated in the state, 1,069,903 tons. Thus, as against every ton

which incurs a terminal handling in Washington, there is practically a corresponding ton whose terminal handling is entirely in other states. The average interstate shipment handled over the defendant's line in Washington is thus found to incur substantially one-half of one terminal handling in the state, as compared to two terminal handlings incurred by each intrastate shipment — a ratio of one to four. The assignment of interstate revenues to Washington upon a mileage basis gives Washington credit for all the revenue covering terminal costs to which the state is entitled and is fair to the intrastate traffic.

(6). One of the reasons advanced by the plaintiff for augmenting Washington mileage proportion of interstate revenues is the contention that expense disproportionate to mileage is incurred at the terminals in Washington. It is true that the operation of terminals is expensive, but the court also finds that operating expense disproportionate to mileage is incurred in other states. Examples of this are (a) operation through the Rocky Mountains in Montana, while the difficulties of mountain operation in Washington have been very much reduced by the Cascade Tunnel, which very much lessens operating expenses; (b) the reduction of both mechanical and personal efficiency by extremely cold weather on the central and eastern part of the defendant's line, a condition

which does not exist in Washington; (c) the necessity of using treated water for locomotives on the plains, no similar expense being required in Washington.

(7). The defendant's large Washington terminals are at Seattle, Tacoma and Spokane. Its large eastern terminals are at the Twin Cities in Minnesota, and at the head of the Great Lakes. The valuation placed by the Interstate Commerce Commission upon said western terminals is but 42.86% of the valuation found for its said eastern terminals, and the mileage of tracks in its said western terminals is but 30.20% of the mileage of tracks in its said eastern terminals. Therefore, if it be assumed that operating expense is increased in proportion to the extent and value of terminals and that revenues should be allocated to states in the same proportion, there would be more revenue assigned from Washington to Minnesota than there would be to assign from Minnesota to Washington on a car moving from Washington to Minnesota, or vice versa.

All things considered, the court finds that, if the mileage proration method were to be modified on the theory that Washington is a terminal state, it would be necessary to apportion as much interstate revenue from other states to Washington as would be appor-

tioned from Washington to other states. The court therefore finds that the mileage prorate method of assigning interstate revenues to Washington is correct and fair to the intrastate traffic.

(f). *Equipment Rentals.* Equipment rentals applicable to Washington intrastate traffic were determined upon the relation of intrastate car-miles to total car-miles in the state during 1933 in the passenger and freight services, respectively. The evidence shows that the assignment is in substantial accordance with the actual use in the state of the equipment on which the expense was incurred.

(g). *Intrastate Gross Operating Revenues, Freight and Passenger.* Defendant's total intrastate gross operating revenues in Washington for the year 1933 were as follows:

Account	Freight	Pass.	Total
(101) Freight	$1,502,153	–0–	$1,502,153
(102) Passenger	–0–	$306,621	306,621
(103) Excess Baggage	–0–	2,163	2,163
(105) Parlor and Chair Car	–0–	3,292	3,292
(106) Mail	–0–	131,721	131,721
(107) Express	–0–	36,780	36,780
(108) Other Passenger Train	–0–	1,746	1,746
(109) Milk	–0–	12,495	12,495
(110) Switching	38,367	–0–	38,367
(111) Special Service Train	14	–0–	14
(112) Other Freight Train	434	–0–	434
(131) Dining and Buffet	–0–	26,971	26,971
(132) Hotel and Restaurant	–0–	15,654	15,654

(133) Station, Train and Boat Privileges	-0-	318	318
(134) Parcel Room	-0-	2,611	2,611
(135) Storage — Freight	2,010	-0-	2,010
(136) Storage — Baggage	-0-	494	494
(137) Demurrage	1,016	-0-	1,016
(138) Telegraph and Telephone	3,653	1,279	4,932
(142) Rents of Buildings and other Property	46,570	16,312	62,882
(143) Miscellaneous	28,427	9,957	38,384
(151) (152) Joint Facility Net Debit	-0-	(11,298)	(11,298)
Total	$1,622,644	$557,116	2,179,760

(h). *Intrastate Passenger Expense.* Total passenger operating expenses applicable to Washington intrastate traffic in the year 1933 were $897,458, determined in the following manner: First, in dividing expenses between the freight and passenger business, those expenses incurred separately in the two services are assigned separately to them; second, common expenses are divided between the freight and passenger services on the relation of the cost of fuel consumed in the two services, respectively. This is the method prescribed by the Interstate Commerce Commission and long prescribed by the Department of Public Works of Washington. Third, total passenger expense is divided between the interstate and the intrastate passenger business in proportion to the revenues earned in the two classes of service. The court finds that this was a correct method of deter-

mining the expense of the intrastate passenger service on the defendant's line.

(i). *Period Used in Determining Certain Expenses.* In figuring expense of maintenance of way and freight car repairs, the preceding findings of the court are based upon the average cost for three years, rather than upon costs incurred in the year 1933. The method used is correct, for the following reasons: Maintenance is not an evenly recurring annual item. It is in part due to use, but in greater part due to wear and wastage of the property. The necessity for maintenance accrues regardless of whether money is available to provide it. For this reason, the maintenance expense actually incurred in any given year is unlikely to be representative of the normal. It is customary in railroad accounting to use a longer period than one year, either five years or three years, in computing normal maintenance. The court finds that the three years' maintenance figures used are correct. Plaintiff's witness offered an exhibit in which maintenance was figured on the basis of but one year, namely, the year 1933. This witness did not state that one year was a proper period for computing maintenance. The court finds that it is too short and cannot be used.

(j). *Pensions.* Plaintiff criticizes the inclusion of a relatively small item for pensions in the operating

expenses assigned by defendant to its Washington intrastate traffic. The court finds that these pensions were paid to superannuated employes of the defendant and were in the nature of deferred compensation for services performed during their active years and that the payment of these pensions was made by the defendant's management in the exercise of proper discretion and business judgment and that they were properly chargeable to operating expenses.

(k). *Other Details of Cost Study.* The court finds that in addition to the details herein noticed the defendant's Exhibit 11, introduced by its witness Burn, and the methods therein used, are substantially correct and follow approved methods of accounting and shows the results of its intrastate operations in the State of Washington during the year 1933 with substantial accuracy. The court further finds that financial results of operation of defendant's railway system and of the portion thereof within the State of Washington for years prior to the year 1933, because of difference in revenues and operating costs and for other reasons, are not representative of financial results of operation for the year 1933 and at the date of the trial of this cause.

VIII.

The court finds and concludes that defendant's local or intrastate business as a steam railway company in

the State of Washington is conducted at a loss and was conducted at a loss during the entire year 1933, and that the tax imposed by Chapter 191, Laws of 1933, if paid, will have to be paid out of defendant's earnings from interstate and foreign commerce and from the income of its property located outside the State of Washington.

IX.

By Chapter 117, Washington Session Laws of 1911, there was created an administrative tribunal called the Public Service Commission (later called the Department of Public Works and now called the Department of Public Service), with the usual powers of regulation and supervision of public utilities, including common carriers by railroad, and the powers and duties of the Railroad Commission, which was created by Chapter 81, Washington Session Laws of 1905, were transferred to said Public Service Commission: Defendant's investment in its line of railway was made to provide adequate facilities for the handling of both interstate and intrastate commerce and a substantial part thereof was made by order of the Railroad Commission of Washington and its successors, the Public Service Commission and the Department of Public Works, for the purpose of equipping the defendant's property to comply with said Public Service

Commission law and the acts amendatory thereof and the orders made pursuant thereto.

Said Railroad Commission and Public Service Commission, and their successors, were established and have been maintained pursuant to Article XII., Section 18, of the Constitution of the State of Washington, providing that "A railroad and transportation commission may be established, and its powers and duties fully defined by law." It is also provided by the Constitution of the State of Washington (Article XII., Section 15), as follows:

"15. PROHIBITION AGAINST DISCRIMINATING CHARGES.—No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state. Persons and property transported over any railroad, or by any other transportation company, or individual, shall be delivered at any station, landing, or port at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing. Excursion and commutation tickets may be issued at special rates."

By the provisions of the Constitution of the State of Washington and said statutes, there is imposed upon the defendant an ineluctable obligation to devote its property to the service of the people of the State of Washington in intrastate transportation, from

which it cannot withdraw and at the same time continue to carry on its business as a common carrier in interstate commerce, and therefore any tax imposed upon the defendant by said Chapter 191, Laws of 1933, would, and does constitute a burden upon and an attempt to regulate interstate commerce, in violation of Article I., Sections 8 to 10, and Article VI., of the Constitution of the United States, and of the Acts of Congress regulating interstate commerce, paricularly Section 1 (18) (21), Section 13, Section 15A and Section 19A thereof, and of the Emergency Railway Transportation Act of 1933.

X.

The court finds that suit involving the issues of this case was originally filed by the defendant in the District Court of the United States, for the Western District of Washington, to enjoin the collection of the occupation tax herein sued for by the plaintiff. The plaintiff herein obtained a stay of proceedings in said Federal Court suit by filing this action in the state court. After said Federal Court suit was filed, Senate Bill No. 18 was introduced at the special session of the 1933 Legislature of the State of Washington, and copy of said Senate Bill No. 18, marked Exhibit "B" is attached to the defendant's answer on file herein and hereby made a part of these findings. This bill was prepared and its enactment was urged by

attorneys for the State of Washington and by a member of the Tax Commission of the State of Washington, for the stated purpose of defeating defendant's contention in this case, that it is obligated by the laws of the State of Washington to do intrastate business and cannot withdraw therefrom. Said bill failed to pass.

XI.

The court finds that defendant's interstate and intrastate business in the State of Washington is inseparably commingled and mutually dependent. For one of the test periods used in the cost studies—the seven days ending November 21st, 1933—intrastate revenue net ton-miles were 4,155,692, or 32.35%, and interstate revenue net ton-miles were 8,691,505, or 67.65%. For the month of November, 1933, intrastate revenue net ton-miles were 14,547,465, or 24.80%, and interstate revenue net ton-miles were 44,121,835, or 75.20%. For the entire year 1933 intrastate revenue net ton-miles were 138,265,617, or 23.10%, and interstate revenue net ton-miles were 460,335,442, or 76.90%.

Both interstate and intrastate business, eastbound and westbound, were largely transported by defendant over the same lines of railroad, in the same trains, by means of the same employes, and with the same facilities. It is not possible, practically and eco-

nomically, or at all, to carry intrastate freight separately from interstate freight by different lines of railroad, in different trains or by means of different facilities and employes.

During the year 1933, defendant's gross passenger operating revenues in the State of Washington amounted to $1,540,264, of which $551,845 was from intrastate business. Most of defendant's passengers were carried on interstate through trains, east and westbound and north and southbound. Passengers carried on local trains operating in local service are relatively few and those trains also carry some interstate passengers. The court finds that it is not possible to carry said intrastate and interstate passengers on separate lines of railroad or by separate trains, economically and efficiently, or at all, and defendant's intrastate and interstate passenger traffic is inseparably commingled with and mutually dependent to the same extent and in the same manner as the freight traffic.

XII.

If defendant could and should abandon its intrastate freight business, it could and would somewhat reduce its train service and its car mileage, and save some direct expense applicable to its Washington freight business, but it would thereby lose its entire

gross revenue from intrastate freight business of $1,622,644. These figures are based upon operations for the year 1933, the latest available at the time of the trial of this cause. Also some reduction in passenger train service could be effected if intrastate passenger business were to be discontinued, which would result in a further saving in direct expense, but the result would be the loss by defendant of its entire gross revenue from the intrastate passenger business, which for the year 1933 amounted to $557,116. The net result of abandonment by defendant of its intrastate passenger and freight business in order to escape the tax imposed by said Chapter 191, Laws of 1933, would be the loss of $2,179,760, and the saving of not more than 14% of that amount.

Therefore, if defendant could and should abandon its intrastate freight and passenger business, the entire burden of maintaining and operating its interstate system of railroad in Washington, constructed and equipped to handle both interstate and local commerce, would fall entirely on interstate commerce and would necessitate an increase of rates and fares greater than the same could bear as a practical matter, or at all, and would result in the destruction of an essential instrument of interstate commerce and of the transportation of the mails, troops and munitions of the United States, and of the value of its property in

the State of Washington to the amount of more than one hundred million dollars.

XIII.

Defendant's railroad is well located and economically managed. It serves the principal cities and towns of the State of Washington. The operation of its railroad in local business is essential to the people of the State of Washington and of the United States. Most of defendant's local rates cannot be raised, because of competition from other kinds of transportation. Under the law, such rates cannot be raised without the consent of the Department of Public Works. Defendant has heretofore applied for an increase of certain local rates and said application was denied by the Department of Public Works, as appears from a copy of its order, marked Exhibit "A", attached to the defendant's supplemental answer herein and hereby made a part of these findings. The court further finds that defendant as a practical matter has been unable to increase its revenues from local business and further finds that whether it can do so in the future is a matter attended with great uncertainty and could be accomplished only after long and expensive litigation, and such increases, if obtained, would have no bearing upon defendant's income in the year 1933, or for many years subsequent thereto. There is at this time an application before the Inter-

state Commerce Commission known as *Ex Parte* 115, for increased rates, and a similar application before the Department of Public Works. No decision has been made and it is not known what increases, if any, will be allowed by said Commission nor what the attitude of the Department will be in the similar state case pending before it. The court finds that defendant has done all it can do to increase its revenue, but is unable to do so.

Pursuant to the foregoing findings of fact, the court makes the following:

CONCLUSIONS OF LAW

I.

The tax imposed by Chapter 191, Laws of 1933, is an excise or occupational tax, as distinguished from a property or other kind of tax. It is imposed for the "privilege of engaging in business activities." As applied to defendant a tax of 1½% is imposed for the privilege of engaging in the business of a "steam railway." In view of the language found in Section 5, the prescribed percentage of gross income must be computed only upon the gross income received from intrastate "steam railway business." But, although this is the measure of the tax, the privilege or occupation upon which the tax is laid is that of engaging in railroad business, which includes the transaction of

both intrastate and interstate business. The penalty for failure to pay is liability to injunction proceedings and seizure and sale of the physical property of the railway, which would make it impossible to engage in either intrastate or interstate commerce. Income from other business activities in which defendant may be engaged are taxable, if taxable at all, at other rates. This case is not concerned with them.

II.

A state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a state cannot tax interstate commerce or the privilege of engaging in it. Where conditions are prescribed and license required and a tax is imposed on one engaged in both interstate and intrastate commerce, certain conditions must be met. One is that the party taxed must be free in law and in fact to withdraw from its intrastate business, while continuing to transact its interstate business free of the tax. Chapter 191, Laws of 1933, does not meet this condition.

III.

Defendant was not, and is not free, under the Constitution and laws of this state to withdraw from its intrastate business while continuing to transact its interstate and foreign business. It performs an in-

dispensable service for the people of the State of Washington, from which it cannot withdraw. Its continued performance of this service is compellable at the suit of the state and of the citizens of the state having an interest in such performance.

IV.

Defendant is an interstate carrier by railroad subject to the Acts of Congress regulating interstate commerce. Under several provisions of the Interstate Commerce Act, especially Section 1 (18) to (21) defendant is not permitted to abandon its lines in this state, or any of them, or the operation of said lines, or any of them, in either interstate or intrastate business, unless it shall first have obtained a certificate from the Interstate Commerce Commission that the present or future public convenience and necessity permit of such abandonment. Obtaining such a certificate is a precedent and indispensable condition of the right of abandonment of operation of any line or part of line of a carrier subject to the Acts of Congress. The prohibition applies to the strictly intrastate business of an interstate carrier by railroad and to every part of its line operated in connection with or as a part of its interstate system. The Interstate Commerce Act, as well by Sections 13(4), 15A, 19A and others, as by Section 1(18) to (21), has forceful

application and is an inseparable obstacle to abandonment by the defendant of intrastate business while attempting to continue to transact interstate and foreign business.

V.

Nor can defendant, as a matter of fact, or as a practical matter, withdraw from its intrastate business while continuing to transact its interstate and foreign business. Defendant's railroad was constructed to handle both classes of business. To abandon its intrastate business would throw the entire burden of operating and maintaining the interstate system on interstate commerce and would create operating losses greater than such interstate commerce could bear. Defendant's interstate business would necessarily be destroyed and its property would be confiscated.

VI.

The court concludes, therefore, that Chapter 191, Laws of 1933, in its requirement of a license (Section 3), the making of reports (Section 6) and the payment of a tax of 1½% of gross income from intrastate railway business as a condition of the right to engage in steam railway business, violates Article I, Section 8, and the Fourteenth Amendment to the Constitution of the United States, and as well Sections 1 (18) to (21), 13(4), 15A and 19A of the Interstate

Commerce Act, and the Emergency Transportation Act of 1933, and is void as applied to defendant.

VII.

The court further finds that the tax imposed by said Chapter 191, Laws of 1933, on the pretext of a tax or fee for the privilege of doing local business in Washington, is in reality a tax and burden upon interstate commerce, and upon the gross revenues received by defendant therefrom, in that said tax, if paid, would have to be paid out of the earnings of defendant from its interstate business, and is a tax upon its business done and upon income earned in other states, and upon property of the defendant located outside the State of Washington, which tax it cannot avoid by withdrawing its property from use in local commerce within the State of Washington, either under said Public Service Commission law of the State of Washington, and the amendments thereof, under the Constitution of the State of Washington, under the acts of Congress regulating interstate commerce, or as a practical matter, or at all, and said tax is in violation of the Constitution of the United States, in that it imposes a burden upon, and interferes with the exercise of governmental powers of the Federal Government, to-wit, the transportation of the United States mails, troops, and munitions of the United States,

and is in violation of Article I, Sections 8 and 10, and Article VI., also the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and of the acts of Congress regulating interstate commerce, particularly Section 1 (18) (21), Section 13, Section 15A, and Section 19A thereof, and of the Emergency Railway Transportation Act of 1933, approved June 16, 1933.

VIII.

Let judgment be entered dismissing plaintiff's action with prejudice and costs to defendant.

WASHINGTON FORTY MILL LIMIT LAW

"Section 1. Except as hereinafter provided, the aggregate of all tax levies upon real and personal property by the state, county, school district and city or town, shall not in any year exceed forty mills on the dollar of assessed valuation, which assessed valuation shall be fifty per cent of the true and fair value of any such property in money, and the levy by the state shall not exceed five mills, the levy by any county shall not exceed ten mills, including the levy for the county school fund, the levy by or for any school district shall not exceed ten mills, and the levy by any city or town shall not exceed fifteen mills; *Provided*, That nothing herein shall limit the power of any county to levy taxes, at the rate provided by law, for any taxing district, other than a school district, where such taxing district includes less than the whole county: *Provided further*, That the limitations imposed by this section shall not prevent the

levy of additional taxes to pay interest or principal on bonds issued by or thru the agency of the state, or any county, city, town or school district, nor the levy of additional taxes to pay interest on, or toward the reduction at the rate provided by statute, of the principal of county, city, town or school district warrants outstanding at the time of the taking effect of this act: *Provided further*, That any county, school district, city or town shall have the power to levy taxes at a rate in excess of the rate specified in this act, when authorized so to do by the electors of such county, school district, city or town by a three-fifths majority of those voting on the proposition at a special election, to be held on the Tuesday next preceding the first Monday in October of the year in which the levy is made, in the manner provided by law for holding general elections, which special election may be called by the board of county commissioners, board of school directors, or council or other governing body of any city or town, by giving notice thereof for two successive weeks by publication and posting in the manner provided by law for giving notices of general elections, at which special election the proposition of authorizing such excess levy shall be submitted in such form as to enable the voters favoring the proposition to vote 'YES' and those opposed thereto to vote 'NO'." (Chapter 4, Laws 1933.)

WASHINGTON AD VALOREM TAX STATUTE WITH REFERENCE TO ASSESSMENT AND VALUATION OF RAILROAD PROPERTY.

"The term 'property of the railroad company', as used in this act, shall include all franchises, rights of way, roadbeds, tracks, terminals, rolling stock equipment and all other real and personal property of such company, used or employed in the operation of the railroad or in conducting its business, and shall include all title and interest in said property, as owner, lessee or otherwise. Real property not adjoining its

tracks, stations or terminals, and real property not used in the operation of the railroad is excepted and shall be assessed in the same manner as like property of individuals." (Section 11157 (4) Remington's Revised Statutes.)

"The commission shall prepare assessment-rolls and place thereon, after the name of each railroad company assessed, the general description of the property, of such railroad company, which shall include its real property, rights of way, tracks, stations, terminals, appurtenances, rolling stock, equipment, franchises and all other real and personal property of such company, which shall be deemed and held to include the entire property and franchises of such railroad company within the state, and all title and interest therein * * * For the purpose of determining the value of the property of each railroad and telegraph company appearing on the assessment-rolls, the commission may, if deemed necessary, view and inspect the property of such company, and shall consider the reports filed in compliance with this act, and the reports and returns of the company filed in the office of any officer of this state, and such other evidence or information as may have been taken or obtained bearing upon the value of the property of the company assessed. In case of railroad or telegraph companies which own or operate railroad or telegraph lines lying partly within and partly without the state, the said commission shall only value and assess the property within this state. In determining the value of the portion within the state, the commission shall take into consideration the value of the entire system, the mileage of the whole system, and of the part within this state, together with such other information, facts and circumstances as will enable the commission to make a substantially just and correct determination. When the value of the property of a railroad or telegraph company within this state shall have been ascertained and determined, the amount thereof shall

be entered upon said assessment-rolls, opposite the name of the company, and shall be and constitute the valuation of the entire property of such railroad or telegraph company within this state, for the levy of taxes thereon, subject to revision and correction by the state board of equalization as hereinafter provided. Upon the completion of such assessment, the commission shall give notice by mail to each railroad and telegraph company assessed, of the amount of its assessment as entered upon such rolls."

(Section 11165, Remington's Revised Statutes).

WASHINGTON STATUTE WITH REFERENCE TO COURT REVIEW OF ORDER OF DEPARTMENT OF PUBLIC WORKS ESTABLISHING RATES.

"Any complainant or any public service affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause

to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action." (Section 10428, Remington's Revised Statutes, which is identical with the same section of Remington's Compiled Statutes.)

PART OF WASHNIGTON STATUTE (CHAPTER 180, LAWS 1935) INCREASING OCCUPATION TAX FROM 1½% TO 3%.

"From and after the first day of May, 1935, there is hereby levied, and there shall be collected from every person a tax for the act or privilege of engaging within said state in any one or more of the businesses herein mentioned. Such tax shall be equal to the gross operating revenue of the business, multiplied by the rate set out after the business, as follows:

I. Railroad, express, railroad car, water distribution, light and power, telegraph and telephone businesses—3% * * * "

(Section 8370-36 Remington's Revised Statutes of Washington, 1935 Annual Pocket Supplement.)

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, *Appellant*, vs. STATE OF WASHINGTON, *Appellee.*	No. 529
GREAT NORTHERN RAILWAY COMPANY, a Corporation, *Appellant*, vs. STATE OF WASHINGTON, *Appellee*,	No. 573
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, *Appellant*, vs. THE TAX COMMISSION OF THE STATE OF WASHINGTON and T. S. HEDGES and T. M. JENNER, as Members of the Tax Commission of the State of Washington, *Appellees.*	No. 544

APPEALS FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,

Attorneys for Appellees.

STATE PRINTING PLANT

SUBJECT INDEX

Page

Abbreviations 2

Statement 2–5

1933 Occupational Tax Act 5–6

State and U. S. District Court decisions sustaining 6–7

Decisions sustaining similar excises as to interstate public service companies—

Washington decisions 7

United States Supreme Court decisions 7–19

Decisions relating to domestic corporations, pertinent to foreign corporations 19

Interstate commerce not unlawfully burdened, where Appellants' total tax, property and excise, not greater than might be lawfully imposed on an ad valorem basis ..19–21

Determination of method of distributing tax burden, left to States 21–22

State revenue laws must be examined collectively to discover whether Appellants' interstate business is unlawfully burdened by offending tax 22–28

State's New Tax Plan 28–30

Evidence shows that Appellant Railroads' aggregate tax burden substantially reduced by State's New Tax Plan 30–35

Appellant Railroads' criticisms answered 33–35

Effect of New Tax Plan on Appellant Telephone Company 35–37

P. T. has not sought rate increase to meet tax, though tax may be passed on to patrons 35–37

Appellants' objections to Occupational Tax Act enumerated ..37–38

Trial Court's Findings in Railroad actions not adopted by State supreme court 38–41

Proper disposition of appeals, if State court's assumptions invalidate tax 41–42

Trial Court's Findings in Railroad actions not adopted by State supreme court 38–41

If findings found material, Court should either review evidence, or remand causes for review of evidence by State supreme court 42–43

Evidence fails to show that either appellant railroad conducted intrastate business at loss in 1933 ..44–45, 93–178

Page

Answer to contention that Appellant Railroads did intrastate business at loss in 1933 46–51

Answer to Appellants' contention that tax violative of commerce clause if appellants restrained by law from renouncing intrastate while continuing interstate operations 51–56

State supreme court has not so construed State statutes and constitution 56–63

Tax Act itself permits such withdrawal 57–59

Since Federal regulations control, no longer in State's power to deny Appellant Railroads right to discontinue intrastate operations 63–64

But Federal regulation does not prevent State taxation 64–68

State likewise without power to prevent Appellant Telephone Company from renouncing its intrastate operations 68–69

State cannot lawfully condition Public Service Company's right to do interstate business, on its continuing to do local business 69–74

Appellants may withdraw from local business if not making a fair return thereon 74–78

Public utility company subject to privilege tax though franchise requires continuation of service 78–81

Answer to contention that tax invalid as to Appellants because their intra and interstate instrumentalities and operations inseparable 81–87

Answer to contention that Appellants would be required to retain present equipment for interstate operations alone 81, 181–7

If contention sound, no state tax or regulatory measure sustainable 82

Similar taxes uniformly sustained where instrumentalities and operations no less commingled 83–87

Cases relied on by Appellants distinguished 87–92

Evidence failed to show that Appellant Railroads' 1933 intrastate business conducted at a loss—

Character of proof offered 93–97

Operating ratio (freight)—comparison of interstate and intrastate 146–7

1934 revenues and expenses—comparison with 1932 and 1933 148–151

No attempt to increase rates to cover occupational tax ... 47–51

Mileage prorate not adequate apportionment to Washington of interstate freight revenue 111–118

Page

N. P. CASE—Inadmissibility of evidence received 98–111, 131–3, 143–5

Court's error in finding that N. P.'s method of apportioning expenses to intrastate traffic correct. 102–5

Mail and express revenue should all be credted to interstate 105–7

Passenger service expense, how properly apportionable to intrastate 108–111

Taxes, proper amount of, and how properly apportionable to intrastate operations 119–124

"Pensions" not properly chargeable as operating expense 125–7

Court's error in finding intrastate freight revenue other than as reported to D. P. W. 127–131

"Traffic expense"—how properly apportionable to intrastate operations 133–4

Propriety of using 3-year average of maintenance of way and car repairs expense 135–6

Joint facility rent income—if used, how apportionable to intrastate 136–7

N. P.'s duplication of operating expenses 138–140

N. P.'s intrastate income for 1933, if properly computed 140–1

N. P.'s evidence showed substantial profit on 1933 local freight business, but loss on local passenger business 141–3

Inadmissibility of evidence that special study understated N. P.'s intrastate expense 143–5

G. N. CASE—Error of court in finding that accuracy of reports as to intrastate revenue not heretofore matter of importance 152–4

Inadmissibility of evidence, and court's error in finding that intrastate revenue was other than as reported to D. P. W. 154–162

Joint facility rents paid—not properly chargeable as operating expense 165–171

G. N.'s duplication of operating expenses 171–2

Taxes—amount of, apportionable to intrastate 172

Joint facility rents paid—how apportionable to intrastate, if proper expense item 173–4

G. N.'s intrastate income, if properly computed 174–6

G. N.'s evidence showed substantial profit on 1933 local freight business, but loss on local passenger business 176–8

TABLE OF CASES

	Page
Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211	68
Alabama v. U. S., 283 U. S. 776	63
Allen v. Pullman Co., 191 U. S. 171	9, 66, 85
American Expr. Co. v. Michigan, 177 U. S. 404	36, 50
Atlantic Coast Line v. Daughton, 262 U. S. 413	24, 167–170
Baker v. Druesedow, 263 U. S. 137	22, 32
Barrett v. New York, 232 U. S. 14	84, 90
Behre v. Anchor Ins. Co., 297 Fed. 986	130
Binderup v. Pathe Exchange, 263 U. S. 291	68
Boston & Maine R. Co. v. Armburg, 285 U. S. 234	83
Bowman v. Continental Oil Co., 256 U. S. 642	53, 86, 90
Buck Stove and Range Co. v. Vickers, 226 U. S. 205	69
Buck v. Kuykendall, 267 U. S. 307	70
Cascade Tel. Co. v. State Tax Commission, 176 Wash. 616	6
Case Threshing Machine Co. v. Wiley, 89 Wash. 301	166
Cascade Telephone Co. v. State Tax Commission, 176 Wash. 616	36
Central Pacific R. R. v. California, 162 U. S. 91	67
Chassanoil v. Greenwood, 166 Miss. 848, 148 So. 781	66
Chicago, M., St. P. & P. R. Co. v. Hedges, 5 Fed. Supp. 752	6–7, 19, 31, 50, 73
Clark v. Williard, 292 U. S. 113	41
Cleveland v. Cleveland City Ry. Co., 194 U. S. 517	79
Colorado v. U. S., 271 U. S. 153	63, 74
Columbus Ry. & Power Co. v. Columbus, 249 U. S. 399	78
Cooney v. Mountain States Tel. & Tel. Co., — U. S. —, 79 L. ed. 498, 55 Sup. Crt. 477	12, 52, 54, 91
Crutcher v. Kentucky, 141 U. S. 47	54, 70, 72
Cudahy Packing Co. v. Minnesota, 246 U. S. 450	24
Culliton v. Chase, 174 Wash. 393	29, 32
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	70
Day v. T. R. & R. Co., 80 Wash. 161	56
Deficit Status of U. S. & Canada R. R., 76 I. C. C. 455	117
Eastern Air Transport v. Tax Commission, 285 U. S. 147	27
East Ohio Gas Co. v. Tax Commission, 283 U. S. 465	54
Edelman v. Boeing Air Transport, 289 U. S. 249	27
Erie Railroad Co. v. Pennsylvania, 21 Wall. 492	79

Page

Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17 65
Flint v. Stone Tracy Co., 220 U. S. 107 67
Galveston, Harrisburg, etc. Ry. Co. v. Texas, 210 U. S. 217 16, 19, 51, 83
Georgia Public Service Com. v. U. S., 283 U. S. 765 63
Georgia Ry. v. R. R. Com., 262 U. S. 625 51
Gibbs v. Baltimore Gas Co., 130 U. S. 396 79
Grand Trunk Western Ry. Co. v. South Bend, 227 U. S. 544 78
Greene v. Louisville & L. R. Co., 244 U. S. 499 32
Gregg Dyeing Co. v. Query, 286 U. S. 472 23, 32
Great Northern Ry. Co. v. State, 147 Wash. 630 60–2
Helsen v. Kentucky, 279 U. S. 245 26, 27
Henderson Water Co. v. Corporation Com., 269 U. S. 278 79
Hoptowit v. Brown, 115 Wash. 661 160
Interstate Busses v. Holyoke Street Ry., 273 U. S. 45 87
I. C. C. v. Oregon-Wash. R. Co., 288 U. S. 14 77
International Textbook Co. v. Pigg, 217 U. S. 91 70
Investigation of Advances in Rates on Grain, 21 I. C. C. 22 116
Johnson v. Wells, Fargo & Co., 239 U. S. 234 25
Kansas etc. R. Co. v. Bodkin, 240 U. S. 227 18
Kehrer v. Stewart, 197 U. S. 60 66
Kennedy v. Canadian Pac. R. Co., 87 Wash. 134 160
Lake Shore & M. S. Ry. Co. v. Felton, 103 Fed. 227 130
Lawrence v. State Tax Commission, 286 U. S. 276 21
Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192 15, 53, 85
LeLoup v. Port of Mobile, 127 U. S. 640 7, 20, 53, 89
Louisville v. Cumberland Tel. Co., 224 U. S. 649 78
Louisville & N. R. R. Coal and Coke Rates, 26 I. C. C. 20 117
Memphis Gas Light Co. v. Shelby County, 109 U. S. 398 79
Michigan Commission v. Duke, 266 U. S. 570 70
Minnesota Rate Cases, 230 U. S. 352 25, 44, 121, 144
Munn v. Illinois, 94 U. S. 113 60
Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249 27
New Jersey Bell Tel. Co. v. State Board, 280 U. S. 338 12
Northern Ohio Traction & Light Co. v. Ohio, 245 U. S. 574 78
Northern Pacific Ry. Co. v. Gifford, 27 Ida. 667, 151 Pac. 909 58
Northern Pacific Ry. Co. v. Gifford, 25 Ida. 196, 136 Pac. 1131 58
Ohio River & W. R. Co. v. Dittey, 232 U. S. 576 17, 18, 19, 74, 85
Ohio Tax Cases, 232 U. S. 576 17, 18, 19, 74, 85
Old Colony Trust Co. v. Omaha, 230 U. S. 100 78

Page

Opelika v. Opelika Sewer Co., 265 U. S. 215 79
Osborne v. Florida, 164 U. S. 650 ..... 8, 9, 33, 65, 72, 84
Osborne v. Mobile, 16 Wall. 479 7
Owensboro v. Cumberland Telephone Co., 230 U. S. 58 78
Pacific Express Co. v. Seibert, 142 U. S. 339 ..... 7, 84
Pacific Tel. & Tel. Co. v. Seattle, 172 Wash. 649 (aff.: 291 U. S. 300) 7
Pacific Tel. & Tel. Co. v. State Tax Commission, 83 Wash. Dec. 67, 48 Pac. (2d) 938 41
People ex rel. Corneli Steamboat Co. v. Sohmer, 235 U. S. 549 .. 17, 86
Philippine Sugar etc. Co. v. Philippine Islands, 247 U. S. 385 43
Pine-Coffin v. Erie R. Co., 69 N. Y. S. 333 130
Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692 .. 11, 53, 85
Postal Tel.-Cable Co. v. Fremont, 255 U. S. 124 .. 9, 36, 50, 55, 85
Postal Tel.-Cable Co. v. Richmond, 249 U. S. 252 .. 10, 36, 50, 85, 90
Puget Sound P. & L. Co. v. Seattle, 172 Wash. 668 (aff.: 291 U. S. 619) 7
Puget Sound P. & L. Co. v. Seattle, 291 U. S. 619 79
Pullman Co. v. Adams, 78 Miss. 814, 30 So. 757 (aff.: 189 U. S. 420) 75, 71
Pullman Co. v. Adams, 189 U. S. 420 ..... 9, 52, 59, 60, 71, 85
Pullman Co. v. Richardson, 261 U. S. 330 ..... 23, 24
Railroad Commission v. C. B. & Q. R. Co., 257 U. S. 563 63
Railroad Commission v. Eastern Texas R. R., 264 U. S. 79 .. 45, 76, 77
Railroad Retirement Board v. Alton R. Co., — U. S. —, 55 Sup. Ct. 758 126
Railway Co. v. Philadelphia, 101 U. S. 528 79
Ratterman v. Western Union Telegraph Co., 127 U. S. 411 ..... 11, 16, 53, 85
Reading R. Co. v. Pennsylvania, 15 Wall. 232 14
Reading R. Co. v. Pennsylvania, 15 Wall. 284 ..... 15, 83
Russell v. Sebastina, 233 U. S. 195 79
St. Cloud Public Service Co. v. St. Cloud, 265 U. S. 352 79
St. Louis v. United Railways Co., 210 U. S. 266 79
St. Louis Southwestern Ry. Co. v. Arkansas ex rel. Norwood, 235 U. S. 350 ..... 16, 85
Seid Chee v. Sanitary Fish Co, 103 Wash. 345 160
Shaffer v. Carter, 252 U. S. 37 24
Southern Ry. Co. v. Greene, 216 U. S. 400 19
Southern Ry. Co. v. Watts, 260 U. S. 519 28
Spokane International R. Co. v. State, 162 Wash. 395 7

Page

Sprout v. South Bend, 277 U. S. 163 ..... 51, 54
Stafford v. Wallace, 258 U. S. 495 ..... 63, 68
State ex rel. Stiner v. Yelle, 174 Wash. 402 ..... 6, 35, 49
State of Maine v. Grand Trunk Ry. Co., 142 U. S. 217 ..... 15, 83
State v. G. N. Ry. Co., 83 Wash. Dec. 66, 48 Pac. (2d) 938 .. 40
State v. Northern Express Co., 80 Wash. 309 .... 7, 33, 59, 60, 73, 76
State v. N. P. Ry. Co., 83 Wash. Dec. 52, 48 Pac. (2d) 931 ..... 6, 19, 39, 40, 46, 51, 63
Superior Oil Co. v. Mississippi, 280 U. S. 390 66
Supply Laundry Co. v. Jenner, 178 Wash. 72 6
Swift & Co. v. U. S., 196 U. S. 375 68
Tacoma v. State Tax Commission, 177 Wash. 604 ..... 6, 34, 36, 80
Telegraph Company v. Texas, 105 U. S. 460 ..... 11, 85
Terral v. Burke Const. Co., 257 U. S. 529 70
Texas v. U. S., 292 U. S. 522 64
Thomas v. Railroad Co., 101 U. S. 71 79
Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 24
Union Tank Line Co. v. Wright, 249 U. S. 275 24
U. S. Express Co. v. Minnesota, 223 U. S. 335 24
U. S. v. Louisiana, 290 U. S. 70 63
United States Glue Co. v. Oak Creek, 247 U. S. 321 24
Wells, Fargo & Co. v. Nevada, 248 U. S. 165 24
Western Union Telegraph Co. v. Alabama, 132 U. S. 472 .. 10, 53, 85
Western Union Tel. Co. v. Kansas, 216 U. S. 1 ..... 20, 53, 90
Western Union Tel. Co. v. Texas, 105 U. S. 460 65
Williams v. Mayor, 289 U. S. 36 77
Williams v. Talladega, 26 U. S. 404 ..... 12, 50, 54
Wiloil Corporation v. Pennsylvania, — U. S. —, 79 L. Ed. 382 27

TABLE OF CONSTITUTIONAL PROVISIONS AND STATUTES CITED

	Page
Constitution of Idaho:	
Art. 11, Sec. 5	57
Constitution of Mississippi:	
Art. 7, Sec. 195	71
Constitution of Washington:	
Art. IV, Sec. 2	40
Art. VII	34
Art. XII, Sec. 13	56, 57, 81
Secs. 14 and 15	56
Sec. 19	56, 57, 81
Mississippi Statutes:	
Code 1892, Sec. 3378	71
Washington Statutes:	
Laws 1911, ch. 117	56
Laws 1933, ch. 4, p. 47	20
Ch. 5, Sec. 1	29
Ch. 191, Sec. 2(2)(e) XI	48
Sec. 3	57, 75
Sec. 16	76
Sec. 17	57
Laws 1935, ch. 180	35
United States Statutes:	
Transportation Act of 1920	63
USCA, Title 47, ch. 5, Sec. 221(b)	69

TEXT BOOKS CITED

	Page
12 Corpus Juris, 13, 50	83
22 Corpus Juris, 1017	160
32 Corpus Juris, 354, 357	130
51 Corpus Juris, 25	51

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, *Appellant*, vs. STATE OF WASHINGTON, *Appellee*.	No. 529
GREAT NORTHERN RAILWAY COMPANY, a Corporation, *Appellant*, vs. STATE OF WASHINGTON, *Appellee*,	No. 573
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, *Appellant*, vs. THE TAX COMMISSION OF THE STATE OF WASHINGTON and T. S. HEDGES and T. M. JENNER, as Members of the Tax Commission of the State of Washington, *Appellees*.	No. 544

APPEALS FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,

Attorneys for Appellees.

STATEMENT

These appeals having been assigned for argument on the same day, and substantially all of the legal questions involved being common to all, the appellees, to avoid needless repetition, have interposed but one brief in the three appeals.

Abbreviations:

For convenience and brevity, the appellant, Northern Pacific Railway Company, will be herein referred to as the "N. P.;" the appellant, Great Northern Railway Company, as the "G. N.;" the appellant, Pacific Telephone & Telegraph Company, as the "P. T.;" the tax commission of the state of Washington, as the "tax commission;" the state of Washington, as the "State;" the Interstate Commerce Commission, as the "I. C. C.;" and the Department of Public Works of the State of Washington, as the "D. P. W."

Unless otherwise qualified, the word "intrastate" means the traffic or business of the particular appellant, both beginning and ending in the state of Washington.

The N. P. and G. N. Cases:

These are appeals from judgments of the State supreme court reversing judgments for defendant in separate actions brought by the State in the superior court for Thurston county, Washington, against these companies to recover the occupational tax measured by 1½% of the intrastate gross income imposed on steam railroads by Chapter 191, Laws of Washington of 1933, for the last five months of 1933. The N. P. is a Wisconsin corpora-

tion, and the G. N., a Minnesota corporation, each owning and operating lines of steam railway in Washington and other states.

The complaint in each case alleges non-payment of the tax, and prays judgment for the amount. (NP Rec. 1-6; GN Rec. 1-6.)

The answers while admitting the amount of the disputed tax to be substantially as alleged by the State, and that the same is unpaid, deny liability therefor on the grounds:

(1) That under the State laws and constitution the defendant is not allowed to withdraw from its local business while continuing to carry on its interstate business;

(2) That it conducted its intrastate business at a loss in 1932 and 1933; and

(3) That its intra and interstate traffic is hauled over the same rails, in the same trains, and by the same employes, and is inseparably commingled and mutually dependent, and that abandonment of its local business, even if possible, would result in the loss of its local revenues with no considerable reduction in its expenses, and would require an increase in interstate tariffs higher than the traffic would bear. (NP Rec. 7-13; GN Rec. 7-20.)

The State replied, denying the material allegations of the railroads' answers, and alleging affirmatively (1) that defendant had never applied to the D. P. W. for permission to increase its tariffs by reason of the occupational tax; and (2) that as a result of the adoption in 1932 and 1933 by the people and state legislature of the

New Tax Plan including the 40-mill limit act and occupational tax act, the tax burden of defendants and other railroads had been greatly reduced as compared with the *ad valorem* taxes which would have been collectible from said companies under the old tax plan. (NP Rec. 17-32; GN Rec. 29-44.)

The cases were tried by the court without a jury resulting in each case in a judgment for defendant (NP Rec. 54; GN Rec. 77-8), from which judgments, appeals were taken to the State supreme court (NP Rec. 252; GN Rec. 253), where, in each case, the judgment was reversed with directions to the lower court to enter judgment for the State for the amount of the tax. (NP Rec. 67; GN Rec. 97.) Each company has appealed to this court.

The P. T. Case:

This is an appeal from the judgment of the state supreme court reversing a decree in an injunction suit instituted by the P. T., a California corporation, in the superior court for Thurston county, Washington, permanently enjoining the defendant, tax commissioners, from enforcing as against the P. T. the provisions of said chapter 191, Laws of 1933, in so far as it imposes an occupational tax on the P. T., an interstate telephone and telegraph company, equal to 3% of its intrastate gross receipts. (Ab. 4, 13.)

In its amended complaint, the P. T. assails the tax on substantially the same grounds urged by the railroad companies, save that it does not allege that it is losing money on its intrastate business, but alleges, on the contrary, that it is earning a return of at least 1.75%

on the fair value of its operating property. (PT Rec. 4.)

The defendant, tax commissioners, answered putting in issue the material allegations of the amended complaint, and setting up as an affirmative defense that the P. T. had never applied either to the D. P. W. or to any other state department for permission either to renounce its intrastate business, or to increase its tariffs because of the offending occupational tax. (PT Rec. 13.) These defenses stand admitted since no reply was interposed thereto. (Rem. Comp. Stat., Sec. 297.)

The trial resulted in a decree permanently enjoining the defendant tax commissioners from enforcing the provisions of said Occupational Tax Act of 1933 as against the P. T. (PT Rec. 15-17.) From such decree, such commissioners appealed to the state supreme court, which reversed the decree of the lower court with instructions to dismiss the suit. The P. T. has appealed to this Court.

THE 1933 STATE OCCUPATIONAL TAX ACT:

By the law here assailed, an occupational tax is imposed for the two-year period ending July 31, 1935, upon those engaged in various business activities in the state, measured by the gross proceeds derived from mining, manufacturing, wholesaling or jobbing, retail distributing, and performing of services. The rates imposed vary with the different activities. Thus, on the gross income of stock brokers, the rate is 2%; on steam railways and highway transportation companies, 1½%; and on light and power companies, water companies and telephone and telegraph companies, 3%. (Laws 1933, Ch. 191, Sec. 2, pp. 870-5.)

The tax is imposed on municipal corporations operating utilities and conducting businesses, the same as upon private enterprises (Sec. 2-e), and has been sustained as such. See *Tacoma v. State Tax Commission*, 177 Wash. 604.

Other states imposing similar excises are shown in the footnote.*

It is conceded, as above noted, that as to interstate public service companies the tax commission construes the Act as not applying to the gross income from interstate business, but to the gross income from intrastate business only.

The tax has been repeatedly sustained by the State supreme court as against attacks made on its constitutionality by various classes of taxpayers. See *State ex rel. Stiner v. Yelle*, 174 Wash. 402; *Cascade Tel. Co. v. State Tax Commission*, 176 Wash. 616; *Tacoma v. State Tax Commission*, 177 Wash. 604; *Supply Laundry Co. v. Jenner*, 178 Wash. 72; *State v. N. P. Ry. Co.*, 83 Wash. Dec. 52, 48 Pac. (2d) 931, NP Rec. 54.

Indeed, the tax was sustained by a three-judge federal district court, in an attack on its constitutionality by five interstate railroads including the two railroad appellants here, made upon the same grounds as urged on these appeals. See *Chicago, M., St. P. & P.*

***Arizona: ch. 77, Laws 1935; Indiana: ch. 50, Acts, 1933; Kentucky: ch. 25, Laws 1934; Mississippi: ch. 119, Laws 1934; New Mexico: ch. 73, Laws 1935; New York City: Local Law No. 21, 1934, amended by Local Law No. 2, 1935; North Dakota: ch. 276, Laws 1935; Oklahoma: Laws 1935, p. 131, ch. 33, art. 6; Ohio: Laws 1933-4, Pt. 2, p. 321; West Virginia: ch. 33, p. 219, Ex. Sess. 1933.**

R. Co. v. Hedges, 5 Fed. Supp. 752, to which we will later refer.

The State supreme court has heretofore sustained excise taxes similar to the 1933 Occupational Tax Act as applied to interstate public service companies. *State v. Northern Express Co.,* 80 Wash. 309; *Pacific Tel. & Tel. Co. v. Seattle,* 172 Wash. 649 (affirmed: 291 U. S. 300); *Puget Sound P. & L. Co. v. Seattle,* 172 Wash. 668 (affirmed: 291 U. S. 619). And see: *Spokane International R. Co. v. State,* 162 Wash. 395.

UNITED STATES SUPREME COURT DECISIONS SUSTAINING EXCISE TAXES EXACTED OF INTERSTATE PUBLIC SERVICE COMPANIES.

Express Companies;

In *Osborne v. Mobile,* 16 Wall. 479, the court upheld a city ordinance fixing the annual license fees for express companies doing business within its limits as follows: if doing an interstate business, $500; if doing intrastate business only, $100; and if doing intra-city business only, $50. The attack was made by a corporation doing an interstate business.

This case, however, was later disapproved in *Leloup v. Port of Mobile,* 127 U. S. 640, 645, as not in harmony with the court's later decisions.

In *Pacific Express Co. v. Seibert,* 142 U. S. 339, a state statute imposing a privilege tax of 2% of the company's intrastate gross receipts in addition to the *ad valorem* tax paid on the company's tangible property, and providing for a penalty of $100 a day for delinquency in making its report and paying the tax, and prohibiting the company from carrying on intrastate business while such tax was delinquent, was upheld as not violative of the commerce clause.

Osborne v. Florida, 164 U. S. 650, involved the validity of an occupation or license tax imposed by cities upon those pursuing divers occupations and professions, in so far as it affected express companies who were required to pay a tax of from $10 to $200 a year depending on the size of the city. As to express companies the state court had construed the act as applying only to intrastate and not to interstate business. As so construed, the supreme court held the act not violative of the federal constitution. In so holding, the court said:

"It has never been held, however, that when the business of the company which is wholly within the State, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute. * * * The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the state whatever unless upon the payment of the fee or tax. It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State." (P. 655.)

Sleeping Car Companies:

By the Mississippi Code of 1892, a tax was imposed "on each sleeping and palace car company carrying

passengers from one point to another within the state, one hundred dollars, and twenty-five cents per mile for each mile of railroad track (in the state) over which the company runs its cars." The state constitution declared sleeping car companies to be common carriers. In *Pullman Co. v. Adams,* 189 U. S. 420, the supreme court, following its former decision of *Osborne v. Florida, supra,* held the tax valid.

Again, in *Allen v. Pullman Co.,* 191 U. S. 171, it was held that a tax law of Tennessee requiring sleeping car companies to pay a tax of $3,000 per annum in lieu of all other except *ad valorem* taxes for one or more passengers taken up at one point within the state and delivered at another and transported wholly within the state and which did not refer to or affect the interstate business of the companies, would not be regarded as disguised attempt to tax the privilege of engaging in interstate commerce, where under the laws of the taxing state, it was not compulsory for a corporation engaged in interstate commerce to carry on that part of its business which was wholly within the state, and was therefore not repugnant to the commerce clause of the federal constitution. In so holding the court followed its former rulings in *Osborne v. Florida, supra,* and *Pullman Co. v. Adams, supra.*

Telegraph Companies:

In *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124, it was held that a license tax of $60 a year imposed by a city on a telegraph company for the privilege of doing intrastate business, could not be declared an unconstitutional burden on its interstate business merely because the local business was unprofitable, where the tax ordi-

nance was in force when the company entered the place and the tax was paid without objection for a series of years, the circumstances thus repelling any intent to invade interstate commerce in levying it, and where the state law afforded means to prevent the tax from burdening the interstate business through an application to increase intrastate rates, of which the company had not sought to avail itself.

And in *Postal Tel.-Cable Co. v. Richmond,* 249 U. S. 252, a license tax imposed on intrastate business was upheld as against the objection that it imposed a burden on the company's interstate business because the net receipts from its intrastate business were insufficient to pay the tax, and the payment would therefore have to be made from interstate receipts.

In *Western Union Tel. Co. v. Alabama,* 132 U. S. 472, it appeared that a statute of Alabama imposed a tax "on the gross amount of the receipts by any and every telegraph company derived from the business done by it in this state." The company reported to the board of assessors only its gross receipts received from business wholly transacted within the state. The board required a further return by the company of gross receipts from messages carried partly within and partly without the state. The company made such further return, and the tax was imposed on the gross receipts as shown by the two returns. In holding that the tax imposed on the messages comprised in the second return was unconstitutional, the court said:

"The principle is, in regard to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866 (Rev. Stat. Sec. 5263 to Sec. 5268), that they shall not be taxed by the authorities of a state

for any messages, or receipts arising from messages, from points within the state to points without, or from points without the state to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this principle is that messages of the former class are elements of commerce between the states and not subject to legislative control of the states, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the state, and, therefore, subject to its taxing power." (p. 473.)

In *Telegraph Company v. Texas,* 105 U. S. 460, it was held that state laws, so far as they impose upon telegraph companies a specific tax on each message transmitted beyond the state, are unconstitutional; but it was said that "any tax which the state may put on messages by private parties, and not by agents of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States."

In *Postal Tel.-Cable Co. v. Charleston,* 153 U. S. 692, it was held that a city ordinance imposing a license tax of $500 upon a telegraph company upon business done exclusively within the city was a valid exercise of the police power and was not an interference with interstate commerce.

In *Ratterman v. Western Union Tel. Co.,* 127 U. S. 411, the court, after an exhaustive review of its earlier decisions, held that a single tax of 5% of the gross receipts assessed under an Ohio law upon receipts of a telegraph company derived partly from interstate, and partly from intrastate commerce, but which were capable of separation, was invalid in proportion to the extent such receipts were derived from interstate commerce, but was otherwise valid.

In *Williams v. Talladega,* 226 U. S. 404, it was held that a municipal license tax on an interstate telegraph company's right to do local business within the state could not be deemed an unconstitutional burden on interstate business because a test for eleven months showed that the company did its intrastate business at that point at a net loss of 86 cents. The tax measure, however, was adjudged invalid because of not excepting from its application messages transmitted for the federal government.

Telephone Companies:

New Jersey Bell Tel. Co. v. State Board, 280 U. S. 338, involved the validity of an occupational tax measured by the state's proportion of the company's entire gross receipts, both intra and interstate. *The company paid without protest the tax based on local receipts.* The court condemned the tax in so far as measured by interstate receipts, Justices Holmes and Brandeis, however, dissenting.

The supreme court's most recent expression on the right of a state to impose an occupational or business tax on public service companies doing both an intra and interstate business, is found in *Cooney v. Mountain States Tel. & Tel. Co.,* —— U. S. ——, 79 L. ed. 498, 55 Sup. Crt. 477, where the court refused to sustain an excise tax imposed on an interstate telephone company and measured by a certain imposition on each telephone instrument used in its business, varying from 20 cents to $2 per year, depending on the number of phones and the rates charged. The offending state law provided that every corporation "engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana * * * shall pay

* * * a license tax * * * for each telephone instrument used, controlled and operated by it in the conduct of such business." The court held that by this language the tax was clearly intended to be imposed on telephone instruments used not only in intrastate but in interstate business and was therefore void.

In considering the following excerpt from the opinion (79 L. ed. 502), the Court will bear in mind that there the tax was on an instrumentality used by the company in carrying on both its intra and interstate activities, while here the tax is measured by intrastate gross income only:

"The business is the maintaining of telephone lines and the furnishing of telephone service in the state. No distinction is made between interstate and intrastate service. The tax is then stated to be 'for each telephone instrument used, controlled and operated.' Again, there is no limitation as to use, control or operation in intrastate business. The tax is 'based upon the number of telephone instruments owned, controlled and operated' during all or any part of the calendar year. A 'telephone instrument' is defined in section two of the act as 'a transmitter and receiver capable of use in the transmitting and receiving of telephone communications.' The tax is thus laid simply by reason of the fact that the company is furnishing telephone service and is based upon the number of telephone instruments used in that service without regard to its character whether intrastate or interstate. * * * All the telephone instruments, not excepted, whether they are used in intrastate or interstate commerce and however the service is paid for, are left subject to the tax. * * * But the tax is not laid on revenues. It is not laid on revenue derived from monthly rates as distinguished from toll charges. It is not imposed with respect either to the nature of the revenue, or to the character of the service from which the revenue is derived, or to the manner in which the charges for the service are fixed.

"The evidence supports the finding that these tele-

phone instruments are available for interstate and foreign communications. * * * It appears that in the operation of this unified system, the telephone instruments are the means by which the customers command at their pleasure the service they desire whether intrastate or interstate. And, so far as the instruments are not excepted, the tax is laid indiscriminately with respect to each of these facilities, regardless of the nature of their use.

"There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce." (Italics ours.)

In a footnote the court here cites a large number of authorities including all those heretofore reviewed, and then continues:

"But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 S. Ct. 1380, 2 Inters. Com. Rep. 134. *There are 'sufficient modes' in which the local business may be taxed without the imposition of a tax 'which covers the entire operations.'* Id., p. 647. See *Williams v. Talladega*, 226 U. S. 404, 419, 57 L. ed. 275, 281, 33 S. Ct. 116." (Italics ours.)

In using the last expression quoted, the court unquestionably had in mind the imposition of a tax measured by intrastate revenues—excises which, as heretofore shown, it had so often theretofore sustained.

Railroad Companies:

Reading R. Co. v. Pennsylvania, 15 Wall. 232, involved the validity of a Pennsylvania statute imposing a tax of two to five cents on every ton of freight transported by any railroad or canal in that state. The tax was held valid as to commerce wholly within the state, but void as to freight hauled in interstate commerce. As

to the tax imposed on intrastate freight, the court said (p. 282):

"But while holding this, we recognize fully the power of each state to tax at its discretion its own internal commerce, and the franchises, property, or business of its own corporations, so that interstate intercourse, trade, or commerce, be not embarrassed or restricted. That must remain free."

But in *Reading R. Co. v. Pennsylvania,* 15 Wall. 284, a state statute imposing an excise tax of three-fourths of 1% on both the intra and interstate gross receipts of domestic railroad corporations, was upheld as not violative of the commerce clause of the constitution, three justices dissenting.

And in *State of Maine v. Grand Trunk Ry. Co.,* 142 U. S. 217, the court sustained as to a foreign corporation, and as not violative of the commerce clause, a state statute requiring every railroad corporation operating in the state to pay "an annual excise tax for the privilege of exercising its franchise," the amount of the tax being determined according to a sliding scale proportioned to the average gross earnings per mile within the state for the preceding year. Four justices dissented.

In *Lehigh Valley R. Co. v. Pennsylvania,* 145 U. S. 192, it was held that a state gross receipts tax of 8/10ths of 1% against a domestic railroad corporation on account of transportation between points in the same state, but passing, during transportation, without the state, was not a tax upon interstate commerce, and did not infringe the provisions of the federal constitution. The court said:

"Taxation is undoubtedly one of the forms of regulation, but the power of each state to tax its own internal commerce, and the franchise, property or business of its

own corporations engaged in such commerce, has always been recognized, and the particular mode of taxation in this instance is conceded to be in itself not open to objection. And while interstate commerce cannot be regulated by a state by the laying of taxes thereon, in any form, yet when the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect that arising upon commerce solely within its own territory. *Ratterman v. West. Union Tel. Co.*, 127 U. S. 411, 424."

But in the later case of *Galveston, Harrisburg, etc. Ry. Co. v. Texas*, 210 U. S. 217, the court held, in a five-to-four decision that a Texas statute imposing a tax upon domestic railroad companies equal to 1% of their gross receipts was, as to those companies whose revenue included receipts from interstate business, a burden on interstate commeree and, as such, violative of the commerce clause of the federal constitution, thus, to the extent that interstate receipts were taxed, reversing by a bare majority, its earlier decisions in this regard.

Never, however, has this court in even a minority opinion questioned the right of the states to impose an excise tax on the intrastate gross receipts of either domestic or foreign public service corporations, doing both intra and interstate business, whatever the character of the service rendered.

In *St. Louis Southwestern Ry. Co. v. Arkansas ex rel. Norwood*, 235 U. S. 350, it was held that the annual franchise tax imposed by an Arkansas statute upon a railroad corporation "for the privilege of exercising its franchise in this state" of a specified percentage of the corporation's outstanding capital stock represented by

property owned and used in business transacted in the state was not repugnant to the commerce clause of the federal constitution, as applied to a foreign railway company doing both interstate and intrastate business, where, as construed by the state court, such tax was upon the right to exercise the privilege to transact intrastate business in corporate form, the amount of the tax being fixed solely by reference to the property of the corporation that was within the state and used in business transacted within the state, excluding any imposition upon, or interference with, interstate commerce.

In *People ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549, the court held a state excise tax or license fee equal to 5/10th of 1% upon intrastate gross earnings imposed on transportation and transmission corporations and associations for the privilege of doing business in the state in corporate form not to be an invalid regulation of commerce as applied to a navigation company engaged in the business of towing upon the Hudson river.

We come now to the outstanding case of *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576,—the *"Ohio Tax Cases."* By an act of 1911, the Ohio legislature prescribed various taxes, some upon property and others upon franchises and privileges with sundry provisions, penal and otherwise, for their collection. The tax there in question was limited in its operation to certain public utilities, including railroads. Each railroad doing business in the state was required to pay an excise tax of 4% of its entire gross earnings from business done

within the state except business done for the federal government.

In sustaining such tax as to railroads, the court held among other things:

That the tax was not void as confiscatory or violative of the due process clause because the complaining roads were not earning a fair return from their local business on the value of their operating property, devoted thereto, and one of which roads was operating at a loss;

That such roads were not arbitrarily discriminated against, contrary to the equal protections clause, because the tax was not exacted of all public utilities, or because the public utilities included, were not all taxed at the same rate; and

That the tax was not void for lack of uniformity because imposed in addition to an ad valorem tax, as being double taxation.

Counsel for the various appellants waive aside the *Ohio Tax Cases, supra,* with the statement that there "the tax was for the privilege of exercising the corporate franchise granted by the state to a domestic corporation," and liken it to *Kansas etc. R. Co. v. Bodkin,* 240 U. S. 227. (NP Brief, p. 33.)

True, in the *Bodkin* case the tax sustained was "on the primary corporate franchise granted by the State" (240 U. S. 232), but this was not true of the *Ohio Tax Cases.* In the latter case the imposition was stated in the statute to be "in the nature of an excise tax, for the privilege of carrying on its intrastate business," and *was imposed equally and alike on corporations, part-*

nerships, and individuals. (232 U. S. 580.) Indeed, appellants' counsel there conceded that the offending tax was not "upon corporate franchises or privileges, as such." (232 U. S. 581.) And in its opinion the court speaks of the tax as one "with respect to the privilege or *occupation.*" (232 U. S. 594.)

The fact that in the *Ohio Tax Cases, supra,* the objecting taxpayers were domestic corporations does not detract from the controlling force of the decision. *Galveston, etc. Ry. Co. v. Texas,* 210 U. S. 217, 228; *Southern Ry. Co. v. Greene,* 216 U. S. 400, 417-8; *Chicago, M., St. P. & P. R. Co. v. Hedges,* 5 Fed. Supp. 752, 760.

In the case last cited Judge Cushman, after reviewing the *Ohio Tax Cases,* said with respect to counsel's attempted distinction:

"There is no reason for contending that the interstate commerce carriage by a domestic corporation can be burdened as the result of a state law, and that carried by foreign corporations cannot. Northern Securities Co. v. United States, 193 U. S. 197."

INTERSTATE COMMERCE NOT UNLAWFULLY BURDENED, WHERE APPELLANTS' TOTAL TAX, PROPERTY AND EXCISE, NOT GREATER THAN MIGHT BE LAWFULLY IMPOSED ON AN AD VALOREM BASIS ALONE.

In this connection, we quote the following from the decision of the state supreme court (*State v. N. P. Ry. Co.,* 83 Wash. Dec. 52, 59-61, 48 Pac. (2d) 931, 935; NP Rec. 61-2):

"It must be remembered that chapter 191 of the Laws of 1933 applies to every person engaging or continuing in business within this state, with a comparatively few exceptions. The law may be said to be a general one and applies to all businesses within the state. In this respect, it is somewhat analgous to a property tax which all persons, with comparatively few exceptions provided for in the statute, are required to pay upon

the property owned by them. The state has the authority to tax property which is used in interstate commerce and which is regularly and permanently located within its limits, where the ascertainment of the amount assessed is dependent upon the value of the property within the state, as the property of other citizens is taxed. *Leloup v. Port of Mobile,* 127 U. S. 640, 8 S. Ct. 1380; *Western Union Telegraph Co. v. Kansas,* 216 U. S. 1, 30 S. Ct. 190.

"Even though the respondent in this case cannot retire from its intrastate business without also retiring from its interstate business, we think that the excise tax imposed upon the gross income from the intrastate business is not such a direct burden upon interstate commerce as to require that the tax be held void.

"Attention at this point should be called to chapter 4 of the Laws of 1933, p. 47, Rem. 1933 Sup. § 11238-1 [P. C. § 6882-77a], which was initiative measure 64, and generally referred to as the '40-mill tax limit for taxation' law. In that act, it was provided that the aggregate of all taxes upon real and personal property in the state should not exceed in any one year forty mills on the dollar of assessment valuation, which should be based upon fifty per cent of the true and fair value of the property in money, with some exceptions which are not here material. The respondent, by reason of this law, has been relieved from paying a very large sum of money as taxes upon the property which it owns in this state and which was subject to taxation, even though devoted to interstate commerce. It is a matter of common knowledge that, under the 40-mill tax limit law, property is now paying about half of what it paid for general taxes prior to the passage of that law; in other words, that, by reason of the law limiting the amount to forty mills, the tax burden upon both real and personal property of the state has been reduced approximately one-half. Having thus provided for a reduction of taxes upon real and personal property, it was necessary for the legislature to find other sources of revenue, and chapter 191 was undoubtedly passed for this reason.

"So far as we are informed, the Federal supreme court has at no time distinctly held that an excise tax, such as that of this state, which is imposed upon all businesses, is such a direct burden upon interstate com-

merce as to render the act of the legislature unconstitutional."

In amplification of what was said by the State supreme court in this connection, may we here set forth the appellees' position in the court below. It was contended: (1) that the State's revenue laws must be considered collectively to determine whether the tax complained of unlawfully burdens appellants' interstate business; (2) that were appellants' physical properties and franchises taxed as in 1932 and prior years to cover the entire cost of state government, such tax could not be deemed an unlawful burden on appellants' interstate business; and (3) that the undisputed evidence shows that under the present state revenue laws, each appellant railroad's entire tax burden is materially less than its *ad valorem* taxes alone would have been, were the State's necessary revenues raised by property taxation alone.

DETERMINATION OF METHOD OF DISTRIBUTING TAX BURDEN IS LEFT TO THE STATES.

This was thus recognized in *Lawrence v. State Tax Commission,* 286 U. S. 276, 279-280, where Your Honors said in sustaining, as not violative of the due process clause, a Mississippi law imposing a tax on the net income of its residents derived wholly from activities carried on by them outside of the state:

"The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its law, are inseparable from the responsibility for sharing the costs of government. See *Fidelity & Columbia Trust*

Co. v. Louisville, 245 U. S. 54, 58; *Maguire v. Trefry,* 253 U. S. 12, 14, 17; *Kirtland v. Hotchkiss,* 100 U. S. 491, 498; *Shaffer v. Carter,* 252 U. S. 37, 50. The Federal Constitution imposes on the states no particular modes of taxation, and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment. * * *

"It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship."

STATE REVENUE LAWS MUST BE EXAMINED COLLECTIVELY TO DISCOVER WHETHER APPELLANTS' INTERSTATE BUSINESS IS UNLAWFULLY BURDENED BY TAXES IMPOSED.

In *Baker v. Druesedow,* 263 U. S. 137, 142, the court said:

"Where illegal discrimination was practiced, it is immaterial whether it was effected by a single assessing board or through the action of two independent boards. *Greene v. Louisville & Interurban R. R. Co.,* 244 U. S. 499, 513; *Southern Ry. Co. v. Watts,* 260 U. S. 519, 526."

The converse, we submit, must be true. If the operation of the state's revenue statutes as an entirety do not result in an invasion of any of appellants' constitu-

tional rights or burden their interstate commerce, appellants cannot be heard to complain.

The principle is thus clearly announced in *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 479-80:

"The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the state imposing a tax upon the sale and use of gasoline within the state. The state court said that the act in question 'taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred acts all users are taxed.' But appellants question the right to invoke other statutes to support the validity of the act assailed. To stand the test of constitutionality, they say, the act must be constitutional 'within its four corners,' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power. When the Supreme Court of the state has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves. *Hebert v. Louisiana*, 272 U. S. 312, 317. See *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 73."

True, a State can neither tax the act of engaging in interstate commerce nor lay a tax on the gross receipts therefrom. (*Pullman Co. v. Richardson*, 261 U. S. 330, 338.)

But on the other hand, it has been held by this Court many times that an apportionment of the cost of State government to an interstate utility company according to the relative value of the property of such company

permanently located or commonly used by it within the state in such interstate commerce is not violative of the commerce clause. (*Cudahy Packing Co. v. Minnesota,* 246 U. S. 450, 453; *Wells, Fargo & Co. v. Nevada,* 248 U. S. 165, 167; *Union Tank Line Co. v. Wright,* 249 U. S. 275, 282; *Pullman Co. v. Richardson,* 261 U. S. 330, 338.)

It has also been frequently held that an apportionment of the expense of state government to an interstate utility company according to its net income including that earned in its interstate activities does not violate the commerce clause. (*United States Glue Co. v. Oak Creek,* 247 U. S. 321; *Shaffer v. Carter,* 252 U. S. 37, 57; *Underwood Typewriter Co. v. Chamberlain,* 254 U. S. 113; *Atlantic Coast Line v. Daughton,* 262 U. S. 413, 416.)

And the rule is likewise established by this court that a tax measured by an interstate utility company's gross income including a mileage proportion of that earned in interstate commerce imposed in lieu of property taxes, will be sustained as not violative of the commerce clause, if such exaction does not exceed that which could lawfully have been imposed on an *ad valorem* property tax basis. *U. S. Express Co. v. Minnesota,* 223 U. S. 335; *Cudahy Packing Co. v. Minnesota,* 246 U. S. 450; *Pullman Co. v. Richardson,* 261 U. S. 330.

In *U. S. Express Co. v. Minnesota,* 223 U. S. 335, 344-5, it was said:

"The right of the State to tax property, although it is used in interstate commerce, is thoroughly well settled. *Postal Telegraph Co. v. Adams,* 155 U. S. 688; *Pullman's Palace Car Co. v. Pennsylvania,* 141 U. S. 18; *Ficklen v. Shelby County,* 145 U. S. 1, 22. * * *

" 'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon prop-

erty or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution.' *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 697."

These lieu taxes of Minnesota and other states, it must be remembered, were not sustained or sustainable on the theory that gross receipts is a proper criterion of property values. Such a holding would have been entirely out of harmony with *Johnson v. Wells Fargo & Co.*, 239 U. S. 234, holding invalid the valuation of the property of an interstate utility company by giving controlling effect to the gross income derived therefrom, and with the Minnesota Rate Cases, 230 U. S. 352, 458, condemning the apportionment of the value of the property of an interstate railroad used in its intrastate and interstate operations according to the gross income received from the two activities.

Such lieu taxes were sustainable, therefore, only on the theory that the tax imposed on gross income was no greater than that which would have been imposed, had the expense of state government been apportioned to these interstate utilities on an *ad valorem* tax basis.

By its New Tax Plan, the State of Washington has seen fit to distribute a part of the governmental costs to appellants and all other property owners on an *ad valorem* property tax basis, and to apportion the remainder of such costs of government according to the gross income received from practically all business activities, including the intrastate receipts of interstate utility companies.

And we respectfully submit that in determining whether appellants' interstate commerce has been unlawfully burdened by Washington's New Tax Plan, the

same test should be applied as in the cases sustaining a tax on interstate companies measured by gross income in lieu of a property tax, and that in the absence of a showing that the total tax burden thus imposed, property and excise, is not greater than that which would have been imposed had the State chosen to apportion the entire cost of government according to the relative value of the taxpayers' properties, it cannot be said that the excise thus exacted in lieu of taxes which might otherwise have been lawfully imposed as an added burden on property, is violative of the commerce clause.

It is of course apparent that a tax levied on an interstate carrier's tangible property and franchises is no less a burden on its interstate business than is a privilege tax measured by its intrastate gross income.

In this connection, may we note the language of Mr. Justice Stone, with Justices Holmes and Brandeis concurring, in *Helson v. Kentucky,* 279 U. S. 245, 252, wherein the majority held a tax on gasoline used in an interstate ferry to be void as violative of the commerce clause:

"I cannot yield assent to the reasoning by which the present forbidden tax on the use of property in interstate commerce is distinguished from a permissible tax on property, measured by its use or use value in interstate commerce. * * * (citing authorities) * * * Nor can I find any practical justification for this distinction or for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, which is neither aimed at nor discriminates against interstate commerce. 'It affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in

no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed.' *Deleware Railroad Tax,* 18 Wall. 206, 232."

That this view is not out of harmony with that now taken by this court is evidenced by the later cases of *Eastern Air Transport v. Tax Commission,* 285 U. S. 147, *Nashville, C. & St. L. Ry. v. Wallace,* 288 U. S. 249, and *Edelman v. Boeing Air Transport,* 289 U. S. 249, holding that a state non-discriminatory use tax may constitutionally be imposed on gasoline imported and stored by an interstate carrier for use in generating motive power for instrumentalities of interstate transportation.

Distinguishing *Helson v. Kentucky,* 279 U. S. 245, Your Honors said in the *Wallace* case:

"But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged." (288 U. S. 267.)

That no distinction is to be made between property taxes and excises with respect to the taxation of the subjects, as distinguished from the instrumentalities, of interstate commerce, was held in *Wiloil Corporation v. Pennsylvania,* — U. S. —, 79 L. Ed. 382, where a non-discriminatory sales or use tax on liquid fuels was sustained as to gasoline sold within, but delivered from without, the taxing state.

"It is not material," said Your Honors there, "whether the tax is upon the sale and delivery or upon the property." (79 L. ed. 384.)

It must follow that if, as a result of the State's present scheme of taxation, "taken in its totality," the interstate carrier's total tax burden is not increased,

but *actually lightened* as compared with the tax burden which might legitimately be imposed by the taxing state, such interstate carrier cannot be heard to complain that its interstate business is unduly burdened.

In *Southern Ry. Co. v. Watts*, 260 U. S. 519, 530, the court said:

"It is argued that this franchise tax is an additional property tax which is not imposed on others, and that, consequently, it violates the uniformity clause of the state constitution and the equal protection clause of the Federal Constitution. It is true that the franchise tax is measured by the value of property already subjected to the *ad valorem* tax. But a privilege tax is not converted into a property tax because it is measured by the value of property (compare *Clark v. Titusville*, 184 U. S. 329, 333, 334); nor by the fact that in this measure is included property not used in the transportation service. Railroads differ in so many respects from other properties that they may, as a class, be taxed differently or additionally, if that is not inconsistent with the constitution of the state.

"Nor is there any basis for the claim that the franchise tax act violates the commerce clause. The tax appears to be upon the privilege of doing an intrastate business. Compare *Armour Packing Co. v. Lacy*, 200 U. S. 226. It is not of the character which is held a burden upon interstate commerce. *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350; *Underwood Typewriter Co. v. Chamberlain*, 254 U .S. 113, 119, 120; *St. Louis-San Francisco Ry. Co. v. Middlekamp*, 256 U. S. 226. Payment of the tax is not made a condition precedent to granting a railroad permission to do interstate business. Compare *Leloup v. Mobile*, 127 U. S. 640. *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 119. *And there is no basis for the contention that the aggregate burden imposed by the property tax, the franchise tax, and the income tax, operates to obstruct interstate commerce.*" (Italics ours.)

STATE'S NEW TAX PLAN:

Prior to 1932 practically the entire cost of government, state, county and municipal, was raised by *ad*

valorem taxes imposed on real and personal property including that of interstate carriers. By measures adopted by the people themselves at the general election of November, 1932, and by the people's representatives at the legislative session of 1933, this scheme of taxation was changed by shifting a substantial part of this burden of governmental expense from property to various kinds of businesses and occupations. Thus, by an initiative measure (Chap. 4, Laws of 1933) it was provided that thereafter (except when authorized by special elections) no more than 40 mills should be thereafter levied on the assessed valuation (50% of the actual value) of real and personal property, such millage being limited to 5 mills for the state, 10 mills for counties, 10 mills for school districts and 15 mills for cities or towns.

At the same election, the people, by direct vote, enacted a state income tax law (Chap. 5, Laws 1933) providing for a tax of certain percentages of all net incomes of individuals and corporations in excess of certain stated amounts. Although this income tax measure was later adjudged unconstitutional (see *Culliton v. Chase,* 174 Wash. 363), the court may nevertheless refer to its recitals to discover the people's purpose in adopting both the 40-mill and income tax measures. To quote:

"Existing methods of taxation, primarily based on property holdings, are inadequate, inequitable and economically unsound. Present conditions point the need of a new subject matter for taxation, which should be based on the ability to pay. Earnings for a given period are a fair measure of such ability.

"The people of the State of Washington, therefore, exercising herein their supreme power and fundamental right, declare their purpose hereby to tax all annual incomes within the state as such, and not as property." (Laws 1933, ch. 5, sec. 1.)

These two acts were initiative measures. At the following legislative session Chapter 28, Laws of 1933, was enacted, Section 4 of which limits the levy for the current school fund (a state fund theretofore unlimited) to five mills. The same session enacted Chapter 191, Laws of 1933 (the law here assailed), imposing an occupational tax on those engaged in various business activities, thereby largely shifting the expense of government from tangible property to such businesses and occupations.

REDUCTION IN RAILROADS' TAXES BY STATE'S NEW TAX PLAN:

At the trial of the railroad cases, appellee introduced exhibits for the purpose of comparing the total taxes, *ad valorem* and occupational, payable by the four large interstate railroads of the state for each of the years 1933 and 1934 (assuming such occupational tax to have been collectible for all of 1933, instead of only for the last five months), with the taxes which would have been payable by such railroads for such years under the revenue laws in effect prior to November, 1932. (Plff's Exs. "43" and "44," NP Rec. 224-226; Plff's Exs. "32" and "33," GN Rec. 241-244), which exhibits are explained by State's witness, Manschreck. (NP Rec. 194-6; GN Rec. 208-211.)

These exhibits are, we believe, self-explanatory, and show that as a result of the New Tax Plan the total taxes payable by the four roads (including the occupational tax) were $597,770 less in 1933 and $549,034 less in 1934 than they would have been under the old tax plan (see lines "A" to "H"), and that such companies' state taxes alone, plus the occupational tax, were $738,248 less in 1933, and $826,343 less in 1934 than such state taxes

alone would have been for those years under the old tax plan. (See lines "I" to "M.")

Had the 40-mill tax limit act been combined with the occupational tax measure it is clear that in determining whether such single tax measure imposed an undue and unlawful burden on appellents' interstate operations, the Court's first inquiry would necessarily have been as to the net results of the operation of such law in increasing or reducing such carriers' aggregate tax burden.

Suppose that, instead of the 40-mill act, the people or their legislature had adopted a measure freeing property from ALL *ad valorem* taxes, shifting the entire burden to businesses and occupations, and thereby substantially reducing the total taxes payable by the appellant railroads. Could these carriers then, while accepting such exemption features, be heard to urge that they should likewise escape the occupational tax and thus avoid any contribution whatever to the support of government? We submit not.

Our position is supported by *Chicago, M. St. P. & P. R. Co. v. Hedges,* 5 Fed. Supp. 752, 756, *et seq.,* where Judge Neterer said:

"To change its taxing system, the electors of the state, by initiation, adopted chapters 4 and 5, pp. 47, 49, Laws of Washington 1933 (40-mill levy limit on real estate and the income tax measure), and the Legislature, the act in issue, an 'emergency measure,' as a new taxing system. The preamble to chapter 5, p. 49, Laws of 1933, exposes the state of mind as follows:

" 'Existing' methods of taxation, primarily based on property holdings, are inadequate, inequitable and economically unsound. Present conditions point the need of a new subject matter for taxation, which should be

based on the ability to pay. Earnings for a given period are a fair measure of such ability.

" 'The people of the State of Washington, therefore, exercising herein their supreme power and fundamental right, declare their purpose hereby to tax all annual incomes within the state as such, and not as property.' Laws 1933, ch. 5, p. 49, Sec. 1.

"The Supreme Court of the state held this Income Tax Law unconstitutional [(*Culliton v. Chase, McKale's Inc. v. Chase*), 25 P. (2d) 81], and thus deprived the state of a portion of its revised system, and further disorganized the revenue situation. The 40-mill limit tax on real property authorized by chapter 4, p. 47, Laws of 1933, is grossly inadequate and the need of the 'emergency measure', and the act in issue, chapter 191, p. 869, Laws of 1933, effective from August 1, 1933, to July 31, 1935, became vital; and, in considering this issue, chapter 166, p. 613, Laws of 1933, should be noted. * * *

"Consideration of the new system to supersede the old, and the status of the litigants under the old system, and the traffic rates approved by the rate-making body, the Interstate Commerce Commission, which must be presumed as sufficient for interstate commerce, is enlightening. May it be said that any burden has been placed on interstate commerce by the challenged act, when, as later particularized, the new system, including the excise law (term used merely for designation) in issue, commerce, intra and inter state, has been relieved of $737,825 taxes?

"The principle that these laws must be considered together is approved in *Baker v. Druesedow,* 263 U. S. 137, 44 S. Ct. 40, 68 L. Ed. 212, and cited cases; *Greene v. Louisville & I. R. Co.,* 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280; *Gregg Dyeing Co. v. Query,* 286 U. S. 472, 52 S. Ct. 631, 76 L. Ed. 1232, 84 A. L. R. 831. If the state has not by all of its taxation legislation, burdened interstate commerce, it may not be criticized. *Hebert v. Louisiana,* 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270, 48 A. L. R. 1102; *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160. * * *

"The plaintiffs are receiving all of the revenue they received prior to the act in issue, with no added burden on interstate commerce, or at all. No burden could be

placed upon interstate commerce by the changed taxing system, if the tax has been lessened and no reduction of tariff rates made, as in this case.

* * * * * * * * *

"* * * Obviously complainants 'suffer no harm from the provisions of the statute.' *Osborne v. Florida,* 164 U. S. 650, 17 S. Ct. 214, 216, 41 L. Ed. 586. The net saving to the complainants, under the new system, including the excise tax, is $737,825. The excise tax is in no event a direct charge against interstate commerce, and, if it indirectly affects it, it is not forbidden. *Oliver Iron Co. v. Lord,* 262 U. S. 172, 43 S. Ct. 526, 67 L. Ed. 929; *State v. Express Co.,* 80 Wash. 309, 141 Pac. 757.

"This does not take cognizance of benefits to the complainants of the Motor Truck Act (chapter 166, p. 613, Laws 1933), curtailing truck competition and increasing the traffic revenues for the complainants' roads. Instead of taking from other states and contributing to the state of Washington, as contended by complainant in argument, there is actually taken from the taxpayer and patrons of the complainants' roads in the state of Washington $737,825 to apply in other states. Assuredly, complainants may not invoke the Fourteenth Amendment. *Gant v. Oklahoma City,* 289 U. S. 98, 53 S. Ct. 530, 77 L. Ed. 1058. * * *."

"But," appellants argue, "we are required to pay the same *ad valorem* taxes as are imposed on all other property, and on top of that, an excise not exacted of other tax payers."

But this argument, we submit, is patently fallacious. Let us consider, for instance, the total revenue received by the State under its New Tax Plan from the valuable business properties in its larger cities. It receives, first, the *ad valorem* tax exacted of the owner, and in addition, the business or occupational tax exacted of every business enterprise conducted on such business property. From such properties as public stages, trucks, ferries, etc. it first exacts an *ad valorem* tax on the vehicles themselves and on the owners' franchises, and in addi-

tion, an occupational tax measured by the intrastate gross receipts from such activities.

And in this connection we would call particular attention to the fact that although the property of municipal corporations is expressly exempted from *ad valorem* taxation by Article VII of the State constitution, the offending occupational tax is imposed on municipalities operating public utilities and conducting businesses, the same as upon private enterprises (Laws 1933, ch. 191, Sec. 2-e), which provisions have been sustained by the State court. See *Tacoma v. State Tax Commission*, 177 Wash. 604. Needless to say, no small part of the burden of taxation is thus shifted from appellants' property to municipally owned street railways, and water, light and power plants not otherwise taxable.

That the total burden of taxation thus imposed has, as a necessary result of the State's New Tax Plan, been shifted from the appellant companies to these municipalities and to the business carried on in connection with the other general taxable property of the State, is, we submit, conclusively demonstrated by the fact that such appellants' entire tax burden, *ad valorem* and excise, is now materially less than it would have been under the former method of requiring taxable property to bear the entire load.

Counsel profess concern that if the 1933 tax be sustained, the state legislature may raise the rate to 10, 25 or even 50%.

The answer is three-fold: (a) it cannot be presumed that the State will attempt to tax these roads out of existence; (b) appellants' patrons who must ultimately pay the tax would not tolerate an unreasonable

exaction; and (c) should counsel's fears be realized, the courts will on application, promptly declare such an unreasonable and discriminatory imposition invalid as violative of the constitutional provisions which appellants now seek to invoke.

Since the 1933 measure was adopted, the sorely pressed State legislature has twice convened, but has not raised the rate as to railroads beyond that originally imposed on several other utilities including telephone companies, but instead, has exacted of the State's citizens a 2% retail sales tax to meet the emergency. (Laws 1935, Ch. 180.)

EFFECT OF NEW TAX PLAN ON APPELLANT, TELEPHONE COMPANY:

This company has received all the benefits of a tax reduction on its property, without necessarily suffering from the imposition of the occupational tax. It concedes that it is making at least some net returns on the fair value of its property used in its intrastate operations. (PT Rec. 4.) There are no competitive companies in the field which it occupies. (PT Rec. 68.) It neither alleged nor proved that its rates could not be so increased as to cover the excise exacted without loss of patronage. Yet it also concedes that it has made no application to any regulatory body, state or federal, for an increase of its rates for the purpose of meeting the tax. (PT Rec. 100.)

There is nothing in the Occupational Tax Act which prevents it from passing the tax on to its patrons.

Not only does the State court in effect so hold in the cases before us, but in *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 410, it was said:

"Moreover, the farmer cannot pass the tax to the

ultimate consumer, while all those later dealing with his products, like all others engaged in commercial pursuits, may and probably will very largely do so."

And in *Cascade Telephone Co. v. State Tax Commission,* 176 Wash. 616, the court, if it did not squarely so hold, at least strongly implied that the fact that the Governor vetoed the section of the Act *requiring* the taxpayer to pass the tax along to the ultimate consumer, did not prevent the taxpayer from doing so if he chose. A similar suggestion is found in *Tacoma v. State Tax Com.,* 177 Wash. 604, 611.

Indeed, none of the appellants even suggest that there is anything in the Act even impliedly forbidding that the tax be passed along to appellants' customers.

"To add by implication" said Your Honors in *American Express Co. v. Michigan,* 177 U. S. 404, 412, "such a provision to a tax law would be contrary to its intent, and be in conflict with the general object which a law levying taxes is naturally presumed to effectuate."

If on application to the proper authority, the P. T. is allowed (and we have no reason to doubt but that such permission would be granted) to increase its rates to the extent of the tax exacted, obviously that company would be in the position, not of a taxpayer, but of a mere tax collector, and neither its intrastate nor interstate operations would be burdened thereby.

For the reasons so clearly set forth in *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124, 217-8, and *Postal Tel.-Cable Co. v. Richmond,* 249 U. S. 252, 258, we submit that so far as the P. T. is concerned, the tax is an invasion of neither the due process nor the commerce clause of the federal constitution.

In *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124,

it was contended, as here, that the complaining company was required by State law not only to continue to engage in intrastate business, but at designated rates, but the court said:

"The company, as we have seen, cites Sec. 7408 as a compulsion upon it to engage in intrastate business and at designated rates. From the rigor of the requirement Sec. 7409 provides a mode of relief, and until it is denied the company cannot complain under the circumstances presented by this record. In other words, if Sec. 7408 is imperative upon the company to continue intrastate business, Sec. 7409 affords a means of obtaining relief from burdensome obedience. The sections are counterparts. If submission to Sec. 7408 results in insufficient revenue and a burden upon interstate commerce, it is made the duty of the Railway Commission by Sec. 7409 upon complaint of the Postal Company to raise the intrastate rate 'fixed' in Sec. 7408. No attempt to secure relief under Sec. 7409 appears to have been made."

DISCUSSION OF APPELLANTS' SPECIFIC OBJECTIONS TO 1933 OCCUPATIONAL TAX ACT:

The N. P.'s and G. N.'s assignments of error are substantially identical and are to the following effect:

(1) That having held as a matter of law that appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, the State court erred in holding said tax not to be violative of the commerce clause;

(2) That having held that as a practical matter appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, said court erred in holding said tax not to be violative of the commerce clause;

(3) That having found that the appellant's intrastate business is conducted at a loss which must be borne by its income from interstate business, said court erred

in holding said tax not to be violative of the commerce clause and due process clause.

(4) That having found that the appellant's intrastate business is conducted at a loss which must be borne by its income from interstate business, said court erred in holding that the tax was not violative of the commerce clause for the stated reason that the appellant had not exhauted its remedy (by writ of review) to obtain intrastate rate increases, for the reason that such circumstance is immaterial, and not supported by, but contrary to the facts found by the trial court.

The P. T.'s assignments of error are the same as the first two above set forth, to which it has added the following:

(5) That having found that the P. T. cannot, as a matter of law, retire from its intrastate business while continuing its interstate business, the court erred in holding the tax not to be violative of the due process clause.

THE TRIAL COURT'S FINDINGS IN THE N. P. AND G. N. CASES WERE NOT ADOPTED BY STATE SUPREME COURT:

At the outset it is important to note that appellants' various assignments of error are based upon wholly erroneous assumptions. The state supreme court did not hold as to any of the appellants, that it could not, as a matter of law, retire from its intrastate business without also retiring from its interstate business. Neither did it find from the evidence as to any of the appellants that, as a practical matter, such appellant could not retire from its intrastate business without also retiring from its interstate business, or that either railroad com-

pany was conducting its intrastate business at a loss. On the contrary, without passing upon the merits of any of these contentions, the court, for the purpose of argument, merely *assumed* them to be well-taken, and then proceeded to hold each and all of them immaterial and to sustain the tax. This is obvious from the following language of the court:

"The next and, as we view it, the important and difficult question is whether the tax may be collected, even though the railway company, the respondent, may not be able to retire from its intrastate business without also discontinuing its interstate. In this connection, *it will be assumed* (a) that the respondent cannot, as a matter of law, retire from its intrastate business; (b) that it is impractical, as a matter of fact, for it to retire from its intrastate business without also retiring from its interstate; and (c) that the intrastate or local business is conducted at a loss which is taken care of by the receipts from the interstate business. Giving effect to these *assumptions,* inquiry must be directed then to whether the tax is valid, even though the railway company may not be able to retire from its intrastate business without retiring from its interstate, and that the intrastate business is conducted at a loss." (Italics ours.) *State v. N. P. Ry. Co.,* 83 Wash. Dec. 52, 55, 48 Pac. (2d) 931, NP Rec. 57.

But counsel for appellant railroads would have Your Honors believe that the State supreme court adopted the findings of the trial court as its own, such contention being based, apparently, upon the court's following statement in its opinion in the N. P. case:

"As found by the trial court, the interstate and intrastate business in this state is inextricably commingled, and the intrastate business is conducted at a loss, and it is necessary to make up this loss from the income

from interstate business." *State v. N. P. Ry. Co.*, 83 Wash. Dec. 52, 53, 48 Pac. (2d) 931, NP Rec. 55.

But it is perfectly apparent that in using this language the court was merely reciting what the trial court had found. Surely, where the State supreme court reached the conclusion that the offending tax was valid without regard to the trial court's findings, this court cannot assume that, by the above recitals, the State supreme court intended to adopt the trial court findings on these hotly contested issues. It must be remembered that the State had assigned numerous errors based on the trial court's findings on these issues and on the admissibility of the evidence upon which they were seemingly based. (Post, pp. 93-180.) The State court could not, we submit, have intended to overrule all of these numerous assignments without making any reference to them whatever.

Section 2, Article IV, of the State Constitution provides:

"In the determination of causes, all decisions of the court shall be given in writing, and the grounds of the decision shall be stated."

Surely, it should require the most positive and unequivocal language, to persuade Your Honors that the State supreme court had so grievously violated its plain constitutional duty.

Again, we find no such recital in the court's opinion in the G. N. case. See *State v. G. N. Ry. Co.*, 83 Wash. Dec. 66, 48 Pac. (2d) 938, GN Rec. 84.

Moreover, in the P. T. case, an equity cause, in which the lower court made no findings, and in which the complaint expressly alleged that the P. T. was making

a net profit on its intrastate business (PT Rec. 4), we find the State supreme court basing its decision upon its opinion in the N. P. case (*Pac. Tel. & Tel. Co. v. State Tax Commission,* 83 Wash. Dec. 67, 48 Pac. (2d) 938, PT Rec. 151), with no reference whatever to the trial court's findings.

In view of fact, then, that in reaching its conclusions on the law, the State supreme court merely *assumed* that it was impractical for the N. P. to withdraw from its intrastate business, and that it was conducting such intrastate business at a loss, the court's opinion, must, we submit, be construed as a mere recital, but without endorsement, of the trial court's findings. Nothing more.

Disposition of appeals if assumptions found material.

What disposition, then, should be made of these appeals should Your Honors conclude that the tax would be invalid on the basis of an assumption that the appellants cannot, as a matter of law, retire from their intrastate business without also retiring from their interstate business?

The correctness of this assumption necessarily involves purely a construction of the local constitution and statutes, as to which the State supreme court's decision is controlling. Consequently, if the correctness of this assumption is found to be material, it would seem that Your Honors should not attempt to decide this question of local law, but should make such disposition of the appeals as to permit the State supreme court to exercise its undoubted prerogative in this regard. *Clark v. Williard,* 292 U. S. 113, 128-9.

But if, as we contend, the Washington constitution and statutes would themselves be violative of the com-

merce clause if given the assumed construction, then obviously this assumption of the State court should be wholly disregarded, since it would be wholly useless and ineffectual for the State court to reach a conclusion which would in and of itself, wholly vitiate such state statutes and constitutional provisions.

APPELLEE'S OBJECTIONS TO TRIAL COURT'S FINDINGS AND RULINGS ON ADMISSIBILITY OF EVIDENCE IN N. P. AND G. N. CASES.

In its appeals to the State supreme court in each of these cases, the appellee here, as appellant there, assigned numerous errors both as to the propriety of the trial court's findings, and as to the admission of evidence received in support of the same. May we note that in its designation of additional portions of the record to be printed in the N. P. and G. N. cases (NP Rec. 325-6; GN Rec. 293-4), the appellee requested that the clerk print those portions of its State court briefs setting forth its assignments of error. While these assignments are printed in the G. N. transcript (GN Rec. 79-83), we fail to find them in the N. P. transcript, but since they appear in the unprinted record and are set forth herein, we assume that this court will notice them.

Under the Washington practice, the complaining party may base error upon adverse findings without the necessity of taking exceptions thereto in the trial court. (NP Rec. 77; GN Rec. 108) But in the appellant's brief, each error relied upon must be clearly pointed out and separately discussed. (NP Rec. 76; GN Rec. 108)

Appellee's purpose in requesting that such assignments be certified to this Court was to show that it had assigned error in the State supreme court based on these various adverse findings and rulings of the trial court,

which assignments the court had failed to consider for the reason that, to sustain the offending tax, it was found unnecessary to do so. This appellee believed necessary not only to advise Your Honors that appellee had not acquiesced in the trial court's findings and rulings, but to show that if such findings were deemed material, appellee was entitled to have the same reveiwed either by this Court, or to have the causes remanded for that purpose to the State supreme court.

Of course, should Your Honors follow any other course, it would mean that the State would be wholly deprived of its unquestioned right to have these adverse findings and rulings of the trial court reviewed either by this or the State supreme court.

Upon an appeal from a decree of the Supreme Court of the Philippine Islands erroneously reversing the trial court solely on a question of law, this Court held in *Philippine Sugar &c. Co. v. Philippine Islands,* 247 U. S. 385, that, in order to dispose finally of the case, Your Honors might review the facts, when all the evidence proffered was admitted, and was in the record, and where the appellant in the court below sought to review the trial court's findings.

The Court will find the evidence on the question of whether or not the appellant railroads are in fact losing money on their local business, and the trial court's adverse rulings on the admissibility of evidence relating thereto, reviewed at length in Appendix "A" (Post, pp. 93-151) as to the N. P., and in Appendix "B," (Post, pp. 152-180) as to the G. N.

EVIDENCE AS TO N. P. AND G. N. NET EARNINGS IN INTRASTATE BUSINESS IN 1933.

The Northern Pacific:

The undisputed evidence showed that instead of losing $413,866 as claimed, had the N. P. computed its passenger operating expense on the same basis as the G. N., its net earnings would have been $87,710; and having made this correction, had it apportioned taxes on a relative use basis as required by the *Minnesota Rate Cases*, 230 U. S. 352, instead of on a relative gross revenue basis, its net earnings would have been $285,131; and having made these corrections, had it correctly apportioned traffic expenses, and not charged pensions as an operating expense, its net earnings would have been $457,160. Having made these corrections, had the N. P., in its calculations, used the intrastate revenues reported to the D. P. W., its net earnings would have been $583,154. (Post, pp. 140-1.)

The Great Norhern:

The undisputed evidence showed that by its own calculations, by using the intrastate revenues reported to the D. P. W., its net earnings were $202,458, and not deducting car and joint facility rentals as an operating expense, its net earnings were $491,544. (GN Ex. "11," p. 1, GN Rec. 258.)

But making the full deductions from its reported revenue as claimed, and not deducting car and joint facility rents as an operating expense, its net earnings were $114,152. (GN Ex. "11," p. "A," item 5, GN Rec. 254.) And even making such deductions from revenue and deducting such car and joint facility rents as an operating expense, but correctly apportioning taxes and joint facility rents, eliminating pensions as an oper-

ating expense, and eliminating duplications of expense, its net earnings were $132,256. (Post, pp. 175-6.)

G. N. AND N. P. CONCEDED A SUBSTANTIAL PROFIT FROM THEIR INTRASTATE FREIGHT BUSINESS.

The N. P. admittedly made a profit of $729,940 on its intrastate freight business, but claimed to have absorbed such profits in its claimed net loss of $1,143,806 on its passenger business with a resulting claimed net loss on the two activities combined of $413,866. (Post, pp. 141-3.)

The G. N., on its most extreme calculations, admittedly made a profit of $430,234 on its intrastate freight business, but claimed to have absorbed such profits in its claimed net loss of $529,503 on its passenger business with a resulting claimed net loss on the two activities combined of $99,269. (Post, pp. 176-8.)

Surely it cannot be seriously contended that any valid statute or constitutional provision, either state or federal, can compel an intrastate carrier to continue its intrastate passenger business, every dollar of revenue from which costs the carrier $1.95 (as the G. N.), and $3.66 (as to the N. P.). See *Railroad Commission v. Eastern Texas R. R.*, 264 U. S. 79.

And if such carrier elects to continue such losing local passenger business, why, we ask, charge the loss to its local freight profits, rather than to its system passenger business to which its local passenger business is at best, merely incidental?

For the purpose of this inquiry, should not these carriers' passenger and freight operations, we ask, under the circumstances here revealed, be treated as separate and distinct business activities for the purpose of determining the validity of the offending tax?

RAILROAD APPELLANTS' CONTENTION THAT OCCUPATIONAL TAX ACT INVALID AS TO THEM, IF THEIR INTRASTATE BUSINESS IS CONDUCTED AT A LOSS.

We submit that under the facts revealed by the record the State supreme court was absolutely correct in not condemning the tax on the ground urged. To quote the language of the court:

"But it is said that the intrastate business is being conducted at a loss, and this loss must be borne by the interstate business and therefore is a burden upon interstate commerce. There is an expression in the case of *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 39 S. Ct. 265, that would appear to support this contention, even though the question was not necessarily involved in that case; and further, in that case there was not involved an excise tax based upon gross income, as here.

"In this state, if the respondent's intrastate business is conducted at a loss, the legislature has provided a remedy, first, by application to the department of public service, with the right of review by the superior court and an appeal to this court. From the findings, it appears that an application has been made and denied by the department, and that another application is pending. It does not appear, however, that the respondent has exhausted the relief granted by the statute, and until it does so, it cannot be said that, even though the intrastate business is being conducted at a loss, it is such a burden upon interstate commerce as would justify holding the law unconstitutional.

"The facts in the case of *Postal Telegraph-Cable Co. v. Fremont*, 255 U. S. 124, 41 S. Ct. 279, presented a similar question, and it was there held that, where the state law affords a means to prevent the tax from burdening interstate commerce, through an application to increase intrastate rates, the tax will not be held void, in the absence of a showing that the company had exhausted the remedy afforded by an increase of the rates on intrastate business. We see no just or legal reason why the respondent should not comply with chapter 191, as all other businesses in this state are required to do." *State v. N. P. Ry. Co.*, 83 Wash. Dec. 52, 61-2, 48 Pac. (2d) 931; NP Rec. 54, 62.

The court recites, it will be noted, that "from the findings, it appears that an application" (for an increase in local tariffs) "has been made and denied by the department, and that another application is pending."

But it definitely appears from counsel's own admissions that neither the N. P. nor G. N. has ever sought an increase of rates from either the D. P. W. or the I. C. C. *by reason of the imposition of the occupational tax.* Thus, speaking of the showing made by the N. P. and G. N. in certain rate investigations pending before each of those bodies, counsel for the N. P. said:

"There was no occupational tax included, because none had ever been levied against the railroad, much less collected, and we don't think any will ever be collected, either. So it certainly was not in the showing." (NP Rec. 154; GN Rec. 200.)

And in the rate proceeding instituted by these roads before the D. P. W. in September, 1934, the railroads did not make any claim based on the occupational tax. (NP Rec. 155; GN Rec. 200.)

Thus the records reveal that far from petitioning these regulatory bodies for an increase of rates to meet the occupational tax, they have always taken the position that such tax is void as to them.

True, each of these carriers alleged in its answer (NP Rec. 13; GN Rec. 19), and secured a finding of the trial court (NP Rec. 50; GN Rec. 73) to the effect that most of its local rates cannot be raised, because of competitition from other kinds of transportation. But there is, we submit, not a syllable of evidence in the record to justify any such finding.

The "competition" referred to, is no doubt highway

transportation companies, but the same tax imposed on railroads is likewise exacted of truck lines. (Laws of Wash. 1933, Ch. 191, Sec. 2(2)(e)XI.) May it not therefore be fairly assumed in the absence of evidence to the contrary, that these competitors have met with the same problem as these appellants as to the necessity of a rate increase to meet the tax. Indeed, the problem of the trucks is all the more pronounced in that their total tax burden is very materially increased by the New Tax Plan whereas that of the railroads, as we have shown, is materially lightened.

The only evidence offered by these roads in support of their allegations of inability to raise *many* of their local rates, was an order of the D. P. W. dated April 27, 1933, denying the carriers' application made January 13, 1933, for an order extending to September 30, 1933, a 15% local rate increase then in effect, to September 30, 1933 (NP Rec. 14-16; GN Rec. 21-23), which order recited that it was a matter of common knowledge that "the present level of rail rates is too high to permit freedom of movement by rail."

But it is apparent that the rates to which the commission referred were the rates which had been in effect up to March 30, 1933, but a few days before such order was entered. It would have had no occasion to speak of any other rates.

Moreover, the effect of the order was to deny a 15% increase. To meet the occupational tax, only a 1½% increase would have been necessary. There is nothing in the order to indicate that the D. P. W. had any occasion to consider the effect of the occupational tax. Nor could it have had, since the order was made in April, 1933, and

the Tax Act did not take effect until August 1, 1933,

It must follow that any statements made in this order relative to the existing rates being as high as the traffic would bear, could not have been made in the light of the imposition of the occupational tax, which would fall as heavily, if not more heavily on the railroads' competitors than on the railroads themselves.

It would not follow, we submit, that because the local traffic would not bear a 15% rate increase, these carriers would have lost patronage because of a 1½% increase in rates.

But the most persuasive reason why any recitals in this order are wholly immaterial is that it is obviously directly opposed to the railroads' own position in these proceedings. If these carriers honestly believe what they allege in their answers, that not many of their local rates can be increased on account of competition, then *why were they before the D. P. W. in April, 1933, petitioning for an increase in such rates? And why, in September, 1934, were they again before the D. P. W. and I. C. C. seeking such an increase?* [NP Rec. 155; GN Rec. 200.]

These carriers cannot, we submit, be heard to assert in one proceeding that the facts justify an increase in their local rates and in other proceedings taken but a few weeks before the trial of these cases, that such increases are wholly unwarranted.

Nor, as already pointed out (Ante, pp. 35-36) is there anything in the Occupational Tax Act indicating a legislative purpose to forbid the public service companies so taxed from thus shifting the burden by an increase of rates. See *State ex rel. Stiner v. Yelle,* 174 Wash. 402,

410; *American Exp. Co. v. Michigan,* 177 U. S. 404, 412-3, and other cases heretofore cited.

The appellant railroads, having never applied to any regulatory body, let alone a reviewing tribunal, for permission to increase their rates *to meet the occupational tax,* cannot now be heard to assert that the same is a burden on interstate commerce either because they are doing local business at a loss, or that they are under legal compulsion to continue their intrastate operations. *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124; *Postal Tel.-Cable Co. v. Richmond,* 249 U. S. 252; *Chicago, etc. R. R. Co. v. Hedges,* 5 Fed. Supp. 752, 759-60.

As shown in our review of the evidence bearing thereon, the record does not support these appellants' claim that in 1933 either of them actually conducted its intrastate business at a loss. (See post, pp. 35-6.) But if such a showing had in fact been made, there is nothing in the record to show that 1933 was representative of what was to be expected in future years. The G. N. made no attempt to show that its 1933 operations were representative, and from such showing as the N. P. attempted, it appeared that 1934 showed at least some improvement over 1933. (Post, pp. 148-151.) In *Williams v. Talladega,* 226 U. S. 404, 417, a eleven-months test period was held insufficient, and in *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124, 126, a finding of the State Court that a two-year test period was insufficient was not disturbed. In his concurring opinion in *Chicago, etc. R. Co. v. Hedges,* 5 Fed. Supp. 752, 760, Judge Cushman said:

"The bills of complaint make no disclosure as to income and expense other than for the years 1932 and 1933. It was stated, in effect, upon the hearing, and not disputed, that no application had been made under the

Public Service Commission Law to increase rates.

* * * * * * * *

"Complainants' case is based upon the presumption that future results will be similar to those already experienced, but such presumption cannot be indulged where there have been so numerous, radical, and far-reaching changes. When such presumption obtains, it depends upon the existence and continuance of the applicable precedent conditions. Any determination now reached, it is clear, would be based upon little more than conjecture and speculation."

Inasmuch as the reasonableness of a rate depends upon whether or not it yields a fair return, the sum required to meet the operating expenses of the utility must be considered. Taxes to which the utility is subject in the performance of its public duties, including state taxes on earnings and federal income taxes are to be considered as part of its operating expenses.

51 C. J. 25;

Galveston Elec. Co. v. Galveston, 258 U. S. 388, 399;

Georgia Ry. v. R. R. Com., 262 U. S. 625, 633.

We submit that the Act is not vulnerable to attack by reason of the claimed present inadequacy of appellants' earnings from intrastate business.

CONTENTION THAT OCCUPATIONAL TAX ACT IS VIOLATIVE OF COMMERCE CLAUSE IF APPELLANTS, AS MATTER OF LAW, CANNOT RENOUNCE THEIR INTRASTATE BUSINESS WITHOUT ALSO WITHDRAWING FROM THEIR INTERSTATE BUSINESS.

Answering this contention, the State supreme court said (*State v. N. P. Ry. Co.,* 83 Wash. Dec. 52, 56, 48 Pac. (2d) 931, NP Rec. 54, 57-61):

"In the case of *Sprout v. South Bend,* 277 U. S. 163, 48 S. Ct. 502, 62 A. L. R. 45, the court had before it an ordinance of the city, in the state of Indiana, which prescribed license fees varying in amount depending upon

the seating capacity of a bus, the bus company being engaged in both intrastate and interstate business, and it was there held that 'the ordinance is void because of the imposition of the license fee.' In the course of the opinion, it was said that a state may, by appropriate legislation, require the payment of an occupation tax from one engaged in both intrastate and interstate commerce, but, in order that the fee or tax may be valid,

"'* * * it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.'

"It will be observed that one of the conditions there placed upon the right of a state to impose the tax is that the person or corporation taxed 'could discontinue the intrastate business without withdrawing also from the interstate business.' The last quoted expression, so far as we are informed, was first used in the case of *Pullman Co. v. Adams,* 189 U. S. 420, 23 S. Ct. 494, where the tax involved was in a specific amount, levied upon

"'* * * each sleeping and palace-car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad-track over which the company runs its cars.'

"In the case of *Cooney v. Mountain States Tel. & Tel. Co.,*— U. S. —, 55 S. Ct. 477, there was involved a statute of the state of Montana prescribing a tax 'for each telephone instrument used in the conduct of the business of operating or maintaining telephone lines and furnishing telephone service in the state of Montana.' There, the telephone company, as is the railroad company here, engaged in both intrastate and interstate business, and it was held that a privilege or occupation tax which a state imposes with reference to both kinds of business, though an indiscriminate 'application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid.'

"It will be observed that in none of the three cases mentioned was the tax based upon the gross income of the intrastate business. There is a difference between

a tax imposed as a license to do business or upon the instrumentality and a tax based upon the gross income. If the tax be a license tax or one upon the instrumentality, it necessarily inheres in the interstate as well as the intrastate business. Where the tax is upon the gross income, the income from the interstate business may be segregated from the intrastate and be held valid.

"In the case of *Bowman v. Continental Oil Co.*, 256 U. S. 642, 41 S. Ct. 606, the state of New Mexico had imposed an excise tax of two cents for each gallon of gasoline sold or used, and an annual license tax of fifty dollars for each distributing station or place of business. The oil company was engaged in both interstate and intrastate business. It was held that the two cents tax per gallon could be sustained because the income from the intrastate business could be segregated from the interstate, but that the fifty dollar tax was void because no such segregation could be made. It was there said:

" 'The applicable rule is that laid down in *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, where, in response to a question whether a single tax, assessed by a state upon the receipts of a telegraph company derived partly from interstate commerce and partly from commerce within the State, but returned and assessed in gross and without separation or apportionment, was wholly invalid or invalid only in proportion and to the extent that the receipts were derived from interstate commerce, this court unanimously answered that so far as levied upon receipts derived from interstate commerce the tax was void, but so far as levied upon receipts from commerce wholly within the State it was valid. This case has been cited repeatedly with approval and its principle accepted. *Western Union Telegraph Co. v. Alabama*, 132 U. S. 472, 476-477; *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192, 200-201; *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692, 697; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 31.

" 'But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void under the authority of *Leloup v. Port of Mobile*, 127 U. S. 640,

647; *Crutcher v. Kentucky*, 141 U. S. 47, 58-59; *Williams v. Talladega*, 226 U. S. 404, 419; and other cases of that character'.

"'In the case of *Cooney v. Mountain States Tel. & Tel. Co., supra*, it was distinctly pointed out that the tax there involved was,

"'"* * * not laid on revenue derived from monthly rates as distinguished from toll charges. It is not imposed with respect either to the nature of the revenue, or to the character of the service from which the revenue is derived, or to the manner in which the charges for the service are fixed.'

"'From what is there said, it would appear to be a reasonable inference that, if the tax were of the character described in the quotation just made from the opinion, the result might be different.

"'In *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 51 S. Ct. 499, the state of Ohio imposed upon every corporation engaged in the business of supplying consumers within the state with natural gas for light, heat or power a tax based upon the gross receipts, and the law was sustained. The East Ohio Gas Company, which resisted the tax, was engaged both in interstate and intrastate business. It brought gas from the states of West Virginia and Pennsylvania over high pressure pipes, and, as stated in the opinion, this was interstate commerce until it reached the distributing pipes which supplied the consumers, and after that it became intrastate and was subject to the tax. In the course of the opinion in that case, we find the same statement with reference to the conditions precedent to the right of a state to impose a tax upon a person or corporation engaged in both intrastate and interstate business, as appears in the quotation from the case of *Sprout v. South Bend, supra.*' In the *Ohio Gas Co.* case, however, the court did not apply the provisions that the gas company could not retire from its intrastate business without withdrawing from its interstate business. The facts, as they appear in the opinion, make it plain that, if the gas company had withdrawn from its intrastate business, it would have completely destroyed its interstate business. The tax there involved was not one upon the instrumentality or a license tax, but was an excise or a tax upon the privilege of doing business.

"The result of the holding in that case, as we view it, would sustain a holding in the case now before us that the tax upon the gross income of the intrastate business was valid, even though the railway company could not withdraw from that business without also withdrawing from its interstate business. We do not look upon cases which involve either a tax upon instrumentalities or a license tax as applicable to the law now in question, which imposes, as already indicated, an excise or tax on the privilege of engaging or continuing in business."

EVEN WERE APPELLANTS UNDER LEGAL COMPULSION TO CONTINUE THEIR INTRASTATE BUSINESS EVEN AT A LOSS, TAX WOULD NOT BE DEEMED AN UNLAWFUL BURDEN ON INTERSTATE BUSINESS UNTIL APPELLANTS HAD BEEN DENIED RATE INCREASES TO MEET TAX.

The same contention as made here by appellants, was made without success in *Postal Tel.-Cable Co. v. Fremont*, 255 U. S. 124, 128. May we here repeat the following language already quoted from that case:

"The company, as we have seen, cites § 7408 as a compulsion upon it to engage in intrastate business and at designated rates. From the rigor of the requirement § 7409 provides a mode of relief, and until it is denied the company cannot complain under the circumstances presented by this record. In other words, if § 7408 is imperative upon the company to continue intrastate business, § 7409 affords a means of obtaining relief from burdensome obedience. The sections are counterparts. If submission to § 7408 results in insufficient revenue and a burden upon interstate commerce, it is made the duty of the Railway Commission by § 7409 upon complaint of the Postal Company to raise the intrastate rate 'fixed' in § 7408. No attempt to secure relief under § 7409 appears to have been made."

True, here the revenue measure does not itself provide the machinery for an application for rate increases, but other regulatory measures do, and until appellants have exhausted the remedy thus afforded, they have no reason to complain.

It would, we feel, be an impertinence to attempt to add anything further to what has been so clearly stated by the State supreme court in this connection.

But we do not agree that there is any such legal obligation as the court assumes.

STATE SUPREME COURT HAS NOT CONSTRUED STATE STATUTES AND CONSTITUTION AS REQUIRING APPELLANTS TO RENOUNCE THEIR INTERSTATE BUSINESS IF THEY WITHDRAW FROM THEIR INTRASTATE BUSINESS.

As heretofore noted, in the present cases the State supreme court merely assumed such to be the law, for argument's sake. And obviously, if in other cases the State supreme court has not construed the State constitutional and statutes as thus assumed, appellants' contention must be without merit.

Appellants contend that under the Public Service Commission Law (Ch. 117, Laws of 1911) and Article XII, Sections 13, 14, 15, and 19, of the state constitution, they cannot withdraw from their intrastate activities while continuing to carry on their interstate business.

Before examining the local decisions, may we suggest that only the sovereign could complain should appellants elect to withdraw from their local business. No one, we submit, can question appellants' right to retire from their local business *with the State's consent. Day v. T. R. & R. Co.*, 80 Wash. 161, 166 and cases cited. But neither appellant contends that it has ever sought the State's permission to renounce its local business. Until it does so, it is hardly in a position to claim that such consent, if in fact necessary, would be withheld.

TAX ACT ITSELF PERMITS WITHDRAWAL.

The Act provides:

"If any person shall engage or continue in any business * * * for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington, a license under this act to engage in and to conduct such business * * * for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such function." (Sec. 3, ch. 191, Laws of 1933.)

Another section (Sec. 17, ch. 191, Laws 1933) provides for the institution of injunction proceedings in the name of the state to restrain the continuance of any taxable business until the tax is paid.

Any person or corporation engaged in a taxable activity is thus given the option of either withdrawing therefrom, or paying the tax. Surely the sovereign State exacting such tax could not be heard to complain of such renunciation.

By the very constitutional provisions upon which appellants rely, railroad, telegraph and telephone companies are "declared to be common carriers and *subject to legislative control.*" (See Art. XII, Secs. 13 and 19.) Surely, no form of "legislative control" could be deemed more legitimate than the exercise of the right of taxation. Nor could the prohibition until payment of the continuance of the business taxed, be deemed an unreasonable or unusual method of tax enforcement.

Article 11, Sec. 5, of the Idaho Constitution provides:

"All railroads shall be public highways, and all railroad, transportation, and express companies shall be

common carriers, and *subject to legislative control,*" etc.

The case of *Northern Pacific Ry. Co. v. Gifford,* 25 Ida. 196, 136 Pac. 1131, 1136, involved the validity of a license tax measured by authorized capital stock, imposed upon all foreign and domestic corporations doing a local business in the state of Idaho. In upholding the tax as to foreign railroad and express companies doing an interstate and local business the court said:

"In this connection it has been suggested by counsel for respondent that under the provisions of section 5 of article 11, of the state Constitution the respondent corporation as a common carrier could not decline or refuse to carry on domestic or intrastate business. This provision of the Constitution is dealing with domestic business and with corporations doing business in this state as distinguished from interstate business. *Foore v. Simon Piano Co., supra.* But, if it were otherwise, this provision of the Constitution says they are subject to *legislative control;* and in the case at bar the Legislature has spoken and designated the terms on which respondent can do business in the state, and that, upon failure to comply with the legislative requirement, it shall have no existence or standing in the state so far as local and intrastate business is concerned, and shall have no standing in the courts for the purpose of prosecuting actions or defending any rights of property. *We conclude, therefore, that to refuse to comply with this provision of the statute, and to become outlawed so far as it involves its right to do business in this state, would not subject it to another process compelling it to do the very business that it is prohibited doing under this legislative direction.*" (Italics ours.)

The foregoing decision was later adhered to in *Northern Pacific Ry. Co. v. Gifford,* 27 Ida. 667, 151 Pac. 909.

Here, as in the Idaho case, the legislature has designated the terms on which appellants may do a local business in this state, namely, by paying the occupational tax exacted, and that upon failure so to do, they have no

right to continue a local business. In view of this requirement, it would seem that the conclusion of the Idaho court is inevitable.

In *State v. Northern Express Co.*, 80 Wash. 309, it was held that a state law levying an excise or privilege tax upon express companies measured by 5% of their gross receipts from intrastate business only, did not impose a burden upon interstate commerce.

It was further held that since the State had no power to place a burden upon interstate commerce, an interstate express company doing business in that state was free to renounce its intrastate business, notwithstanding the constitutional and statutory provisions making express companies common carriers subject to state control, and prohibiting discrimination in privileges and transportation charges.

The case was heard *en banc*, the court overruling its former departmental decision (76 Wash. 636) relied upon by appellants here.

Answering the express company's contention that under the state statutes and constitution it was not at liberty to abandon its intrastate business while continuing its interstate activities within the State, the Court said, after reviewing numerous decisions including *Pullman Co. v. Adams*, 189 U. S. 420:

"Respondents make a general reference to the public service commission law of 1911 as supporting their contentions. It may be answered that no provision of that law could operate as a regulation upon interstate commerce. All that it seeks to do, and all that the state has power to do, is to impose regulations upon local business, and while the state cannot say to the foreign corporation, 'We will annex certain conditions with which you must comply before you can do an inter-

state business in or through this state,' it can say to such corporation, 'If you choose to do a business which is purely local in its character and which has attached to it no elements of interstate commerce, you must submit that business to the regulation and control of the laws of this state.' To go further than this, the state has not attempted, or if it has, its attempt is vain. So far as any constitutional provision is concerned, we find no essential difference between our constitution and that of the State of Mississippi referred to in the *Adams* case. Our constitution provides, in Sec. 13, Art. 12, that 'all railroad, canal and other transportation companies are declared to be common carriers and subject to legislative control.' Section 195 of the constitution of Mississippi reads: 'Express, telegraph, telephone, and sleeping car companies are declared common carriers in their respective lines of business, and subject to liability as such.' If, under this provision of the Mississippi constitution, nothing could be found compelling express companies to do a local business, we can find nothing in the language of our constitution which adds any such power. The whole theory of state control of public service corporations is based upon the doctrine, as expressed in *Munn v. Illinois*, 94 U. S. 113, that, when one devotes his property to a public use, he grants to the public an interest in that use, and must submit to be controlled by the public for the public good to the extent of the interest he has created. 'He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to control.' So here the express company may withdraw its property from any local use and discontinue such use; but so long as it continues in such use, it must submit to state control and regulation." (pp. 324-5.)

It will be urged that the *Northern Express* case was modified or overruled in the later case of *Great Northern Railway Co. v. State*, 147 Wash. 630, 646-7, likewise an *en banc* decision, wherein appears the following language:

"We are firmly convinced, however, and we are bound by our convictions to so decide, that under the more recent cases of the supreme court of the United

States, particularly that largely quoted from, *International Paper Co. v. Commonwealth of Massachusetts, supra,* the operation of the statutes in question here, under the commerce clause of the federal constitution, necessarily burdens such interstate commerce, *because (1)of the legal condition that respondent is a public carrier largely engaged in business in this state and not free to withdraw therefrom;* (2) under such conditions the state by the exaction of these fees is compelling such foreign corporation, as a condition of its right to do a local business in this state, to submit to a burden on its interstate business; and, (3) that the statutes violate the due process clause of the Fourteenth Amendment to the federal constitution because of imposing a tax on property beyond the jurisdiction of the state." (Italics ours.)

The court does not say, it is to be noted, whether the company's want of ability to withdraw was due to restrictions in the State or federal statutes, or to practical necessity.

What the court intended to say, we submit, is that the interstate railroad company was not free to withdraw as a practical matter, by reason of the intercommingling of its intra and interstate activities—and for the following reasons:

(1) The court says, it will be noted:

"We are firmly convinced * * * that *under the more recent cases of the supreme court of the United States* * * * the statutes in question * * * necessarily burdens such interstate commerce, because (1) of the legal condition that respondent is a public carrier largely engaged in business in this state and not free to withdraw therefrom;" etc. (Italics ours.)

But a careful search shows that there were no United States supreme court decisions tending to support the conclusion that the railroad company was forbidden by constitution or statute from withdrawing from its local business.

(2) Other language used in the opinion shows that the court could not have intended that the company was forbidden by law from withdrawing from its local business. Thus, in commenting on a case relied upon by counsel, the court said (147 Wash. 646):

"It will be noted that that case was not a case involving a public carrier required to do business in this state and unable to withdraw therefrom. *It was more free to withdraw* than was Northern Express Company in the case cited in 80 Wash. 309, 141 Pac. 757, and perhaps as free to withdraw as the two complaining parties in 136 Wash. 285, 239 Pac. 840 and 138 Wash. 72, 244 Pac. 398, cases heretofore cited." (Italics ours.)

It is apparent, of course, that here the court was speaking of the ability of the company to withdraw from its state business *as a practical matter*. Otherwise, why imply that there were different degrees of freedom to withdraw? If continued operation was made mandatory by constitution or statute, the duty was absolute, not relative.

(3) After having so exhaustively considered the question in the *Northern Express* case (80 Wash. 309), and having concluded that an interstate carrier was under no statutory or constitutional compulsion to continue its intrastate operations, it is inconceivable that the court could have intended, without discussion, to have overruled its earlier decision.

But were there any doubt as to the effect of the Great Northern case on the attitude of the present court, it is, we submit, set at rest by what was said in the cases from which these appeals are taken. To quote:

"So far as the opinion in the case of *Great Northern R. Co. v. State*, 147 Wash. 630, 267 Pac. 506, is out of harmony with the holding in this case, it will be dis-

approved." *State v. N. P. Ry. Co.*, 83 Wash. Dec. 52, 62, 48 Pac. (2d) 931, NP Rec. 54, 63.

IT IS NO LONGER WITHIN THE STATE'S POWER TO DENY THE APPELLANT RAILROADS THE RIGHT TO DISCONTINUE THEIR INTRASTATE ACTIVITIES.

It is, of course, recognized by all courts that Congress has the unquestioned right to regulate intrastate commerce when the situation becomes such, by reason of the interblending of the interstate and intrastate operations of the enterprise that adequate regulation of the particular commerce between the states cannot be maintained without regulating intrastate transactions of a like character.

This rule is elaborately and convincingly explained in the well considered case of *Stafford v. Wallace*, 258 U. S. 495, 517 *et seq.*, where the authorities are cited and reviewed. More recent cases affirming this rule are: *Georgia Public Service Com. v. U. S.*, 283 U. S. 765; *Alabama v. U. S.*, 283 U. S. 776, and *U. S. v. Louisiana*, 290 U. S. 70.

Thus, in *Railroad Commission v. C. B. & Q. R. Co.*, 257 U. S. 563, it was held that the I. C. C. had authority under the Transportation Act of 1920 to fix passenger rates on intrastate business to the end "that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system," both intra and interstate.

And in *Colorado v. U. S.*, 271 U. S. 153, it was held that under the 1920 Transportation Act the I. C. C. had power to authorize abandonment, as respects both intrastate and interstate traffic, of a branch line of railroad lying wholly within a state, upon the ground that con-

tinued operation would result in large operating deficits constituting an undue burden upon interstate commerce, even where the State was present resisting such abandonment.

In *Texas v. U. S.*, 292 U. S. 522, it was held that the I. C. C. has power to authorize a lease of one interstate railway to another permitting the lessee to abandon or remove general offices and shops of the lessor, the maintenance of which as found by the Commission would entail unnecessary and wasteful expenditures, even though such abandonment or removal was forbidden by the statutes of the State of the lessor's incorporation in which such offices and shops were located.

"Even explicit charter provisions," it was there said, "must yield to the paramount regulatory power of the Congress."

And Your Honors cited numerous authorities as supporting the following excerpt:

"Obligations assumed by the corporation under its charter of providing intrastate service are subordinate to the performance by it of its federal duty, also assumed, 'efficiently to render transportation services in interstate commerce.'" (292 U. S. 531-2.)

It must therefore follow that whatever provisions may be found in the constitution and statutes of the state of Washington which might be so construed as to impose the absolute duty upon interstate railroads of continuing their intrastate business, such provisions, even if otherwise valid, are now, if not wholly superseded, at least suspended and no longer effective by reason of the field being wholly occupied by paramount federal regulations.

FEDERAL REGULATION DOES NOT PREVENT STATE TAXATION.

But it is equally true that Congress has never undertaken to control the action of the states in the imposition

on interstate carriers of either *ad valorem* or privilege taxes.

In *Federal Compress & Warehouse Co. v. McLean,* 291 U. S. 17, 23, this Court said:

"The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy."

No such "obstacle" is, we submit, presented where, as heretofore shown, the State's New Tax Plan actually results in a substantial reduction of the carrier's aggregate tax burden.

The tax there involved was a non-discriminatory tax on the business of storing and compressing cotton.

The following is quoted from *Western Union Tel. Co. v. Texas,* 105 U. S. 460, 466:

"The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a state, and does not affect other nations or states or the Indian Tribes, that is to say, the purely internal commerce of a state, belongs exclusively to the state, is as well settled as that the regulation of commerce which does affect other nations or states or the Indian Tribes belongs to Congress. Any tax, therefore, which the state may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States."

In *Osborne v. Florida,* 164 U. S. 650, 655, it was said:

"It has never been held * * * that when the business of the company which is wholly within the state, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local."

(Quoted in *Kehrer v. Stewart,* 197 U. S. 60, 68, and *Allen v. Pullman Car Co.,* 191 U. S. 171, 181.)

"The importance of the commerce clause to the Union," said Mr. Justice Holmes in *Superior Oil Co. v. Mississippi,* 280 U. S. 390, 395, "of course is very great. *But it also is important to prevent that clause being used to deprive the States of their life-blood by a strained interpretation of facts.*" (Italics ours.)

The following language of the supreme court of Mississippi is impressive:

"It does not matter whether the intrastate business done was nearly equal to the interstate business, the state's control over the intrastate business is full and complete, subject only to the provisions of the Federal Constitution. The powers of the state, not given to the United States government by the Federal Constitution, are reserved to the state or the people. The state constitutes an essential unit in the federal scheme, and the state should not be embarrassed in the operation of its functions within its sphere, but should be left to discharge those functions according to its own conception thereof. This nation, as it was founded, cannot exist without the states fulfilling their proper functions in the scheme. The importance of the powers and rights of the states have not been magnified, and have been frequently overlooked. The power of the state is not restricted except by the Federal Constitution or the State Constitution.

"That which is inherent in intrastate commerce does not lose its essential nature when it becomes a part of transactions in interstate commerce. *York Mfg. Co. v. Colley,* 247 U. S. 21. * * *

"The constitutional equality of the states is essential to the harmonious operation of the scheme upon which the republic was organized. This country is an indestructible union of indestructible states. *Coyle v. Smith,* 221 U. S. 559, 31 S. Ct. 688, 55 L. Ed. 853; *White v. Hart et al.,* 13 Wall. (80 U. S.) 646, 20 L. Ed. 685. In *Texas v. White* it was held that, if a state would exercise its sovereign power, then it must be permitted to exercise its legitimate power in all legitimate ways." *Chassanoil v. Greenwood,* 166 Miss. 848, 148 So. 781, 786.

"We must remember," as Your Honors emphasized in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 154, "that the revenues of the United States must be obtained in the same territory, from the same people, and excise taxes must be collected from the same activities, as are also reached by the states in order to support their local government."

Of course the interstate carrier is enabled to enjoy its privilege of engaging in local business primarily as a result of the privilege so to do originally derived from the states themselves. The respective privileges enjoyed by the carrier, derived from the national and state governments respectively, may be likened to two franchises, one from the federal government, and one from the State. Each is a valuable right, taxable by the sovereignty from whom derived, even when such right, having once been exercised, can be abandoned only with the consent of both.

In *Central Pacific R. R. v. California*, 162 U. S. 91, it appeared that the interstate road had two franchises, one from the Federal government and one from the State. The possession of either would have entitled it to operate without the other. The Court sustained the action of the State assessing board in its assessment and taxation of the State franchise notwithstanding the possession by the road of the Federal franchise which was alone sufficient to authorize its operation. In so holding it was said (p. 127):

"If the state franchise to be assessed were confined to the right to operate the road and take tolls, such a franchise was originally granted by the State to this company, and as such was taxable property. If the subsequent acts of Congress had the effect of creating a Federal franchise to operate the road, that merely rendered the state right subordinate to the Federal right, and did not destroy the state right nor merge it into

the Federal right, and no authority is cited to sustain any such proposition. * * * Whether plaintiff in error now operates its road under the franchise derived from the United States or from the state is immaterial, as the Supreme Court well said. The right to operate the road is valuable, whether it is being exercised or not, and the question, we repeat, relates to the existence of the franchise, and not to the extent of its value."

Recognizing the principle that because intrastate activities are not immune from state taxation simply because subject to federal regulation, this court has repeatedly held that decisions holding a given activity subject to state taxation, are not pertinent in determining whether such activity is subject to federal regulation. For example:

"The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. It does not follow that because a thing is subject to state taxation it is also immune from Federal regulation under the Commerce Clause. *Stafford v. Wallace, supra,* pp. 525-527; *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, 245."

Binderup v. Pathe Exchange, 263 U. S. 291, 311.

Besides the cases cited in the above excerpt, see also *Swift & Co. v. U. S.,* 196 U. S. 375, 400.

STATE IS LIKEWISE WITHOUT POWER TO PREVENT THE APPELLANT TELEPHONE COMPANY FROM RENOUNCING ITS INTRASTATE BUSINESS.

What has been said in this connection with respect to the appellant railroads, applies also with respect to the appellant telephone company. The intra and interstate activities and instrumentalities of this company are, we submit, no less completely interwoven than are those of the railroad appellants.

It must follow that any state law, whether embodied in constitution or statute, which would seek to condition this company's continued operation as an interstate

instrumentality, upon its continuing to carry on its intrastate activities, however unprofitable the latter might become, would be unquestionably obnoxious to the commerce clause.

True, Congress, while having delegated to the Federal Communication Commission the complete regulation of the interstate activities of telephone companies, has not yet given such Commission jurisdiction of local telephone exchange service where regulated by state commissions (USCA Title 47, Ch. 5, Sec. 221 (b)). But this, we submit, is wholly immaterial. Congress unquestionably has this power if and when it seeks to exercise it, just as truly as in the case of interstate railroads. And a State statute requiring continued intrastate operation as a condition to a continuance of interstate operation would quite obviously just as truly violate the commerce clause, whether Congress has or has not undertaken the regulation of the company's intrastate activities.

This leads us to our next point:

STATE CANNOT LAWFULLY CONDITION A PUBLIC SERVICE COMPANY'S RIGHT TO DO AN INTERSTATE BUSINESS, ON ITS CONTINUING TO DO A LOCAL BUSINESS.

State statutes, imposing conditions on corporations precedent to their right to transact business within the state, are ineffectual to prevent transactions constituting interstate commerce.

Thus a state statute requiring certain classes of foreign corporations to file statements is an invalid restriction and burden and unconstitutional as to foreign corporations engaged in interstate commerce. *Buck Stove and Range Co. v. Vickers,* 226 U. S. 205; *Inter-*

national Textbook Co. v. Pigg, 217 U. S. 91; *Crutcher v. Kentucky,* 141 U. S. 47, 56, 57.

And, in *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 291, it was said:

"A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. *Crutcher v. Kentucky,* 141 U. S. 47, 57; *Western Union Telegraph Co. v. Kansas,* 216 U. S. 1, 27; *International Text-Book Co. v. Pigg,* 217 U. S. 91, 112; *Sioux Remedy Co. v. Cope,* 235 U. S. 197."

It is of course apparent that if a State may not lawfully impose conditions on the right of a corporation to carry on interstate commerce within its territorial limits, it cannot impose conditions on its continuing to carry on its existing interstate business.

Again—a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. *Terral v. Burke Const. Co.,* 257 U. S. 529, 532-3.

Conversely, a State cannot lawfully condition a foreign corporation's constitutional right to engage in interstate commerce within its boundaries, upon its doing a local business therein, or thereafter forbid such interstate activities because of such foreign corporation's renouncing a local business already established.

And see also *Michigan Commission v. Duke,* 266 U. S. 570, and *Buck v. Kuykendall,* 267 U. S. 307.

The Constitution of Mississippi, Art. 7, section 195, provides:

"Express, telegraph, telephone, and sleeping-car companies are declared common carriers in their respective lines of business, and subject to liability as such."

Mississippi Code 1892, Sec. 3378, imposed a privilege tax on each sleeping and palace car company carrying passengers from one point to another in the state of "$100, and, in addition thereto, 25 cents a mile for each mile of railroad over which the company runs its cars."

In *Pullman Co. v. Adams,* 78 Miss. 814, 30 So. 757, it was held no defense to a suit for such taxes, that the local business of defendant, an interstate and intrastate sleeping car company, was done at a loss, and that it could not have declined the business, because, by the above constitutional provision, it was made a common carrier. The court said:

"The contention that the appellant does its local business at a loss, and yet must do it under the constitution of 1890 making it a common carrier, and hence that its interstate business is indirectly burdened, is fallacious. Were that so, it would be the provisions of law declaring the sleeping car companies, common carriers, that would contravene the interstate commerce clause of the federal constitution, not this license tax.

"It is not for the appellant to get all out of the local business the 'traffic will bear' and then escape the correlative burden of this license tax by pleading that it, though conforming to the law making it a common carrier, as to profits, should not conform to the law taxing the business it does wholly local and entirely within this state."

The Mississippi decision was affirmed by the United States Supreme Court in *Pullman Co. v. Adams,* 189 U. S. 420, on the assumption that interstate sleeping car

companies would be held free by the state court to abandon the local business taxed if they saw fit, and in so holding, said:

"If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in *Crutcher v. Kentucky*, 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by *Osborne v. Florida*, 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax.

"* * * If the constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the constitution or the tax act, is invalid. But we assume that the opinion of the Supreme Court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, *and we take it so the more readily that we can see no ground for a different view.*" (Italics ours.)

Thus, not only did Your Honors conclude that under the decision of the Mississippi court interstate common carriers are free, if they choose, to renounce their local business while continuing their interstate activities, but expressly say that it "*can see no ground for a different view.*"

The State supreme court took the same view in *State*

v. Northern Express Co., 80 Wash. 309, 324-5, where it was said:

"It is equally fallacious if it is meant by this assertion that, as a condition for engaging in interstate commerce, the state requires the corporation to also engage in intrastate commerce. Such a plea violates a rule concerning which there is now no dispute, that the state can impose no burden upon interstate commerce nor exact any condition upon which foreign corporations may engage in such business within this state. If the constitution should be read as imposing an obligation upon corporations doing an interstate business to also engage in a local business, then, as said in the *Adams* case, 'the question for us might be which, if not both, the clause of the constitution or the tax act, is invalid.'

"Respondents make a general reference to the public service commission law of 1911 as supporting their contentions. It may be answered that no provision of that law could operate as a regulation upon interstate commerce. All that it seeks to do, and all that the state has power to do, is to impose regulations upon local business, and while the state cannot say to the foreign corporation, 'We will annex certain conditions with which you must comply before you can do an interstate business in or through this state,' it can say to such corporation, 'If you choose to do business which is purely local in its character and which has attached to it no elements of interstate commerce, you must submit that business to the regulation and control of the laws of this state.' To go further than this, the state has not attempted, or if it has, its attempt is vain."

Answering a similar contention made by the complaining interstate railroad companies, Judge Neterer said, in *Chicago, M., St. P. & P. R. Co. v. Hedges*, 5 Fed. Supp. 752, 758:

"The contention that the law must fail for that intra and inter state business of the complainants is so inseparably interwoven that interstate (intrastate) business cannot be renounced, is not convincing. Equity does not require a useless thing. The complainants would not renounce intrastate business, which is: N. P., $6,613,-

958.98; interstate, $6,231,366.63. O. W., intrastate, $779,676.88; interstate, $3,026,256.60. Milwaukee, intrastate, $1,171,236.56; interstate, $2,163,054.27. G. N., intrastate, $1,860,608; interstate, $2,616,837. S. C. P., intrastate, $81,568.98; interstate, $1,333,410.73. Such claim, in the face of the history and record in the case, is fallible. *Ohio Tax Cases*, 232 U. S. 576, 34 S. Ct. 372, 58 L. Ed. 737; *Gant v. Oklahoma City, supra.* While these cases are not directly in point, they are lucid and bear upon the history in the instant issue. Complainants' claim is narrow and without equity, and does not weigh upon conscience. No attempt has been made to renounce, nor purpose to do so, and, until this is done, complainants cannot complain. No right is withheld or denied. The laws and constitution of the state give way to the commerce clause of the United States Constitution (Art. 1, Sec. 8, cl. 3), and the vitalizing Commerce Act (49 USCA Sec. 1 *et seq.*). See *Colorado v. United States*, 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878. And the rate-making body could and would afford relief, and, if denied, complaint might be available."

That the P. T.'s interstate business is negligible compared with its local business, is shown by the following figures taken from its returns to the tax commission for the last five months of 1933. (Plff's Ex. "22" PT Rec. 131-150):

	Pacific Company
Gross revenues from local and interstate business.....	$4,175,350
Gross revenues from interstate and foreign commerce..	355,662
Percentage of gross revenues from interstate and foreign commerce of total gross revenues within the State.	8.52%

Thus, the language of Judge Neterer is particularly pertinent to that company.

APPELLANTS MAY WITHDRAW FROM LOCAL BUSINESS IF NOT MAKING A FAIR RETURN.

The appellant Telephone Company alleges that for the first six months of 1933 its net earnings on intrastate business were not in excess of 1.75% of the fair value of the property used and useful in furnishing such service.

(PT Rec. 4.) And the N. P. and G. N. each contend that in 1933 it lost money on its intrastate business.

If this be true, then each complaining company has the undoubted right to withdraw from its local business, since the state would certainly not be in a position to compel operation at less than a fair return. But, having voluntarily continued their local operations, they cannot now be heard to claim exoneration from the business tax imposed.

To repeat what was said in *Pullman Co. v. Adams*, 78 Miss. 814, 30 So. 757 (affirmed: 189 U. S. 420):

"It is not for the appellant to get all out of the local business the 'traffic will bear' and then escape the correlative burden of this license tax by pleading that it, though conforming to the law making it a common carrier, as to profits, should not conform to the law taxing the business it does wholly local and entirely within this state."

In this connection, may we observe that the payment of the offending tax is not made a condition precedent to the carrying on of the business upon which the same is imposed. Thus as already noted, section 3, chapter 191, Laws of Washington, 1933, provides:

"If any person shall engage or continue in any business * * * for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

In other words, it is not made unlawful for a person to engage in a taxable business without having first

secured a license. Failure to pay the tax is not made a criminal offense. But if a person continued in the taxable activity after August 1, 1933, he became subject to the tax which could be collected either summarily or by an action at law. (See Sec. 16, ch. 191, Laws 1933.)

That even a domestic corporation may renounce its unprofitable local business though its operations be controlled by regulatory measures similar to those upon which appellants here rely, has been definitely settled by this court.

Thus in *Railroad Commission v. Eastern Texas R. R.*, 264 U. S. 79, it was held that the usual permissive charter of a domestic railroad company did not obligate the company to operate its railroad at a loss, nor was such obligation to be implied from the acceptance of its charter and operation thereunder. In so holding, Your Honors said:

"The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return."

There the Texas statutes relating to railroads were carefully analyzed, from which analysis it was found that they were all of the usual permissive type which did not obligate the company to continue to operate indefinitely.

What was said in that case as to the Texas regulatory statutes applies, we submit, with equal force to all of the numerous statutes and constitutional provisions cited in appellants' briefs and pleadings. *State v. Northern Express Co.*, 80 Wash. 309, 325.

In *I. C. C. v. Oregon-Wash. R. Co.*, 288 U. S. 14, it was held that because the charter of a railroad company authorized it so to do, it was not made its duty to construct and operate an extension to its existing lines.

From the cases cited it seems that a railroad company is under no compulsion to construct a line for the rendition of either interstate or intrastate service even though its charter contemplates such construction and service. Having constructed such line and finding the local business unprofitable, it may abandon such service. Under such circumstances can it be said that there is any contractual obligation to continue operations whether its operations be profitable or unprofitable? We submit not. If there be a contract obligation to operate, it must necessarily exist whether or not its operations prove remunerative.

In this connection, attention is also called to *Williams v. Mayor*, 289 U. S. 36, involving the right of the state of Maryland to grant an exemption from *ad valorem* taxes to a railroad corporation for a period of two years. The railroad was already in operation, and had there been a contract obligation on its part to continue operation, the grant of a tax exemption would, of course, have been without consideration and void. But in upholding the right of the company to such exemption, the court said in part (pp. 44-5):

"It is idle to say that a railroad, when once it has been organized, is under a duty to go on, and hence that its distress is not important for any one except itself. Science has wrought her wonders, but the time is not yet here when trains will run under the impulsion of duty without more. There is room, indeed, for question whether even the duty is so absolute as the respondents' argument assumes. *Railroad Commission v. Eastern Texas R. Co.*, 264 U. S. 79, 85. Certain it is, in any

event, that operation may end with the consent of the Public Service Commission when the earnings are inadequate."

CORPORATION SUBJECT TO PRIVILEGE TAX THOUGH FRANCHISE REQUIRES CONTINUATION OF SERVICE.

That any provisions of the constitution or statutes claimed to impose upon public service companies the continuing duty to operate must be construed in the light of the state's paramount power of taxation, is, we submit, well illustrated by those cases upholding the right of a municipality to impose license taxes upon public service companies operating under an unexpired franchise from the very municipality exacting the tax.

It is of course well established that where a municipal ordinance or state law grants to a public service corporation the right, for the benefit of its inhabitants, to occupy the streets of a city with mains and pipes for furnishing water or gas, wires and poles for lighting or telephone service, or tracks for street car service, and such franchise is accepted and acted upon, the same cannot be revoked by the state or municipality during the life of such franchise. *Northern Ohio Traction & Light Co. v. Ohio,* 245 U. S. 574, 585; *Old Colony Trust Co. v. Omaha,* 230 U. S. 100, 117; *Owensboro v. Cumberland Telephone Co.,* 230 U. S. 58, 73; *Grand Trunk Western Ry. Co. v. South Bend,* 227 U. S. 544, 556; *Louisville v. Cumberland Tel. Co.,* 224 U. S. 649, 664.

It is equally true that when such a franchise has been accepted by the grantee, the same becomes a contract binding the public service company to furnish public service on the terms and conditions set forth in, and *during the life of the franchise. Columbus Ry. & Power Co. v. Columbus,* 249 U. S. 399; *Cleveland v.*

Cleveland City Ry. Co., 194 U. S. 517; *Opelika v. Opelika Sewer Co.*, 265 U. S. 215; *St. Cloud Public Service Co. v. St. Cloud*, 265 U. S. 352; *Henderson Water Co. v. Corporation Com.*, 269 U. S. 278; *Thomas v. Railroad* Co., 101 U. S. 71, 83; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396; *Russell v. Sebastian*, 233 U. S. 195, 209.

But notwithstanding such contract obligation assumed by the public service company to continue its public utility operations during the life of its franchise, and the reciprocal obligations of the state or municipality, it is well-recognized that the municipality may nevertheless exact from such public utility company a license tax for the privilege of so performing its franchise obligations.

Memphis Gas Light Co. v. Shelby County, 109 U. S. 398;

Erie Railroad Co. v. Pennsylvania, 21 Wall. 492;

Railway Co. v. Philadelphia, 101 U. S. 528;

St. Louis v. United Railways Co., 210 U. S. 266;

Puget Sound P. & L. Co. v. Seattle, 291 U. S. 619, 627.

In the case last cited it was said:

"Appellant asserts a contract under its franchise to use the streets of the city for the purpose of carrying on its business for an unexpired term of years. It argues that the franchise is a contract license to carry on the business, and that the exaction of a tax as a condition precedent to the enjoyment of the license will operate to destroy the privilege granted by the franchise. This argument was made and answered in *Memphis Gas Co. v. Shelby County*, 109 U. S. 398, and in *St. Louis v. United Railways Co.*, 210 U. S. 266. Surrender of the state's power to tax the privilege is not to be implied from the grant of it. Hence, appellant took its franchise subject to the power of the state to tax the granted privilege in common with all other privileges

and property in the state. Without a clearly expressed obligation on the part of the city to surrender that power the contract clause does not limit it." (Citing authorities.)

None of the appellants either alleged or proved when they began to do an intrastate business within the state of Washington. As a matter of fact it was in each case, long after the adoption of the State constitution in 1889. Hence, if the obligations imposed by the state constitution be likened to the contract obligations assumed by the Puget Sound Light & Power Company in the case last cited, then obviously such obligations were assumed with full knowledge of the State's right to impose the tax now complained of just as the Puget Sound Company did in that case.

Every presumption is in favor of the reservation by the State of the complete exercise of its fundamental right to tax. *Tacoma v. State Tax Commission,* 177 Wash. 604, 611.

We respectfully submit that this presumption obtains just as truly to constitutional provisions as to statutes. By simply imposing upon certain corporations the obligations of public service companies, the constitutional convention did not, we insist, evidence an intent to relieve such corporations from taxation for the privilege of so functioning. Instead, a contrary purpose is evidenced by section 1, article 12, of the State constitution, providing that "all laws relating to corporations may be altered, amended, or repealed by the legislature at any time," and that "all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law." Surely, conditioning the right to continue operations upon the payment of a legiti-

mate occupational tax does violence neither to this section nor to the right of "legislative control" reserved as to these public service companies. (See Art. 12, Sec. 13, 19 Wash. St. Const.)

CONTENTION THAT SAME INSTRUMENTALITIES ARE USED IN BOTH INTRA AND INTERSTATE BUSINESS, AND RENUNCIATION OF INTRASTATE BUSINESS WOULD RESULT IN INTERSTATE RATES GREATER THAN TRAFFIC COULD BEAR.

The P. T. alleges that its interstate and intrastate business is done over the same lines, through the same exchanges, by the same employees, and with the same facilities, and that it is impossible for it to operate otherwise, and that if it could and should abandon its intrastate business, the entire burden of maintaining and operating its intrastate system, equipped to handle both classes of business, would fall entirely on interstate business and would necessitate an increase of rates greater than the same could bear and would result in the destruction of an essential instrument of interstate commerce and of the value of its properties in amounts of many millions of dollars. (PT Rec. 5-6.)

The answers of the appellant railroads contain similar allegations. (NP Rec. 10-11; GN Rec. 17-19.)

Whether or not these averments are supported by the evidence is discussed in Appendix "C," Post, pp. 181-7.

But even accepting such allegations at their face value, this, we submit, would be no defense to a business tax measured solely by a percentage of their intrastate revenues.

May we first point out that appellants constructed

their properties fully conscious of the State's undoubted right to impose exeises on their intrastate business. They need not renounce such local business so long as they pay the tax. It is not shown, as we have seen, that, by adjustment of intrastate rates, the offending tax cannot be passed on to appellants' customers. Their election to withdraw from intrastate business will, if made, be purely voluntary.

Obviously the same objection here advanced might be made with equal plausibility to any duty imposed on appellants in connection with their intrastate business, whether it be the payment of a license tax or compliance with some rule or order of the state regulatory body. Let us suppose that the D. P. W. should promulgate some (to appellants) offensive rule or regulation affecting telephone or railroad intrastate operations. Could appellants be heard to question the validity of such regulation on the ground that the expense of carrying on their interstate business would be increased by the abandonment of their intrastate business thereby necessitating an increase of interstate rates and a consequent burden on interstate commerce?

Were appellants' operations confined wholly to intrastate business, the validity of the occupation tax as applied to these objecting companies could not be questioned. Because these companies are also engaged in interstate business, this tax which is imposed only on their intrastate receipts and which is not in the slightest degree increased by their interstate operations cannot, we submit, be said to constitute an unlawful burden on interstate commerce. The possible indirect effect on their interstate business visioned by appellants is, we

submit, too remote and fanciful to be deemed a valid objection to the tax.

While the states are without power directly to regulate, prohibit, or burden interstate commerce, yet, to come within the rule, such interference must be direct and substantial, and not merely incidental. The states may, so long as they do no more than legitimately exercise their reserved police and taxing power, enact laws which will be valid, although they may incidentally affect interstate commerce. 12 C. J. 13, 50; *Boston & Maine R. Co. v. Armburg,* 285 U. S. 234, 238, and cases cited.

The length to which this court has gone in upholding state legislation potentially but not directly affecting interstate commerce is, we submit, illustrated by its early decisions in *Reading R. Co. v. Pennsylvania,* 15 Wall. 284, and *State of Maine v. Grand Trunk Ry. Co.,* 142 U. S. 217, upholding state excise taxes measured by the gross receipts of foreign and domestic railway companies derived from both their intra and interstate business.

And while, as heretofore shown, Your Honors, in *Galveston, Harrisburg etc. Ry. Co. v. Texas,* 210 U. S. 217, in a five-to-four decision, held invalid a Texas statute of this kind, so far as interstate revenues were concerned, never, so far as we can find, has this court held a state occupational tax, measured only by the intrastate gross receipts of interstate public service companies, whether foreign or domestic, unconstitutional as violative of the commerce clause.

Were it true, as claimed, that appellants' intra and interstate businesses are hopelessly commingled we may

assume that a state excise imposed directly upon their instrumentalities used in both activities, such as cars, engines, or telephone instruments, would offend the commerce clause.

But this, if the court pleases, is not true of *a tax measured by a percentage of gross receipts from intrastate business only.* Such a tax cannot, we submit, be held to burden appellants' interstate operations. Appellants' instrumentalities used in interstate operations are taxed only to the extent that the same are used in local service. If not so used, they are not taxed at all.

We know of no decision, and are confident counsel can cite none, striking down an occupational tax measured only by intrastate revenues, however intercommingled may be the local and interstate operations of the public service company. On the other hand, such a tax has been in numerous cases sustained by this court.

It is a matter of common knowledge, of course, that the instrumentalities of railroads and telegraph companies in carrying on their intra and interstate activities are no less commingled than are those of interstate telephone companies. To possibly a lesser extent this is likewise true of express and sleeping car companies.

In *Pacific Express Co. v. Seibert,* 142 U. S. 339, a privilege tax measured by 2% of the interstate express company's local revenues was sustained. On the other hand, in the later case of *Barrett v. New York,* 232 U. S. 14, a city ordinance imposing a license tax *directly on an interstate express company's express wagons* used in hauling both interstate and local express was condemned as a burden on interstate commerce.

We may add that in *Osborne v. Florida,* 164 U. S. 650, a lump-sum license tax imposed by cities upon ex-

press companies doing both intra and interstate business was sustained.

In *Pullman Co. v. Adams,* 189 U. S. 420, an excise measured in part by the mileage of line operated by a sleeping car company doing both local and interstate business was sustained. A lump sum excise tax was sustained as to a company doing the same kind of business in *Allen v. Pullman Co.,* 191 U. S. 171.

In *Western Union Tel. Co. v. Alabama,* 132 U. S. 472, and *Ratterman v. Western Union Tel. Co.,* 127 U. S. 411, occupational taxes measured by a percentage of local revenues were sustained as to telegraph companies doing both a local and interstate business, while in *Telegraph Co. v. Texas,* 105 U. S. 460, an excise measured by the number of intrastate messages sent, was sustained as to an interstate company.

And in *Postal Tel.-Cable Co. v. Fremont,* 255 U. S. 124, *Postal Tel.-Cable Co. v. Richmond,* 249 U. S. 252, and *Postal Tel.-Cable Co. v. Charleston,* 153 U. S. 692, lump sum license taxes imposed by municipalities on interstate telegraph companies for the privilege of doing a local business were sustained.

In *Lehigh Valley R. Co. v. Pennsylvania,* 145 U. S. 192, and the well-considered case of *Ohio River & W. R. Co. v. Dittey,* 232 U. S. 576 (the "Ohio Tax Cases"), occupational taxes measured by a percentage of local revenue, were sustained as to railroad companies doing both intra and interstate business.

In *St. Louis S. Ry. Co. v. Arkansas ex rel. Norwood,* 235 U. S. 350, a privilege tax measured by the proportion of the company's capital stock used within the state,

was sustained as to a foreign railway company doing both intra and interstate business.

In *People ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549, a privilege tax measured by local gross earnings was sustained as to a navigation company doing both local and interstate business.

Is it not, we ask, most remarkable that if counsel's position be sound, the same would not have been successfully urged in some one of these numerous cases?

Were counsel's contention meritorious, no good reason could, we submit, be suggested why the tax should not for the same reason be condemned as to every private enterprise compelled by economic necessity to use the same instrumentalities in doing both a local and interstate business. Yet who would seriously urge that such institutions as Sears-Roebuck or Montgomery Ward should be relieved from the tax on this ground?

Indeed, this court has held directly contrary to appellants' contention.

In *Bowman v. Continental Oil Co.*, 256 U. S. 642, a statute of New Mexico, applicable to distributors of gasoline, imposed an excise of two cents for each gallon sold or used, and an annual license tax of $50.00, payable in advance, for each distributing station, place of business or agency. The law was held invalid as to the $50.00 license tax *on each distributing station* as a direct tax on an interstate instrumentality, the court saying (p. 648):

"No doubt the State might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the State has not done this by any act of legislation. * * *

But the difficulty is that, since *plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce.* * * *." (Italics ours.)

Thus, in the *Bowman* case the contestant established precisely the same defense asserted here, namely, that it necessarily conducted its interstate and domestic commerce in gasoline at the same stations and by the same agencies. Yet this court upheld that part of the law imposing a 2 cent gallonage tax on gasoline in so far as it applied to domestic sales, Your Honors saying (p. 646):

"* * * so far as the excise tax is concerned—imposed as it is upon the sale and use of gasoline according to the number of gallons sold and used—the divisible nature of the subject renders it feasible to control the operation and effect of the tax so as to prevent it from being imposed upon sales in interstate commerce, while allowing the State to enforce it with respect to domestic transactions and with the allowance of an injunction limited accordingly plaintiff will receive the full protection to which it is entitled under the Constitution of the United States."

Examination will show that in all of the cases relied upon by appellants, the tax was imposed on *the interstate instrumentality itself,* and not merely measured by intrastate revenues from such instrumentality, as shown by the following review:

Interstate Busses v. Holyoke Street Ry., 273 U. S. 45:

There the state law complained of by the carrier operating an interstate and intrastate bus line required a license of *all* for-hire motor vehicles and also a certificate of public convenience and necessity issued by the state regulatory body. Neither license nor certificate

were required as to carriage exclusively interstate. The carrier contended that since it carried both interstate and local passengers on the same busses, the state regulation was invalid and unenforcible as to it, as a burden on interstate commerce. But the court said (p. 51):

"It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried efficiently and economically in busses used exclusively for that purpose or that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the Act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employes."

Now, let us assume that the court had there actually found that the bus company was in fact compelled by unavoidable circumstances to use the same busses for the carriage of both interstate and local passengers, and for that reason had held the state law invalid as a burden on interstate commerce, would this case, even on this assumption, lend color to counsel's contention? Obviously not, for the reason that such statutory requirement of a license and certificate of necessity would then have been a *direct burden* on the carrier's interstate business—a regulation of the *instrumentalities themselves,* used by the carrier in its interstate operations. The issuance of licenses and granting of a certificate of necessity being within the discretion of the state officers, the extent of the service rendered would likewise obviously be within the control of such authorities. Such a law, it might plausibly be argued, would directly burden and restrict interstate commerce.

On the contrary, the Washington Occupational Tax

Act in no way interferes with appellants' interstate operations. These companies may carry on their interstate business as they see fit, and are limited in their local operations only to the extent that they must contribute to the support of the state government for the privilege of so doing. Surely, this is not a *direct* burden on interstate commerce forbidden by the commerce clause.

LeLoup v. Port of Mobile, 127 U. S. 640:

In that case the offending city ordinance exacted a license tax from telegraph companies doing business within the city, of $225 per year. The ordinance was applicable to all companies whether engaged in intrastate or interstate business, or both, and imposed a fine for failure to pay the license fee imposed. The court said as to the point involved:

"The question is squarely presented to us, therefore, whether a state, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one state to another and between the United States and foreign countries * * *. We are not prepared to say that this can be done."

There, the burden on interstate commerce was more direct even than had the tax been directly imposed on the interstate instrumentality. It was exacted of the interstate telegraph company itself.

It is interesting to note that in that case the companies were paying in addition to a property tax, "a tax of three-quarters of one per cent on their gross receipts within the state." (p. 645.) *As to this occupational tax, no question was raised.*

Western Union Tel. Co. v. Kansas, 216 U. S. 1:

There the offending law required that the telegraph company pay a given percentage of its authorized capital, whenever and however employed, as a condition to its right to continue to do domestic business in Kansas. It was held that such a tax burdened interstate commerce and taxed property beyond the limits of the State.

It thus appears that the tax here assailed is in no way similar to that imposed under the Kansas law.

Postal Tel.-Cable Co. v. Richmond, 249 U. S. 252:

There a license tax imposed on intrastate business was upheld as against the objection that it imposed a burden on the company's interstate business because the net receipts from its intrastate business were insufficient to pay the tax, and the payment would therefore have to be made from interstate receipts.

Barrett v. New York, 232 U. S. 14:

There an ordinance of the city of New York imposed a license fee, not upon or measured by the intrastate revenues of the express company, but upon the *very instrumentality* used in its interstate business, namely, the express wagons used to haul both kinds of business.

Bowman v. Continental Oil Co., 256 U. S. 642:

The tax there held bad was a license tax of $50 per station imposed on companies distributing gasoline in both domestic and interstate commerce. It was shown that the company necessarily conducted its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies. It was held under those circumstances that the tax was void as a burden on interstate commerce. There again, the tax

was on the interstate instrumentality itself, the gasoline station.

As already noted, this case is a highly presuasive authority in support of the tax here in question.

The distinction between this class of cases and the case at bar is, we submit, clearly pointed out in the recent case of *Cooney v. Mountain States Tel. & Tel. Co.*, — U. S. —,.55 Sup. Ct. 477, 482, 79 L. Ed. 498, 504, where Your Honors said as to a privilege tax made applicable to telephone instruments used in both interstate and intrastate business:

"A privilege or occupation tax which a State imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid. * * * *Barrett v. New York,* 232 U. S. 14, 29, 31. * * * *Bowman v. Continental Oil Co.,* 256 U. S. 642, 647, 648, 65 L. Ed. 1130, 1144, 1145, 41 S. Ct. 606. In the cases of the express companies, the principle was applied to a privilege tax imposed alike with respect to wagons used in the movement of both interstate and intrastate shipments. The local shipments 'were handled in the same vehicles, and by the same men' that were employed in connection with the interstate transportation and it was impracticable to effect a separation. *Barrett v. New York,* 232 U. S. 14, 58 L. Ed. 483, 34 S. Ct. 203, and *Platt v. New York,* 232 U. S. 35, 58 L. Ed. 492, 34 S. Ct. 209, *supra.* In *Bowman v. Continental Oil Co.,* 256 U. S. 642, 65 L. Ed. 1139, 41 S. Ct. 606, supra, the question arose under a statute of New Mexico laying an annual license tax of five dollars for each station distributing gasoline. The court pointed out the distinction between an excise tax on sales of gasoline where, as the subject matter was separable, full protection could be afforded by enjoining enforcement as to the interstate business, and the license tax which with its prohibition fell upon the business as a whole. The Court said: 'But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect

this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void.' The difficulty, continued the Court, 'is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence, it cannot be enforced at all.'

"In the instant case, the tax, being indivisible and indiscriminate in its application, necessarily burdens interstate commerce."

Although we have reviewed only those cases relied upon by appellants' counsel, we are satisfied that all cases in which state or municipal regulatory or tax measures have been held repugnant to the commerce clause are readily distinguishable for the same reason pointed out with respect to the *Holyoke* and *Adams Express* cases. And in no case decided by the highest court, has a state excise tax or ordinance been adjudged offensive to the commerce clause, where imposed for the privilege of doing, and measured by gross income from, interstate business alone.

For the reasons urged, we respectfully submit that the judgments of the State supreme court should in each instance be affirmed.

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,

Attorneys for Appellees.

APPENDIX "A"

Challenge to Trial Court's Findings of Fact and rulings on admissibility of evidence in N. P. Ry. Co. v. State, No. 529.

ASSIGNMENTS NP-3 TO NP-33

Each railroad appellant owns and operates a railroad between Puget Sound and the Great Lakes. As such interstate carrier, each keeps its system accounts as prescribed by the I. C. C. (GN Rec. 110, NP Rec. 79.) The I. C. C., however, does not prescribe rules for the apportionment of system revenues and expenses as between the various states through which such appellants operate. (GN Rec. 110.)

Whether each road's local business is profitable or unprofitable depends, of course, upon the amount of its intrastate revenues less operating expenses and taxes properly chargeable to its intrastate operations.

Such local revenues can obviously be ascertained with reasonable accuracy. But where, as here, these companies' local traffic is handled at the same terminals, and hauled over the same rails, on the same trains, by the same engines, and with the same employes, as their interstate traffic, the extreme difficulty of accurately apportioning these joint operating expenses to local traffic becomes at once apparent. Consequently, any method or methods proposed for so doing, must, we submit, be scrutinized with the utmost caution before the court can set aside a revenue measure on the theory

that the railroad so taxed is in fact losing money on its local business.

It must be remembered that these roads do both an intra and interstate passenger business, and an intra and interstate freight business over the same rails. Consequently, to discover what proportion of their operating expenses should equitably be apportioned to their intrastate traffic, these roads were confronted, among numerous others, with the following problems:

(1) The apportionment of system operating expenses as between freight and passenger service;

(2) The apportionment of each of some hundreds of different items of system passenger expenses and system freight expenses to its Washington operations;

(3) The apportionment of each of these numerous items of passenger and freight expenses (so apportioned to Washington) as between Washington intra and interstate freight and passenger service.

Pursuant to the I. C. C.'s instructions, each railroad divides its system operating expenses under some 197 separate and distinct accounts, and in reporting its operating expenses in Washington to the D. P. W., each company uses these same accounts and account numbers. (See NP Ex. "9," pp. 702-707, NP Rec. 276-281.) These accounts are divided into the following six main divisions of operating expenses:

(1) "Maintenance of Way and Structures"; (2) "Maintenance of Equipment"; (3) "Traffic"; (4) "Transportation — Rail Line"; (5) "Miscellaneous Operations" (which includes such items as dining and buffet service, hotels and restaurants, grain elevators,

stockyards, etc.); and (6) "General" (which includes salaries of officers and clerks, legal expenses, etc.).

Confronted with the problem of isolating its operating expenses incident to local traffic, each road pursued the following course:

It proceeded on the assumption, first, that its operating expenses incident to its operations, both intra and interstate, in the state of Washington, were, as to both freight and passenger traffic, accurately shown in its reports to the D. P. W. for 1933 and previous years.

All intra and interstate passenger service expense as so reported was apportioned as between intra and interstate passenger service (a) by the N. P. according to relative intra and interstate passenger miles (a method challenged by the State); and (b) by the G. N., according to the relative intra and interstate passenger revenue (a method not contested by the State).

But the segregation of intrastate freight service expenses did not prove so simple. Intra and interstate freight, it was found, was hauled (as above noted) over the same rails, by the same engines, in the same cars and trains, by the same employes, and by means of the same terminal facilities. Moreover, freight movements were found to involve at least two distinct classes of expenses: (1) line-haul expense and (2) terminal expense. Each road, therefore, undertook to make two special studies each covering a seven-day period—one to determine the average cost of the various elements of terminal or switching expense, and the other to ascertain the line-haul expense incident to local freight traffic. Having purported to find the total line-haul expense for the test week chosen, and the number and character of

the various switching operations incident thereto, and having, in a separate study, purported to find the cost of such various switching operations, it purported to calculate therefrom the total operating expenses incident to the intrastate operations for the test week. The total operating expenses incident to intrastate freight traffic for 1933 were then computed by the two roads in substantially the following manner: As to the N. P., the cost per intrastate revenue ton mile was found for the week, and such cost multiplied by the total intrastate revenue ton miles for the year. The G. N.'s method was somewhat more complicated, but substantially the same in principle.

To the intrastate freight service operating expenses as so computed, each company then added certain other items of claimed expense (questioned by the State), and thus arrived at what each claimed to be its total intrastate operating expenses for 1933. This amount was then deducted from its claimed total operating revenues for the year (a figure likewise contested by the State), and reached what was termed its "net revenue from railway operations." From the latter figure, each road then deducted what it claimed to be the amount of its 1933 taxes properly apportionable to its intrastate operations. To arrive at this amount, each road apportioned its property taxes as between its intra and interstate traffic in the relation which its intrastate revenues bore to Washington's mileage proportion of its revenues from interstate traffic (a method most vigorously challenged by the State).

The figure arrived at by such deduction of taxes and railway operating expenses from its railway operat-

ing revenues is known as "Railway operating income," and it is this figure which the N. P. claims to be determinative of whether the company has made or lost money for the year. (NP Rec. 97.)

The G. N. contended, however, that for the purpose of determining whether it was doing business at a loss, it was entitled to make the following additional deductions: (1) the excess of rental paid and rental received for the use of equipment ("equipment rentals"); and (2) the excess of rentals paid for the use of tracks and other facilities of other carriers over the rentals received for its own facilities from other carriers ("joint facility rent").

These joint facility rents were apportioned by the G. N. to intrastate traffic in the relation which it found all its operating expenses incident to intrastate traffic bore to its total operating expenses for the year within the state (a method protested by the State).

This was a debit item as to the G. N., but a very substantial credit item for the N. P., which possibly explains the difference in the attitude of counsel for the two companies.

Before specifically pointing out the different results reached by the State's and railroads' witnesses, it is thought appropriate at this point to discuss the various Assignments of Error involving the admissibility of evidence and the propriety of the appellant railroad's methods of apportioning operating expenses, taxes, and joint facility rents.

ASSIGNMENT NP-3*

COURT'S ERROR IN PERMITTING N. P.'s WITNESS, PETERSON, TO TESTIFY AS TO RELATIVE AMOUNT OF FREIGHT TRAFFIC DURING TEST WEEK AND ENTIRE YEAR 1933.

The N. P.'s claim that it lost money on its intrastate business for 1933 was based as above noted, on a purported special study of line-haul intrastate freight traffic during the week of October 22, 1933 (NP Rec. 89, *et seq.*), and a special study as to switching operations during the week of June 3, 1934. (NP Rec. 102, *et seq.*) For the purpose of attempting to show that this October test week was representative of the year's business, Peterson testified that a study was made for the purpose of comparing the relative revenues earned and ton miles and car miles operated during October and said test week in October, with the total for the year. (NP Rec. 89.) The State's counsel objected to any testimony as to such study if the same was based on entries in the company's books not introduced in evidence. (NP Rec. 90.) The objection being overruled, the witness testified to such comparative figures, from which he concluded that October was more favorable to both intra and interstate traffic than the average for the year. He further testified that to obtain the figures for October, 1933, he had the auditor of freight receipts make a special compilation, which figures were not reported to the D. P. W. (NP Rec. 90.) The court thereupon denied

*(NP 3) The court erred in permitting the N. P.'s witness, Peterson, to testify over objection that the same was hearsay and that the underlying data was not produced, as to the relative ton miles, revenue and average miles of haul of Washington traffic in October, 1933, and during the week of October 22, 1933, as compared with the entire year, and in refusing to strike such testimony after received. (NP Rec. 90-92.)

the State's motion that the testimony with respect to such comparative figures be stricken as hearsay and as based on the company's books not introduced in evidence. (NP Rec. 91.) The witness then testified over objection of the State's counsel as to the same kind of a comparison made with respect to the week of October 22, 1933, and the entire month of October. (NP Rec. 91-2.)

It would seem that the mere recital of these proceedings is sufficiently convincing that this evidence was not admissible under the hearsay and best evidence rules. Not only were the books not produced, but the individual who, it is claimed, took this data from the original records was not produced as a witness. Neither was this data (for the month and test week) reported to any state department. It would seem that in a proceeding in which a state law is assailed as unconstitutional, the State's counsel should not be left in a position where it is entirely impossible for him to verify figures and conclusions sought to be injected into the record in violation of some of the most fundamental rules of evidence.

The evidence, we submit, was not admissible.

ASSIGNMENT NP-4*

COURT'S ERROR IN RECEIVING IN EVIDENCE N. P.'s EXHIBIT "7" OVER OBJECTION THAT SAME WAS BASED ON HEARSAY AND RECORDS NOT RECEIVED IN EVIDENCE.

N. P. Exhibit "7" consisted of 22 pages of set-ups and computations based upon the special traffic study made during the week of October 22, 1933. (NP Rec. 93-4.)

This exhibit was received in evidence over the State's objection that the same was hearsay, largely based on conclusions and on estimates not made by a qualified expert, and from data taken from books not introduced in evidence and which the State's counsel had no opportunity to examine, and compiled by persons whom the State's counsel was given no opportunity to examine. (NP Rec. 101-2.)

As pointed out under Assignment NP-3, the value of the exhibit hinges on whether or not the test week chosen was representative of the year's traffic. The data bearing upon whether or not this was in fact a representative week was based upon records not received in evidence and the individual who took such data from the company's books was not even called as a witness.

Moreover, it appears that the revenues shown upon the N. P.'s books and reported under oath to the D. P. W. as the revenues received from intrastate freight traffic were not used in the preparation of such exhibit, but a lesser figure resulting from deducting therefrom certain revenues claimed to have been derived from

---

*(NP 4) The court erred in receiving in evidence N. P.'s Exhibit "7" over objection that the same was hearsay, and that the data upon which based was taken from the N. P.'s records not introduced in evidence. (NP 101-2.)

interstate or foreign shipments and switching although theretofore reported under oath to the D. P. W. as intrastate revenues. Mr. Peterson testified that these deductions were taken from the answers to interrogatories submitted by the N. P. (NP Rec. 94.) This is not the fact. No deductions of any kind were made in the answers to interrogatories *sworn to be true* by the N. P.'s assistant general auditor. (NP Rec. 78-9.) They were taken instead from so-called supplemental answers to interrogatories, verified by Mr. da Ponte, one of the N. P.'s attorneys, who only avers such answers to be true "to the best of affiant's knowledge and belief." (NP Rec. 84.) Da Ponte most certainly would not have been qualified to testify as an accountant. How, then, can his affidavit on mere information and belief be deemed to override the positive sworn statement of the N. P.'s assistant general auditor, and the sworn report to the D. P. W. which the N. P. itself introduced in evidence? (NP Ex. "9," Rec. 284.)

This information was contained in the records at the N. P.'s storage elevators (NP Rec. 151) and there is nothing to show that the same could not have been readily produced.

As shown under Assignment NP-17 (Post, pp. 131-133), the deductions attempted to be made as so-called interstate switching revenue were not shown by any exhibit of any kind although the records from which such showing might have been made were available in the state. (NP Rec. 248.)

Without going into further detail, we submit that, for the reasons shown, N. P.'s Exhibit "7" was not admissible and should be disregarded.

ASSIGNMENT NP-5*

COURT'S ERROR IN FINDING THAT N. P.'s METHOD OF APPORTIONING OPERATING EXPENSES TO ITS WASHINGTON TRAFFIC IS CORRECT.

In support of this assignment we need hardly do more than call attention to the following footnote that appeared in the N. P.'s report to the D. P. W. and tax commission for 1933 and for a number of years theretofore (NP Rec. 117):

"The statements herein either of revenues or expenses attributed to Washington are misleading unless properly understood. They are necessarily based on arbitrary assumptions as follows:

"Revenues contain (first) the revenues of business wholly local within the State and in addition a proportion of interstate revenues determined by the proportion of mileage which each interstate freight shipment or passenger is carried within the State.

"Charges for expenses contain (first) those expenses incurred in each state, and are considered wholly applicable to that state, and in addition some mileage proportion of expenses which cannot be localized. *Apportioning either such revenues or such expenses on a mileage basis is purely arbitrary* and has been adopted for want of any other basis." (Italics ours.)

Asked whether in his opinion the method used for apportioning operating expenses to Washington was the best method that can be used for the purpose of determining the propriety of rates both in this and other states, N. P.'s witness, Mr. Peterson, replied:

"I think each question there will have to depend largely on the local situation. You ask whether or not, for the purpose of determining the propriety of a local

---

*(NP 5) The court erred in finding that the method used by the N. P. in assigning operating expenses to its Washington properties is the method prescribed by the D. P. W., and that the expenses incurred in Washington by the N. P. were correctly stated in Finding VI. (Finding VIII-b, NP Rec. 36-7.)

rate in any one of the states traversed by the N. P. the method used in the apportionment of these operating expenses as I have reported them to the state of Washington is the best method that could be used for the purpose of making such apportionment. I would say no. You ask me why. Well, because the conditions are constantly changing." (NP Rec. 118.)

We can only wonder if Mr. Peterson's replies were not actuated by apprehension that perhaps his answers might be used against him later in some rate hearing in the middle or "bridge" states.

Operating expenses incident to maintenance of way and structures, with the exception of superintendence, insurance, stationery and printing and "general" were practically all, Mr. Peterson testified (NP Rec. 115), directly assignable to Washington.

Mr. Peterson testified further:

"The expenses incident to all terminal services rendered within the state as to both interstate and intrastate traffic are all apportioned directly to the state. In addition to the actual operating expenses that are incident to the terminal services, the N. P. maintains large terminal facilities, such as docks, warehouses, yards, repair shops, depots, and so on in the larger cities of the state of Washington," etc. (NP Rec. 123.)

And see also the testimony of Mr. Lonergan. (NP Rec. 172-3.)

This, we submit, is an important reason why the N. P.'s method of apportioning operating expenses to Washington is indefensible in a case in which its true earnings from local business is in issue. Washington is a terminal state where the long-haul interstate business is assembled and distributed. The intermediate or "bridge" states have no terminal facilities comparable with the terminal states. (NP Rec. 128.) C. R. Loner-

gan, since 1927 chief of traffic division of the D. P. W., and for 33 years in the N. P.'s employ in various capacities, including that of traveling freight agent, general agent, assistant general freight agent, general freight agent, and assistant to the vice-president in charge of traffic (NP Rec. 172), testified:

"I am familiar with the method of accounting of the N. P. to the state of Washington in accounting for its railway operating expenses. (NP Rec. 173.) * * *

"The objection to the apportionment of all of the expenses connected with the maintenance of way and structures of a terminal state such as Washington as applies to the N. P., to the state of Washington, and the apportionment of none of those expenses whatever to the bridge state is that it does not place the proper charge upon interstate traffic; it places it all where it is expended, in the state of Washington. The terminal facilities located in Washington are of benefit to the traffic traversing the intermediate states, and in my opinion some of that expense should be apportioned to those intermediate states. That should also be true in regard to the maintenance of the terminals in Wisconsin and Minnesota. That should likewise be apportioned to this state and to the intermediate states as well. A portion of the taxes imposed by the state of Washington on the N. P. terminal facilities in Washington should likewise be apportioned to the bridge states, for the same reasons I have stated." (NP Rec. 175-6.)

It follows, of course, that if it is improper that all the terminal expense be assigned to Washington, an unjust maintenance expense burden must fall on intrastate business when such total terminal expenses are divided between Washington intra and interstate business according to relative freight car miles as was used in the N. P.'s special study. (See NP Ex. "7," p. 19, NP Rec. 167.)

We submit that a method of apportionment of expenses between states which the N. P., in its reports,

concedes to be "purely arbitrary" (NP Rec. 117-8), cannot yield results from which the court can set aside a state tax on the theory that this appellant is losing money in the state.

ASSIGNMENTS NP-6 TO NP-8*

COURT'S ERROR IN FINDING THAT STATE CONTENDED THAT N. P. SHOULD CREDIT PART OF ITS MAIL AND EXPRESS REVENUE TO LOCAL BUSINESS (NP AB. 288) AND IN FINDING THAT ANY PART OF SUCH REVENUE SHOULD BE APPORTIONED TO INTRASTATE.

These findings are wholly unsupported by the record. The State's only contention with respect to the N. P.'s revenues from mail and express was in connection with the method adopted by N. P.'s witness Peterson in apportioning passenger operating expenses between intra and interstate traffic. Peterson had prepared an exhibit in which he apportioned such expenses on a relative passenger mileage basis. (NP Ex. "7," p. 11.†)

---

*(NP 6) The court erred in finding that plaintiff contended that the N. P. should credit part of its mail and express revenue to local business, whereas no such contention was in fact made. (Finding XII, NP Rec. 43-4.)

(NP 7) The court erred in finding that $221,359 or any other sum should be added to the N. P.'s intrastate passenger revenue for 1933, for intrastate mail and express, such finding being wholly unsupported by the record. (Findings IX-h, IX-i and IX-j, NP Rec. 40-41.)

(NP 8) The court erred in finding that the N. P.'s intrastate passenger revenue for 1933 was any sum greater than $429,635 as shown by plaintiff's Exhibit "25." (Finding IX-j, NP Rec. 42, 212A.)

†Defendant's Exhibit "7," p. 11, was omitted from the printed Transcript of Record, possibly because of its being inadvertently omitted from the transcript certified to this court by the clerk of the State supreme court. The same has now been properly certified to

The State sought to show on cross-examination (NP Rec. 132-3) that the use of this method wholly ignored the expenses incurred in connection with mail and express traffic, all of the revenues from which were assigned by the N. P. to interstate traffic. (NP Rec. 132.) *There is not a suggestion in the record that counsel for the State ever made the slightest objection to the apportionment of all mail and express revenue to interstate.* Counsel for the N. P. thereafter had Peterson prepare another exhibit apportioning a certain proportion of this mail and express revenue to intrastate based on relative passenger miles (NP Ex. "53," p. 2; NP Rec. 229), but without the slightest basis therefor since Peterson conceded what the court well knows to be the fact, that there is no relation between the proportion of interstate passengers and the proportion of interstate mail and express carried on a given train. Peterson testified:

"You ask if, as a matter of fact, it is impossible to make any apportionment of mail and express. It is, unless you consider that the mail that moves on local

---

this court, but not having been printed as part of the Transcript of Record, it is herein set forth, as follows:

Def.'s Ex. "7," p. 11

NORTHERN PACIFIC RAILWAY COMPANY

State of Washington—Year 1933

Passenger proportion of Operating Expenses, Intrastate.			
Total passenger proportion of Operating Expenses year 1933, Intra and Interstate			$3,142,708
Revenue Passenger miles		%	
Intrastate	18,052,604	47.76	
Interstate	19,749,788	52.24	
	37,802,392	100.00	
Passenger proportion of Operating Expenses as applicable to Intrastate Traffic 47.76% of $3,142,708 or			1,500,957

trains is intrastate mail. That is the only way. That is not used. You ask if you can safely assume that. *No, I can't assume it, it is a false assumption.*" (NP Rec. 141.)

And again:

"You ask how much money the lines in the state of Washington realize from local mail and local express. I don't know. We know there is some, but the matter of division is a matter I can't inform you on." (NP Rec. 209.)

And again asked as to the relation between such revenue and passenger miles, he said:

"You ask if it is not true that I don't know anything about the relation. I can't give an exact opinion of the relationship, no." (NP Rec. 210.)

Counsel for the N. P. was, of course, actuated by no mere spirit of generosity in attempting to slough off a part of this mail and express revenue to intrastate traffic. He realized that whereas the total passenger revenue, intrastate and interstate, for 1933 was only $1,351,082 (Plff.'s Ex. "25," NP Rec. 212a), the operating expenses in connection therewith were $3,142,708 (Plff.'s Ex. "26," NP Rec. 217); *i. e.*, that the reported expenses were 232% of the reported revenues. Consequently the more passenger business he could donate to local operations, the more operating expenses he could pile up on the intrastate side of the ledger.

The offending findings should, we submit, be wholly ignored.

ASSIGNMENTS NP-9 AND NP-10*

COURT'S ERROR IN FINDING THAT N. P.'s PASSENGER SERVICE OPERATING EXPENSES SHOULD BE APPORTIONED TO INTRASTATE ON RELATIVE PASSENGER MILE BASIS INSTEAD OF RELATIVE REVENUE BASIS.

As part of its purported operating expenses, the N. P. made the following charge:

> "Passenger proportion of operating expenses applicable to Intrastate Traffic..... $1,500,957."
> (N. P. Ex. "7," p. 11; NP see footnote *ante*, pp. 105-6.)

This result was reached by apportioning the total intra and interstate operating expenses incident to Washington passenger traffic ($3,142,708) to intrastate traffic on the basis of relative passenger miles hauled in intra and interstate service. In so doing, the N. P.'s witness wholly ignored the obvious fact that its passenger trains are operated largely for the purpose of hauling express and mail, all of the revenues from which are apportioned to its interstate business. (Plff.'s Ex. "25," accts. 106-7, NP Rec. 212a.) It is, of course, clear that the relative number of Washington interstate and intrastate passengers hauled one mile has no logical relation to the amount of mail and express hauled on the passenger trains accommodating passengers. This was virtually conceded by N. P.'s witness Peterson, who prepared the exhibit. (NP Rec. 132-3.)

---

*(NP 9) The court erred in finding that the correct method of apportioning the N. P.'s passenger service operating expenses as between intra and interstate passenger service is in the relation of relative revenue passenger miles, and not relative gross revenues. (Finding IX-i, NP Rec. 41-2.)

(NP 10) The court erred in finding that the N. P.'s expense of intrastate passenger business for 1933 was $1,500,000, or any other sum greater than $999,381 as shown by plaintiff's Exhibit "26." (Finding IX-j, NP Rec. 42.)

Take, for example, the passenger trains operating between Seattle and Grays Harbor. These trains, as we well know, are operated principally to afford mail and express service, yet, according to the N. P.'s theory, if on an average ten revenue passengers were carried on these trains, only one of which was an interstate passenger, then 90% of the operating expenses would be apportioned to the N. P.'s intrastate passenger service, although all of the revenue from mail and express is apportioned to interstate operations. Such an apportionment of expense, is, of course, wholly indefensible. Expenses must logically be apportioned as between intra and interstate operations with reference to the relative amount of interstate and intrastate business handled, and *since relative revenues is our only available data* as to the relative amount of intra and interstate passenger train business done (including mail, express, milk and other activities; see Plff.'s Ex. "25"; NP Rec. 212a) it is, we submit, impossible to conceive of how these expenses can logically be apportioned on any basis other than relative revenues. And were further justification for our position necessary, we need but turn to the G. N. exhibits, where we find the G. N. apportioning passenger operating expenses by precisely the method we urge here. To quote (G. N. Ex. "11," p. 7; GN Rec. 265-6):

"2. PASSENGER PROPORTION OF OPERATING EXPENSES—INTRASTATE:

"(a) Passenger proportion of operating revenues Intrastate and Interstate	$1,540,264
"(b) Passenger proportion of operating expenses—Interstate and Intrastate—as reported to W. D. P. W.	2,481,136
"(c) Operating Ratio	161.09%*
"(d) Intrastate Operating Revenues Passenger proportion	551,845

"(e) Intrastate Operating Expenses—Passenger proportion (d) × (c): ..... 888,967"

*Arrived at by dividing (b) by (a)—expenses by revenues.

Thus, in making its apportionment, the G. N. first finds the ratio of passenger operating expenses, both interstate and intrastate, to passenger operating revenues, both interstate and intrastate, and applies that ratio (161.09%) to the total intrastate passenger operating revenues to ascertain the passenger service proportion of intrastate operating expenses. In other words, it apportions its operating expenses as between intra and interstate passenger service on the basis of relative operating revenues from the two classes of service. That there may be no mistake, let us follow the G. N.'s method in the N. P. case:

"PASSENGER PROPORTION OF OPERATING EXPENSES—INTRASTATE:

"(a) Passenger proportion of operating revenues intrastate and interstate (Plff's Ex. "25"; NP Rec. 212a)	$1,351,082
"(b) Passenger proportion of operating expenses—Interstate and Intrastate (N. P. Ex. "7," p. 11; see footnote, *ante*, pp. 105-6)	3,142,708
"(c) Operating ratio (b ÷ a)	232.61%
"(d) Intrastate operating revenues, Passenger proportion (N. P. Ex. "7," p. 7, 1st figure in 5th line; Plff's Ex. "25," total of 2nd vertical column; NP Rec. 212a.)	429,635
"(e) Intrastate Operating Expenses—Passenger proportion ("d" × "c")	999,374"

And this figure, it will be observed, is just $7 less than the figure reached by plaintiff's witness, Manschreck, who followed the method here urged by plaintiff. (See Plff.'s Ex. "26," NP Rec. 213.)

But as shown, the N. P. charged $1,500,957 as its 1933 intrastate passenger operating expenses, or $501,-

576 more than can be reached on any reasonable theory. (N. P. Ex. "7," p. 11, see footnote, *ante* pp. 105-6.)

ASSIGNMENTS NP-11 AND GN-10*

COURT'S ERROR IN FINDING THAT THE MILEAGE PRORATE DIVISION OF REVENUES FROM INTERSTATE SHIPMENTS AS BETWEEN STATES IS THE CORRECT METHOD OF APPORTIONING SUCH REVENUES TO WASHINGTON.

Both the N. P. (N. P. Ex. "7," p. 7; NP Rec. 161) and the G. N. (G. N. Ex. "11," pp. "9," and "C;" GN Rec. 256, 267-8) contend that the ad valorem taxes on their respective operating properties in Washington should be apportioned between intrastate and interstate traffic in that proportion which the revenues from intrastate traffic bear to the revenues from interstate traffic. It is further conceded that for the purpose of determining the amount of such interstate revenue the total revenue from each interstate shipment is apportioned to Washington in that proportion which the miles of haul in Washington bear to the total mileage of haul as to each individual shipment. (NP Rec. 118-9; GN Rec. 127). The State contends in each case that this method of apportionment of taxes is improper, for the reason, if for none other, that this mileage prorate division, while it may do for purely statistical purposes, is

*(NP 11) The court erred in finding that the mileage prorate division of revenues from interstate shipments is the method prescribed by the D. P. W. and the I. C. C., and is the correct method for apportioning such revenues to Washington. (Finding VIII-a, NP Rec. 36.)

(GN 10) The court erred in finding that in the apportionment of operating revenues received from interstate freight business to the G. N.'s Washington operating properties, such properties were not entitled to more than a mileage prorate of such interstate freight revenues. (Finding VII-e, GN Rec. 65-7.)

purely arbitrary and is unfair to a terminal state such as Washington, and for this reason: The rate exacted for handling traffic involves at least two services, (1) the line-haul service, and (2) the terminal service. The terminal service is just as essential as the line-haul service, and falls most heavily on terminal states such as Washington where a large part of the profitable long-haul business originates and terminates. The mileage prorate is computed on a station-to-station movement only (GN Rec. 146; NP Rec. 120), and consequently, such apportionment method wholly ignores both the terminal service rendered and terminal expenses incurred in the movement. Thus, Mr. Peterson testifying for the N. P., said:

"The company furnishes a large amount of service in connection with the movement of that traffic (interstate) which is included in the tariff aside from the purely line haul: * * * I will say that it includes the large expenses in connection with switching, also handling of freight at terminals for both classes of traffic, both intrastate and interstate. * * * The assembling of the cars into the originating trains would involve some switching, none of which would be reflected in the mileage prorate division. The mileage prorate would include the line haul only." (NP Rec. 120-121.)

Mr. Burn of the G. N. testified substantially to the same effect. (GN Rec. 146-7.)

It is rather startling to compare the court's findings that the mileage prorate is "the method prescribed by the Department of Public Works" (NP Rec. 35), with the following testimony of Mr. Lonergan, since 1927 chief of the D. P. W.'s traffic division (NP Rec. 172):

"You ask me to state whether or not in my opinion such method of apportioning revenues followed by the N. P. is a proper method of apportioning revenues to

the state of Washington for the purpose of determining the true net railway revenues in the state. I would say not for ratemaking purposes. (NP Rec. 174.) * * *

"You ask whether it is my opinion that the interstate revenues should be apportioned to Washington on a mileage prorate. No. You ask why not. Because that division does not allow for the terminal service. In other words, if the expenses are to be apportioned locally, to the terminal state, then a greater proportion of the earnings or the revenues should be apportioned to that state. You should either apportion a certain proportion of the expenses connected with this terminal service to the remainder of the states, or you should apportion a greater percentage of the interstate revenues to the state to equalize those expenses. (NP Rec. 176.) * * *

"The rate is made to compensate for the haulage over the mountains. It is also made to cover cost of terminal services. The terminal service charge is absorbed in the line haul rate. The terminal services and the line haul service is all included as part of the structure of the service, the total service, to be paid for by the imposition of this tariff. If the computation of mileage is from station to station, the terminal service is in no way whatever reflected by the apportionment on a mileage prorate. It wholly ignores it and considers only the mileage of haul." (NP Rec. 182.)

"It is," Mr. Lonergan said, "a matter of common knowledge that these figures that are filed in the annual reports of the railroads covering their state revenues and expenses are incorrect." (NP Rec. 175.) With respect to the recognition of this principle by the D. P. W., Mr. Lonergan said:

"In all consideration of intrastate rates we have always taken into account these arbitrary assumptions that are contained in the state figures, and to quite an extent have disregarded them. That is, the mileage prorate which gives the state of North Dakota or Montana the same revenue per mile as it does in the state of Washington without regard to the terminal services, the absorption of competitive switching on interstate busi-

ness, and many other factors which distort the figures." (NP Rec. 175.)

And we find the D. P. W. making the following finding of fact in 1930 in a proceeding in which the G. N. and N. P. were parties:

"All of the operating cost figures are based upon the arbitrary allocation of revenues and expenses now employed under which interstate revenues are apportioned to states on basis of a mileage pro-rate. This disregards the terminal proportion of the revenue and gives the intermediate states as great a share in proportion to mileage as the states in which the traffic originates and terminates. It gives no consideration to relative costs in different states as constituting any measure of relative revenue which should be apportioned to such states. Non-revenue freight or company material is a large factor in the operating costs in Washington, but under the existing plan of localizing expenses to the state in which they occur, the costs of handling company freight is not distributed in proportion to their responsibility for the expenses. Absorption of competitive switching charges on interstate traffic and many other factors also contribute to distort the facts." (Plf.'s Ex. "24," NP Rec. 211-2.)

In this connection it is also important to note that in the division of revenues as between connecting carriers on through shipments, the originating and terminating carrier is commonly allowed far more than a mileage prorate division. The terminal line usually receives a minimum of 25% of the through rate with the local rate as the maximum.

Asked whether there was any general principle governing the apportionment of interline revenue as between two terminal lines and an intermediate line, Mr. Edmunds, assistant traffic manager of the Union Pacific System (NP Rec. 199; GN Rec. 247) testified:

"The basis most generally used has been a mileage prorate with a minimum of 25% to any line, whether the terminal lines or the intermediate line. The local rate is the maximum generally, yes. It might be less than 25%, depending on the agreement of the parties. These divisions would apply both west and east, to traffic going in both directions. As a rule the short line would get the 25% minimum whether it received the traffic or originated the traffic." (NP Rec. 201; GN Rec. 248.)

The Oregon-Washington ("O-W") operates between Portland and Huntington (on the Idaho-Oregon boundary); the Oregon Short Line ("O. S. L."), between Huntington and Granger, Wyoming; and the Union Pacific ("U. P.") between Granger and Omaha. Huntington corresponds roughly with the location of Spokane on the G. N. and N. P., and Omaha is approximately the same distance from Chicago as St. Paul. 100% of the O-W stock is owned by the O. S. L. and approximately all of the O. S. L. stock is owned by the U. P. On a shipment between Portland and Omaha the O. W. receives 35%, the O. S. L. 27% and the U. P. 38% of the through rate. On the same haul, the mileage prorate would give the O-W 22.05%, the O. S. L. 30.44% and the U. P. 47.51%. (NP Rec. 199-203; GN Rec. 247-50.)

A graph is set forth in the record (NP Rec. 228a; GN Rec. 250a) comparing the divisions as compared with the mileage prorate division between the O-W and the Milwaukee and G. N. east and west of Spokane, and as between the N. P. and O-W east and west of Wallula.

On shipments between the points on the Southern Pacific ("S. P.") and Omaha via the U. P. system, the S. P. receives about twice its maximum mileage prorate of the West of Missouri River revenue. (GN Rec. 252.)

The through rate on lumber from Longview points

to Omaha is 62.5 cents. Of this, the railroad there (before being absorbed by other roads) received 3½ cents for a 5-mile or 23-mile haul. (GN Rec. 253.)

A striking illustration of the inadequacy of the mileage prorate as to terminal states exists in the cases of Oregon and Wisconsin, as to which Mr. Peterson testified:

"The N. P. reports to the regulatory bodies of Oregon and Wisconsin: The states of Wisconsin and Oregon have a considerably higher expense because of the short mileage in the state and the terminal operations in that state. In making its reports to Wisconsin and Oregon regulatory bodies it uses the same basis of allocation to the state as it did the state of Washington. The net revenue from operation in the state shows a deficit for the year 1933 for Wisconsin and Oregon. I know that has been true for a good many years. No, I would not say that the lines in Oregon and Wisconsin are not a valuable part of the N. P. system. You ask if that means that the N. P. is not actually making money from its railway operations in Wisconsin and Oregon. We are making money probably from the operations as a whole, but not necessarily from the operations in that state. It does not mean that the N. P. system would profit by having the portion of its system located in Oregon and Wisconsin eliminated." (NP Rec. 121-2.)

It is interesting to note the trial court finds that the mileage prorate method is "the method prescribed by the * * * Interstate Commerce Commission." (NP Rec. 36.) Let us quote from a few of the I. C. C. decisions:

"Fundamentally, this statement proceeds on what we consider to be an erroneous theory; that is, that certain portions of a system of railroad can be segregated from the whole and the expenses and earnings be charged and credited to such portions on a mileage-prorata basis." *Investigation of Advances in Rates on Grain,* 21 I. C. C. 22, 25-26.

"It is to be expected that an originating division would apparently not be self-supporting any more than would the average large terminal in a city. To make them self-supporting it is necessary to assign to the originating division and to the terminal a sufficient portion of the revenues to more than offset the expenses. This would have to be an arbitrary sum. It could hardly be accomplished by the ordinary method of prorating the revenue or dividing it under a block-mileage system." *Louisville & Nashville R. R. Coal and Coke Rates*, 26 I. C. C. 20, 29.

"The apportionments of revenues, expenses, and other income items between the line of the United States and Canada and the lines of the Grand Trunk in Canada are in many instances made upon bases of road mileage, car-mileage, or train mileage. We have held that a portion of a railroad system can not be separated from the whole, and the earnings and expenses charged, and credited to such portion on a mileage prorate basis. *Investigation of Advances in Rates on Grain*, 21 I. C. C. 22, 25; *Louisville & Nashville R. R. Coal and Coke Rates*, 26 I. C. C. 20, 30. It is well known that a mileage prorate of transportation revenues or expenses will in many cases result in a showing of deficits for branch lines of light traffic density, notwithstanding the showing for the system as a whole is a substantial profit." *Deficit Status of U. S. & Canada R. R.*, 76 I. C. C. 455, 457-8.

It is to be particularly noted that these companies themselves each year set out in an impressive foot note in their reports to the D. P. W.:

"Apportioning either such revenues or such expenses on a mileage basis is purely arbitrary and has been adopted for want of any other basis." (NP Ab. 82.)

"The figures entered as 'revenues earned within the State on interstate traffic,' are compiled upon a straight mileage basis in accordance with order of the Railroad Commission and are given under protest for the reason that *this Company claims that basis does not accurately reflect the revenues earned within the state of Wash-*

ington from such traffic.'' (GN Rec. 147-8.) (Italics ours.)

We respectfully submit that by apportioning *ad valorem* taxes on the basis of the relation of intrastate earnings which are known, and interstate "earnings" apportioned to Washington, a terminal state, on this mileage prorate basis, the court would by these companies' own admissions, be resorting to most arbitrary and erroneous assumptions for the purpose of defeating the occupational tax. This, we are confident, the court will not do.

ASSIGNMENTS NP-12 TO NP-14*

COURT'S ERROR IN IGNORING TAXES PAID BY N. P.'s TENANT LINES, AND HOLDING THAT TAXES SHOULD BE APPORTIONED BETWEEN INTRA AND INTERSTATE TRAFFIC ON RELATIVE REVENUE BASIS.

The N. P.'s first error was in attempting to apportion the entire amount of *ad valorem* taxes payable on its Washington operating property ($2,005,015) to its intra and interstate operations (N. P. Ex. "7," p. 7; NP Rec. 161) whereas $227,600.74 of these taxes were in fact paid by its tenant companies. (Plff.'s Ex. "28;" NP Rec. 214.) Thus, in reality, the N. P. paid in taxes on its operating properties only $2,005,015 less $227,601, or $1,777,414.

Having determined the correct figures, how should these taxes be apportioned as between the N. P.'s Washington intrastate and interstate freight operations? On a relative revenue basis? We submit not. If A and B have the joint use of a private roadway and A uses the same four times as much as B, clearly A should equitably pay 4/5ths of the taxes payable by A and B jointly. And it is immaterial, we submit, whether B receives pro-

---

*(NP 12) The court erred in finding that the 1933 ad valorem taxes on the N. P.'s Washington operating property should not be apportioned as between intrastate and interstate traffic on a relative use (car-mileage) basis, but instead on a relative revenue basis, with interstate freight revenues apportioned to Washington on a mileage prorate basis. (Finding XII, NP Rec. 43-4.)

(NP 13) The court erred in finding that in computing the ad valorem taxes properly apportionable to the N. P.'s intrastate traffic for 1933, credit should not be allowed such traffic for the taxes contributed by the N. P.'s tenant lines. (Finding XII, NP Ab. Rec. 43-4.)

(NP 14) The court erred in finding that the N. P.'s intrastate traffic for 1933 should be charged with ad valorem taxes paid in the sum of $876,083 or any greater sum than $678,662. (Finding XI-b, NP Ab. Rec. 43, 215-6.)

portionally more gross revenue from his use of such roadway than does A. To support our contention, we need fortunately go no further than the N. P.'s own agreements with the G. N. and O. W. for the joint use of the N. P.'s tracks between Portland and Seattle. The N. P. owns these tracks but the G. N. and O-W. use them in their railway operations jointly with the N. P. For this privilege the G. N. and O-W. pay the N. P. an annual rental based on a certain percentage of the cost of construction plus betterments, and in addition, contribute a certain proportion of the taxes paid on this portion of the N. P.'s road. Now how are those taxes apportioned as between the N. P., G. N. and O-W.? According to the relative amount of gross revenue received by each carrier? No. *The taxes are apportioned according to the relative amount of use made of such property by the respective roads.* To quote from the O-W. agreement (p. 13, Sec. 2):

"The Oregon Company (O-W.) also will pay such pro rata proportion of the cost actually incurred by the Pacific Company (N. P.) in the maintenance and operation of the Point Defiance Line (which cost shall include insurance and *taxes* and a just sum to cover cost of superintendence and management) as the number of miles on the said railway or any part thereof run by engines and cars in its trains bears to the whole number of miles run by engines and cars in trains of all the parties using the same or any part thereof." (NP Rec. 156.)

And further quoting from the G. N. agreement (p. 6, sec. 2):

"The Northern Company (G. N.) will also pay such pro rata proportion of the cost actually incurred by the Pacific Company (N. P.) in the maintenance and operation of the property (which cost shall include insurance and taxes and a just sum to cover cost of superinten-

dence and management) as the number of miles on said railway or any part thereof run by engines and cars in its trains bears to the whole number of miles run by engines and cars in trains of all the parties using the same or any part thereof." (NP Rec. 131.)

This, then, is the way these litigants by their own voluntary agreements apportion taxes as between themselves. Nor have they offered any valid reason for apportioning taxes on a different basis as between intrastate and interstate operations. It is to be noted that no distinction is made in these joint user agreements as between passenger and freight train cars.

Nor are we without authority. In the *Minnesota Rate Cases*, 230 U. S. 352, certain railroad companies including the N. P. and G. N. were contending that certain intrastate rates fixed by the Minnesota regulatory authority were confiscatory, as not yielding a fair return upon that portion of the complaining carriers' operating property used in intrastate operations. Having established the value of all of their respective Minnesota operating properties used in both interstate and intrastate operations, they then attempted to apportion such value as between their interstate and intrastate operations on the basis of relative gross revenues received in these two classes of service. But in condemning this method the court said (230 U. S. p. 458 *et seq.*):

"The apportionment of the value of the property, as found, between the interstate and intrastate business, was made upon the basis of the gross revenue derived from each. This is a simple method, easily applied, and for that reason has been repeatedly used. It has not, however, been approved by this court, and its correctness is now challenged. * * *

"In support of this method, it is said that a division of the value of the property according to gross

earnings is a division according to the 'value of the use,' and therefore proper. But it would seem to be clear that the value of the use is not shown by *gross* earnings. The gross earnings may be consumed by expenses, leaving little or no profit. * * *

"When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business, and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments respectively, the property exclusively used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common. It is suggested that other methods of calculation would be equally unfavorable to the state rates but this we cannot assume.

"It is sufficient to say that the method here adopted is not of a character to justify the court in basing upon it a finding that the rates are confiscatory."

In brief, the Supreme Court holds that the value of operating property should be apportioned as between such interstate and intrastate business in proportion to the extent of the use made of such property in each business, and not in proportion to the relative gross revenue derived therefrom.

And since taxes are based upon property *values* it must logically follow that the relative amount of taxes chargeable to each of two kinds of business jointly utilizing the same property must be determined by the same

method; namely, by the *relative extent of use* made of the joint property in such two classes of business—not by the relative gross revenues derived therefrom.

The N. P., as already shown, has used the gross revenues method condemned by the Supreme Court. The State, on the contrary, has apportioned taxes on the basis of relative extent of use, the method approved by the Supreme Court.

Thus, in Plaintiff's Exhibit "29" (NP Rec. 215-6) Mr. Manschreck first finds the ratio of total state *passenger* car and locomotive mileage to total state *freight and passenger* car and locomotive mileage to be 15.91%. He therefore apportions 15.91% of the total N. P.'s taxes to passenger service and the remainder (84.09%) to freight service. The ratio of interstate freight car mileage to total of intra and interstate freight car mileage for the test period was found by defendant to be 42.30%. (N. P. Ex. "7," p. 13; NP Rec. 164.) Manschreck therefore apportions 42.30% of the total taxes apportionable to state intra and interstate freight service to intrastate freight service, or $632,227. There being no other factor available, Manschreck finds the ratio of intrastate passenger revenue to the total intra and interstate passenger revenue and apportions to intrastate passenger operations that percentage (31.80%) of the total taxes apportionable to both intra and interstate passenger service, or $89,926, making a total of $722,153. This added to the $13,236 regulatory license tax makes a grand total of $735,389 apportionable to Washington intrastate operations. The taxes apportioned to this service under the N. P.'s calculations, are $889,319, or $153,930 less than the maximum apportionable by the proper method used by Mr. Manschreck.

But if the N. P. is to be allowed to transfer $369,606 reported under oath to the D. P. W. as intrastate freight revenue, to interstate freight revenue, then obviously Mr. Manschreck has apportioned too much taxes to intrastate freight traffic. Mr. Manschreck's figures were based on the assumption that all of the freight business reported as intrastate was in fact intrastate. The total freight revenues reported by the N. P. as intrastate were $5,372,895 (Plff.'s Ex. "25," NP Rec. 212a, 1st vertical column). The N. P. contends (erroneously as we will show later) that $369,606, of this revenue was in fact revenue derived from shipments for export and therefore foreign and not intrastate traffic. Since we are not furnished with data as to the corresponding number of freight car miles involved, we are compelled to assume that a reduction should be made corresponding with the revenue involved, *i. e.*, in the relation of $369,606 to $5,372,895, or 6.879%. This percentage of $632,227 (the taxes Manschreck found should be apportioned to intrastate freight service) is $43,491. Deducting this amount from the grand total of taxes which Manschreck found should be apportioned to intrastate freight and passenger traffic, we have $735,389 less $43,491, or $691,898, or $197,421 less than the $889,319 reached by the N. P.'s calculations.

It will be observed in making this modified calculation we have ignored the $161,031 which the N. P. contended should be transferred from its reported intrastate switching revenue, to interstate. (NP Ex. "7," p. 4; NP Rec. 159-160.)

ASSIGNMENTS NP-15 AND GN-13*

COURT'S ERROR IN FINDING THAT PENSIONS PAID WERE PROPERLY CHARGEABLE AS PART OF THE N. P.'s AND G. N.'s OPERATING EXPENSES.

It was shown that if "pensions" were eliminated as an item of operating expense, the operating expenses incident to intrastate traffic would be reduced by at least $103,471 in the case of the N. P. (Plff.'s Ex. "37," NP Rec. 231, Test. of Manschreck, NP Rec. 191-2), and $22,066 in the case of the G. N. (Plff.'s Ex. "25," GN Rec. 233-4.)

Mr. Manschreck's computation as to the G. N. was based on the G. N.'s "book showing," *i. e.*, the assumption that all its operating revenues reported as intrastate were in fact intrastate. If, however, the court finds it to be established by competent evidence that a certain amount of the G. N.'s revenues reported as intrastate, should be transferred to interstate, then its intrastate freight revenue for 1933 would be $1,622,644 (G. N. Ex. "11," p. "B," GN Rec. 255), instead of $2,753,703 as shown by its books and sworn report to the D. P. W. (GN Ex. "11," p. 11, GN Rec. 268a), and this item of $22,066 would have to be reduced to an amount represented by the proportion which $1,622,644 bears to

---

*(NP 15) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "General Expenses," for the week of October 22, 1933, was $5,945.44, or was any sum in excess of $4,407.89, which error was the result of the court including "pensions" as an item of operating expenses. (Finding IX-e, NP Rec. 39, 221.)

(GN 13) The court erred in finding that pensions paid were properly chargeable as part of the G. N.'s operating expenses for the purpose of determining its railway operating income for 1933. (Finding VII-j, GN Rec. 69.)

$2,753,703, or 58.92%, making the amount 58.92% of $22,066, or $13,001 only.

However commendable the practice of these roads of paying pensions, we cannot believe it a good defense in an action for a legitimate tax, that the company elects to pay pensions to its ex-employes and hence cannot pay the contested tax without drawing on its interstate earnings.

Mr. Manschreck testified in the G. N. case:

"My thought on the pensions was that pensions are a donation by the owners of this property to its former employees, and would be in the same class as paying dividends on this stock. I think pensions should be charged to profit and loss, and not to operating expenses. I think this is a gift or a grant. I don't think it is deferred compensation to those employees." (GN Rec. 224.)

In Railroad Retirement Board v. Alton R. Co., — U. S. —, 55 Sup. Ct. 758, 770-773, the court said in holding invalid the Federal Compulsory Retirement and Pension Act:

"We think it cannot be denied and indeed, is in effect admitted, that the sole reliance of the petitioners is upon the theory that contentment and assurance of security are the major purposes of the act. We cannot agree that these ends if dictated by statute, and not voluntarily extended by the employer, encourage loyalty and continuity of service. We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the states, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment

of the railroads' duty to serve the public in interstate transportation."

If the payment of pensions to superannuated employees is not a duty which regulatory bodies may lawfully impose on public service companies, does it not logically follow that if such companies, voluntarily elect to pay such pensions, they are not at liberty to set up such payments as claims against their gross operating revenues superior to the right of the sovereign authority to collect its taxes? We submit not, Your Honors.

ASSIGNMENT NP-16*

COURT'S ERROR IN FINDING THAT $530,637, OR ANY OTHER SUM WHICH WAS REPORTED BY THE N. P. TO THE D. P. W. FOR 1933 AS INTRASTATE FREIGHT REVENUE WAS IN FACT INTERSTATE REVENUE.

The first item on page 4, NP's Ex. "7" (Ab. NP Rec. 159) is as follows:

"Operating revenues State of Washington Intrastate as reported to Department of Public Works.....$5,802,530."

There is then deducted from this amount the sum of $530,637 as "deduction account of amount as included in connection with foreign commerce $369,606," and "deduction account of switching in connection with interstate traffic included as intrastate, $161,031."

There is, we submit, nothing in the record justifying these deductions. These revenues, as indicated by the exhibit itself, were reported to the D. P. W. intra-

*(NP 16) The court erred in finding that $530,637, or any other sum reported by the N. P. to the D. P. W. for 1933 as intrastate freight revenue was in fact interstate revenue. (Finding X, NP Rec. 42-3.)

state revenues. That this was true was likewise testified to by Mr. Peterson, defendant's statistician. (Plff.'s Ex. "25," NP Rec. 182, 212a.)

Counsel for the N. P. seem to justify these deductions by certain purported supplemental answers to interrogatories filed in the cause by this appellant's counsel. But this, we submit, is no justification whatever. The N. P. filed with the D. P. W. its report for 1933, sworn to be the Assistant General Auditor to the following effect:

"That it is his duty to have supervision over the books of account of the respondent and to control the manner in which such books are kept; that he knows that such books have, during the period covered by the foregoing report, been kept in good faith in accordance with the accounting and other orders of the Interstate Commerce Commission, effective during the said period; that he has carefully examined the said report and to the best of his knowledge and belief the entries contained in the said report have, so far as they relate to matters of accounts, been accurately taken from the said books of account and are in exact accordance therewith; that he believes that all other statements of fact contained in the said report are true, and that the said report is a correct and complete statement of the business and affairs of the above-named respondent during the period of time from and including January 1, 1933, to and including December 31, 1933." (N. P. Ex. "9," NP Rec. 284.)

Such report was also sworn to by the company's vice president to the effect that he has carefully examined the foregoing report; that he believes that all statements of fact contained therein are true, and that the said report is a correct and complete statement of the business and affairs of the N. P. and the operations of its property during the year 1933. (NP Ex. "9," p. 915, NP Rec. 284.)

On page 700 of this report (...ec. 275) the revenues of the N. P. on intrastate t... are shown to have been $5,802,530.12.

In the N. P.'s answers t... rrogatories the revenues of the N. P. on intras... raffic are set forth for each of the months of Aug... eptember, October, November, and December, ... oth by accounts and in the total amounts, and... answers are verified by W. C. Pinger, defendan... stant general auditor, who avers:

"That he prepar... oregoing answers to the interrogatories propor... plaintiff and made the same for and in behalf of ... orthern Pacific Railway Company; that said an... re to affiant's knowledge true and correct." (Pl... "2," NP Rec. 78-9.)

Then on Ju... 34, a paper is filed denominated "Defendant's S... upplemental Answers to Interrogatories" in ...ich it is stated that certain amounts should be dedu...d from the amounts shown under account No. 101 in the original answers to interrogatories. But these so-called "supplemental answers" are merely verified by L. D. da Ponte, attorney for defendant, to the effect that the same are "true and correct to the best of affiant's knowledge and belief." (NP Rec. 84.) Moreover, not a word is said in these so-called supplemental answers as to switching in connection with interstate traffic.

We have then, on the one side, the N. P.'s report to the D. P. W. sworn to by the N. P.'s assistant general auditor and vice-president that the N. P.'s intrastate revenues for 1933 were $5,802,530, and the answers to interrogatories sworn to by the N. P.'s assistant general auditor that the same are *"to affiant's knowledge,*

true and correct," and on the other, the affidavit of one of the N. P.'s attorneys that to the best of his knowledge and belief, the original answers to interrogatories are erroneous in certain particulars. Whom should the court believe? The sworn report of the company's vice-president and assistant general auditor who are in a position to know, and the sworn statement of the company's assistant general auditor that the answers to interrogatories are correct, or the attempted controverting statement of counsel sworn to merely on information and belief with no averment that he has knowledge of the facts? Had counsel attempted to testify at the trial as to the matters set forth in his affidavit he of course could not have qualified as such witness. How, then, can it be said that his written statement sworn to merely on information and belief, can change the effect of the assistant general auditor's sworn statement? We submit that Mr. daPonte's statement should be utterly disregarded, and the company's report and the original answers to interrogatories should be accepted as undisputed evidence.

See 32 C. J. 354, 357;
Lake Shore & M. S. Ry. Co. v. Felton (C. C. A.), 103 F. 227;
Behre v. Anchor Ins. Co. (C. C. A.), 297 Fed. 986;
Pine-Coffin v. Erie R. Co., 69 N. Y. S. 333.

Unless Mr. daPonte's affidavit made on mere information and belief be held to overcome the positive sworn statement of the company's assistant general auditor, and the company's verified report to the state regulatory body, then N. P.'s Exhibit "7," p. 4 (NP Rec. 159-160), is erroneous and $530,637 must be added to the company's intrastate revenues for 1933.

But a corresponding amount of operating expenses must also be added. The relation of operating expenses to revenues is shown by N. P.'s Exhibit "7," p. 4, to be 68.06%. Consequently .6806 × $530,637 or $361,152 must be added to operating expenses, and the difference of $169,485 should be added to the "net revenue from railway operation" as shown in line "3," NP Ex. "7," p. 1, NP Rec. 159-160.)

ASSIGNMENT NP-17*

COURT'S ERROR IN REFUSING TO STRIKE AVERMENT IN PETERSON AFFIDAVIT THAT AMOUNT OF N. P.'s INTERSTATE SWITCHING REVENUE FOR 1933 WAS $207,965.

On November 13, 1934, the court, on the State's motion, reopened the case for the purpose of permitting it to introduce further evidence as to the matters set forth in Manschreck's affidavit (NP Rec. 232-241), and on November 16, 1934, the date set for such hearing, Manschreck's affidavit was received in lieu of his testimony, it being stipulated that the N. P. might file an affidavit in rebuttal thereto, but that the State might have the right to cross-examine such witness if it so desired. (NP Rec. 251.) Nothing was set forth in the Manschreck affidavit except a criticism of the calculations made, and conclusions reached, by Peterson in N. P. Exhibit "7," based on the special studies for the weeks of October 22, 1933, and June 3, 1934. (NP Rec. 232-241.)

---

*(NP 17) The court erred in refusing to strike paragraph 7 of Peterson's affidavit to the effect that the amount of the N. P.'s interstate switching revenue for 1933 was $207,965 because not based on any record evidence before the court (NP Rec. 248-9.)

On November 26, 1934, the N. P. offered in evidence the affidavit of E. V. Peterson which was received in evidence over the State's said objection. (NP Rec. 242.)

In paragraph 7 of the Peterson affidavit above referred to it is stated that an analysis had been made for the year 1933 showing that the amount of the N. P.'s interstate switching revenue for 1933 was $207,965. (NP Rec. 245.) It will be recalled that this switching revenue was all reported to the D. P. W. as intrastate revenue (NP Rec. 132), but in the N. P.'s studies the N. P. attempted to transfer a large part ($161,031) from intrastate to interstate. (N. P. Ex. "7," p. 4; NP Rec. 159-160.)

With regard to this switching revenue, Peterson testified:

"You ask if it is not a fact that there is no record in the state of Washington anywhere, that would show these facts. No, the only report we furnished to the D. P. W. for 1933 was in Ex. '9,' the annual report, in which it showed the entire amount of switching revenue. It was all shown as intrastate. That was sworn to by our officers and filed. It was made March 4, 1934, and was made on the same basis of previous years. The record in the state would be available at the various stations. You ask if there is any record here to show the change in our book accounts. No, there is no record here. There is no record offered in exhibits of any kind that would tend to show whether these were interstate or intrastate movements. I couldn't do that without going to our records scattered around throughout different parts of the state or our records in St. Paul." (NP Rec. 248.)

The State's counsel thereupon moved to strike paragraph 7 as not based on anything shown of record, and because based on record evidence not produced, which motion was denied. (NP Rec. 248-9.)

For the reasons pointed out in the motion to strike we respectfully submit that this portion of the Peterson affidavit should have been stricken and the same disregarded.

ASSIGNMENT NP-18*

COURT'S ERROR IN FINDING THAT "TRAFFIC" EXPENSE SHOULD PROPERLY BE APPORTIONED BETWEEN INTRA AND INTERSTATE OPERATIONS ON A RELATIVE TONNAGE BASIS INSTEAD OF A RELATIVE REVENUE BASIS.

"Traffic" expenses are those incident to the solicitation of traffic. The purpose of such expenditures is to secure revenue-bearing traffic. It is logical, therefore, to assume that expenses in the solicitation of freight traffic are proportional to the amount of freight *revenue* received and not to the amount of *tonnage* originated. For example, the intrastate tonnage of logs for 1933 was 2,000,463 and all other intrastate freight, 1,776,398 (see N. P. Ex. "7," p. 16; NP Rec. 166.) We think the court judicially knows that the N. P.'s log traffic is largely if not entirely non-competitive. Consequently, little or no "traffic expense" can rightfully be charged to that kind of traffic. Yet said appellant apportions as much "traffic expense" to a ton of logs as to a ton of automobiles with perhaps ten times the revenue per ton mile.

Logs are a very low revenue-producing commodity. (NP Rec. 126.) The length of haul is very short even

*(NP 18) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "Traffic Expenses" for the week of October 22, 1933, was $3,086.41, or was any sum in excess of $2,366.77, as shown by Exhibit "B" attached to the affidavit of State's witness, Manschreck. (Finding IX-e, NP Rec. 39, 241.)

as compared with other intrastate business. The greatest volume of this traffic is 18 miles. (NP Rec. 146.) Something, we submit, is decidedly wrong with a method of apportionment which assigns the same proportion of expense to a ton of logs hauled but a few miles, and to a ton of silk hauled 2,000 miles.

Mr. Manschreck apportioned these "traffic" expenses as between intra and interstate on a relative revenue basis, rather than on a relative tonnage basis (NP Rec. 241) which, we submit, yields a result as nearly correct as the limited data supplied by the N. P. permits. This apportions 50.149% to intrastate. The percentages apportioned by other possible factors would be as follows: relative freight car miles, 42.30%, relative gross ton miles, 41.92%; relative net ton miles, 46.47%. (NP Ex. "7," p. 13; NP Rec. 164.)

Using the relative revenue basis, the State's calculations in "Exhibit B" attached to the Manschreck affidavit (NP Rec. 241), shows that the N. P.'s 1933 intrastate freight expenses charged to "traffic" would have been $37,525.65 less, and its operating income correspondingly greater than as shown by N. P.'s Exhibit "7."

In his criticisms of Exhibit "B" attached to Mr. Manschreck's affidavit (NP Rec. 241) Mr. Peterson insists that the total reduction on Mr. Manschreck's theory should be $31,552.81 instead of $37,525.65 as shown in Mr. Manschreck's exhibit. In our final calculations we will therefore use the figure of $31,552.81 instead of the figure found by Mr. Manschreck.

ASSIGNMENTS NP-19 TO NP-21*

COURT'S ERROR IN FINDING THAT OPERATING EXPENSES INCIDENT TO MAINTENANCE OF WAY AND STRUCTURES AND FREIGHT-TRAIN CAR REPAIRS SHOULD BE DETERMINED BY THREE-YEAR INSTEAD OF ONE-YEAR AVERAGE.

With the above exceptions the operating expenses and revenues for the single year, 1933, were taken by the N. P. as the test in making its calculations. But as to maintenance of way and structures and freight-train car repairs, the annual average for 1931 to 1933 was taken. It would seem that if the results of more than one year's operations were taken as to these large items of expense, the same period should be used as to all other items of expense and revenues. There was no showing as to the amount of deferred maintenance of way and structures and equipment there may have been at the beginning of this three-year period taken as the test. The amount of freight-train car repairs expense necessary for a given period would, of course, depend upon the condition of the cars at the beginning of the period, as well as the extent of the use of the cars during such period. Mr.

---

*(NP 19) The court erred in finding that the N. P.'s operating expenses incident to maintenance of way and structures should be determined by taking the annual average for three years instead of for 1933 alone, or that the N. P. had any deferred maintenance in 1933. (Finding XIII, NP Rec. 45.)

(NP 20) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "Maintenance of Way and Structures," for the week of October 22, 1933, was $11,202.01, or was any sum in excess of $8,724.02 as shown by plaintiff's Exhibit "31." (Finding IX-e, NP Rec. 39, 217.)

(NP 21) The court erred in finding that the N. P.'s total intrastate freight operating expenses classified as "Freight car repairs, depreciation and retirement," for the week of October 22, 1933, was $9,552.01, or was any sum in excess of $8,372.41, as shown by plaintiff's Exhibit "32." (Finding IX-e, NP Rec. 39, 218.)

Peterson, who sponsored the three-year test, had no personal knowledge as to extent of such deferred maintenance if any. (NP Rec. 127, 210.)

Whatever may be said in justification of using a three-year instead of a one-year average as to these items, the fact remains that had only a one-year period been taken, the expenses for the year chargeable to intrastate freight traffic would have been $167,563 less than the amount charged in the N. P. Exhibit as shown by Manschreck's figures. (See item "M," Plff's Ex. "36," NP Rec. 220.) And see Manschreck's testimony in explanation of this and companion exhibits. (NP Rec. 188-192.)

ASSIGNMENT NP-22*

COURT'S ERROR IN FINDING THAT ANY SUM LESS THAN $1,127,464 SHOULD BE ASSIGNED AS NET JOINT FACILITY RENTS TO THE N. P.'s INTRASTATE OPERATIONS FOR 1933.

The N. P. pays out a certain amount each year for the use of the tracks and other facilities of other roads, and also receives from other roads certain rentals for the joint use of its own tracks and other operating property. The excess of the rentals so received over those paid out as to its Washington properties was, in the year 1933, $1,355,064 (NP Ex. "7," p. 8; NP Rec. 161.) Of this amount, the sum of $227,600.74 (NP Ab. 178) should be deducted as the net amount of the taxes

---

*(NP 22) The court erred in finding that only $582,774, or any other sum less than $1,355,064, of the net joint facility rents received by the N. P. from its Washington operating properties should be assigned to the N. P.'s intrastate operations for 1933. (Finding XIV-b, NP Rec. 46-7.)

paid by foreign lines, which taxes seem to be credited as part of the joint facility rentals. This leaves, then, $1,355,064 less $227,600, or $1,127,464 as the net amount earned by the N. P. during 1933 as rental for the joint use of its facilities in Washington by foreign lines.

It is at once apparent that since this amount represents rentals of property located in Washington, and since such property, to the extent used by other lines, is not used by the N. P. in its interstate operations, the entire amount should be credited to the N. P.'s local operations.

As will later be shown, the G. N. insists that the excess of the joint facility rentals which it pays over those which it receives, should be treated as an operating expense item in determining whether it is making or losing money on its intrastate business. (See GN Ex. "11," pp. 1 and "A," GN Rec. 254, 258.) If this be true, then clearly the net amount received as such rentals should be added to the N. P.'s income in calculations made for the same purpose. In our discussion of the evidence in the G. N. case we will later point out (Post, pp. 165-171). why it is thought that neither joint facility rental paid nor joint facility rentals received should be considered in making these calculations. We are, however, submitting the net figures as shown in the N. P. case for use by the court should it conclude that such rentals received should be deemed a proper item of revenues, and the rentals paid be deemed a proper operating expense item.

ASSIGNMENTS NP-23 TO NP-26*

COURT'S ERROR IN COMPUTING N. P.'s GROSS REVENUES, OPERATING EXPENSES, TAXES, JOINT FACILITY RENTS, AND NET INCOME FROM ITS INTRASTATE OPERATIONS.

Duplication of Operating Expenses.—In the preparation of the N. P.'s Exhibit (N. P. Ex. "7") the N. P.'s witness, Peterson, assumed that all of the expenses charged to intrastate freight operations ($3,291,785; see N. P. Ex. "7," p. 6; NP Rec. 160) were expended solely in connection with the revenues credited under account 101, "freight," and that additional operating expenses should be charged in connection with all the other freight revenue credits. These additional freight revenue credits (other than account 110 "Switching") were as follows (Plff.'s Ex. "25," NP Rec. 212A):

---

*(NP 23) The court erred in finding that the N. P.'s total intrastate freight operating expenses for the week of October 22, 1933, was $75,078.42 or any sum in excess of $69,163.64 (Finding IX-e, NP Rec. 39); that the N. P.'s cost per revenue net ton mile was .98411c or any greater sum than $69,163.64 divided by 7,629,079 or .906579c, or that the N. P.'s total intrastate freight operating expenses for 1933 were $3,291,785 or any other sum greater than 334,493,591 multiplied by .906579c, or $3,032,448.64. (Finding IX-f, NP Rec. 39-40.)

(NP 24) The court erred in finding that the N. P.'s total intrastate operating expenses for 1933, other than taxes, were $4,796,440, or any other sum greater than $999,381 plus .6064 times the amount of the N. P.'s intrastate freight revenue for 1933. (Finding XII, NP Rec. 43-4.)

(NP 25) The court erred in finding that the N. P.'s total intrastate operating revenues for 1933 were only $5,271,893, or $5,493,252, or any other sum less than $5,802,530, as reported under oath by the N. P. to the D. P. W. for that year, and as alleged in its answer. (Findings X and XII, NP Rec. 42-4; Answer, NP Rec. 9.)

(NP 26) The court erred in finding that the N. P.'s net earnings from intrastate business for 1933 was a deficit of $228,623.22 or any other amount less than $817,443 if joint facility rents are not included, or $1,944,907 if joint facility rents are included. (Finding XII, NP Rec. 44.)

Acct. 111	Special service train	$1,149
112	Other freight train	102,002*
132	Hotel and restaurant	7,831*
135	Storage—freight	825
137	Demurrage	9,741
142	Rent of buildings and other property	5,569
143	Miscellaneous	46,504
151, 152	Joint facility—net debit	9,417 (red)
	Total	$164,204

The N. P. attempts to calculate these assumed additional operating expenses by first finding the ratio between the total operating expenses incident to intrastate freight service ($3,291,785) to the operating revenues received from intrastate freight operations credited to account 101, "freight" only, *i. e.*, $4,836,839, and then applies this percentage (68.06%) to the above sum, $164,204, thereby reaching a figure of $111,757, which it charges as additional operating expenses to intrastate freight operations. (See first calculation, NP Rec. 160.) But, as is conclusively shown by the affidavit of Mr. Manscheck (NP Rec. 232-241), in arriving at the figure of $3,291,785, the N. P.'s witness has already taken into account every item of operating expense incident to its entire intrastate freight operations with the exception of the starred items: "Other freight train, $102,002" (which we now concede, but is not shown in the Manschreck affidavit) and "Hotel and restaurant, $7,831.". Excluding these starred items, the above total would be: $164,204 less $102,002 and less $7,831, leaving $54,371. Applying the operating ratio of 68.06% to this item, we have .6806 times $54,371, or $37,005 which constitutes a clear duplication of operating expenses in the N. P.'s Exhibit and should hence be deducted therefrom.

Mr. Manschreck, in his affidavit, most convincingly explains in detail this attempted duplication of expense, and to this affidavit we respectfully refer the court for further details as to our position. (NP Rec. 232-241.)

Conclusions as to N. P.'s intrastate income for 1933:

The results of the State's showing with respect to the items of expense discussed under the foregoing assignments may be summarized as follows:

N. P.'s railway operating income from 1933 intrastate operations as shown by N. P.'s calculations (N. P. Ex. "7," p. 1, NP Rec. 158)	$413,866 (red)
Plus excess charge for intrastate passenger operating expenses as shown by Manschreck (Plff's Ex. "26;" NP Rec. 213)—$1,500,957 (NP Ex. "7," p. 11, see footnote *ante*, pp. 105-6) less $999,381 (Plff's Ex. "26.") (See *ante*, pp. 108-111)	501,576
Such Ry. operating income after above correction	$87,710
Plus excess charge for taxes apportionable to 1933 intrastate operations as shown by corrected showing made by Manschreck—$889,319 (NP Ex. "7," p. 7, NP Rec. 161) less $735,389 (Plff's Ex. "29," NP Rec. 215-6) less $43,491 (see *ante*, pp. 119-124)	$197,421
Such Ry. operating income after above corrections	$285,131
Plus items of expense duplicated in N. P.'s calculations (see *ante*, pp. 138-9)	37,005
Such Ry. operating income after above corrections	$322,136
Plus item of expense charged to intrastate operations as "pensions" (Plff's Ex. "37," NP Rec. 221; *ante*, pp. 125-7)	$103,471
Such Ry. operating income after above corrections	$425,607
Plus reduction in operating expenses charged to "Traffic expense," by apportionment on revenue instead of tonnage basis (Manschreck's Ex. "B," NP Rec. 241; *ante*, pp. 133-4)	$31,553
Such Ry. operating income after above corrections	$457,160

Plus net amount by which N. P.'s railway operating income erroneously reduced by transferring revenues reported as intrastate, to interstate (*ante*, pp. 127-131), $169,485 less proportionate taxes: $43,491 (*ante*, p. 124)	$125,994
Such Ry. operating income after above corrections.	$583,154
Plus reduction in operating expense as to maintenance of way and structures and freight-train car repairs, if reported 1933 expense be taken instead of 3-year average (Item "M," Plff's Ex. "36," NP Rec. 220; *ante*, pp. 135-6)	$167,563
Such Ry. operating income after above corrections.	$750,717
N. P.'s railway operating income from 1933 intrastate operations after above corrections (Continued)	$750,717
Plus net joint facility rents received by N. P. on its Washington operating properties in 1933 (*ante*, pp. 136-7)	$1,127,464
N. P.'s net railway operating income from its 1933 intrastate operations after above corrections.	$1,878,181

EVIDENCE UNDISPUTED THAT N. P.'S NET EARNINGS WERE AT LEAST $729,940 FROM ITS INTRASTATE FREIGHT TRAFFIC IN 1933:

The N. P.'s various set-ups show its revenues and expenses incident to its intrastate passenger service separately from its revenues and expenses incident to its intrastate freight service. Consequently the results of its freight service operations alone may be readily calculated by deducting the revenues and expenses incident to its intrastate passenger service from its figures purporting to show the results of its combined intrastate freight and passenger service for that year.

The claimed "Result of Intrastate Operations" for 1933, freight and passenger, are set forth in NP's Exhibit "7", page 1 (NP Rec. 158) wherein the following results are shown:

(1) Gross operating revenues	$5,271,893
(2) Operating expenses	4,796,440
(3) Net revenue from railway operation	$475,453
(4) Railway taxes (on operating property)	889,319
(5) Railway operating income (deficit)	$413,866 (R)

Now, using this same form of set-up, and showing the corresponding figures incident to freight service alone, we have:

(1) Gross operating revenues	$5,271,893	
Less revenues from all intrastate passenger operations (Col. 2, Pfl's Ex. "25", NP Rec. 212a; NP Ex. "7", p. 7, NP Rec. 161):	429,635	$4,842,258
(2) Operating expenses	$4,796,440	
Less operating expenses incident to intrastate passenger service operations (NP Ex. "7", p. 6, ln. 2, NP Rec. 160):	1,500,957	3,295,483
(3) Net revenue from freight service operations only (ln. 1 less ln. 2)		$1,546,775
(4) Railway taxes on operating property incident to passenger service only (NP Ex. "7", p. 7, NP Rec. 161)		816,835
(5) Railway operating income from freight service operations only (ln. 3 less ln. 4)		$729,940

NET LOSS CLAIMED BY N. P. ON 1933 INTRASTATE PASSENGER BUSINESS.

Revenues from passenger service (Pfl's Ex. "25," vertical Col. 2, NP Rec. 212a)		$429,635
Operating expenses from passenger service other than taxes (NP Ex."7", p. 6, 2nd item, NP Rec. 160)	$1,500,957	
Taxes apportioned to passenger service (NP Ex. "7", p. 7, next to last item, NP Rec. 161)	72,484	$1,573,441

Net loss claimed by N. P. on 1933 intrastate passenger service	$1,143,806
Ratio between total expense and total revenues	366%
Cost of each dollar of revenue received	$3.66

ASSIGNMENTS NP-27 AND NP-28*

COURT'S ERROR IN PERMITTING PETERSON TO TESTIFY THAT THE N. P.'s INTRASTATE OPERATING EXPENSES WERE $251,000 GREATER IN 1933 THAN SHOWN BY THE N. P.'s SPECIAL STUDY, AND IN FINDING THAT THE USE OF SUCH TEST WEEK RESULTED IN AN UNDERSTATEMENT OF SUCH EXPENSES OF SOME $300,000.

Paragraph 4 of the Peterson affidavit, referred in Assignment NP-17 (*ante*, pp. 131-3) is to the effect that the study for the week of October 22, 1933, showed a traffic movement "greatly in excess of the average for 1/52 of a year" and if proper adjustment were made for that situation, the operating expenses as to intrastate freight traffic would be increased by $251,000 over those stated in N. P. Exhibit "7," page 1. (NP Rec. 243.) The State moved to strike this paragraph of the affidavit because not based on any record evidence before the court, which motion was denied. (NP Rec. 249-250.) The court thereupon stated that it was understood that paragraph 4 would be considered only in connection with

---

*(NP 27) The court erred in refusing to strike paragraph 4 of Peterson's affidavit (NP Rec. 243) to the effect that the N. P.'s intrastate operating expenses for 1933 were $251,000 greater than as shown by N. P.'s Exhibit "7," on the ground that the same was not based on any record evidence before the court. (NP Rec. 249-250.)

(NP 28) The court erred in finding that the N. P.'s use of the test week of October 22, 1933, to determine its intrastate operating expenses resulted in an understatement of such cost for 1933 of approximately $300,000, or any other sum. (Findings IX-b and IX-g, NP Rec. 37-8, 40.)

and in explanation of evidence already in the record. (NP Rec. 250.)

The court will find that the only data or figures in the record that could possibly afford a basis for Peterson's conclusions are the figures which he gave over the objections urged in Assignments NP-3 and NP-4 (*ante*, pp. 98-101) as to the relative revenue and traffic during the test week and the whole of 1933. This testimony was hearsay and not the best evidence and was clearly inadmissible. Hence we insist (1) that Peterson's conclusions as to the intrastate freight operating expenses being greater than the results shown by N. P. Exhibit "7," page 1 (NP Rec. 158) were inadmissible and should be disregarded; and (2) that the court erred in making a finding based on such testimony.

The data and computations, if any, by which Peterson reached his conclusions are nowhere set forth in the record. The only figures mentioned in the record were pure hearsay. The records themselves were neither produced nor offered in evidence, and witness who, it is claimed, took off this data, was not produced as a witness. (See Assignment NP-3, *ante*, pp. 98-9.) Surely a revenue measure should not be set aside on mere estimates of this character. The following is quoted from the *Minnesota Rate Cases*, 230 U. S. 352, 465-6:

"We are of opinion that on an issue of this character involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation."

The finding, it will be observed, is in any event erroneous, in that the excess is found to be $300,000,

whereas Peterson estimated it to be only $251,000. (NP Rec. 243, Findings IX-b and IX-g, Rec. 37-8, 40.)

ASSIGNMENT NP-29*

COURT'S ERROR IN REFUSING TO STRIKE AVERMENT IN PETERSON'S AFFIDAVIT THAT OPERATING RATIO ON N. P.'s SHIPMENTS FOR EXPORT WAS LOWER THAN ON ITS INTRASTATE FREIGHT TRAFFIC.

In paragraph 3 of the Peterson affidavit above referred to, the court will find certain averments as to the relative traffic density and cost per net ton mile on N. P.'s main and branch lines, and the conclusion that consequently in N. P.'s Exhibit "7" there was an excessive deduction made from intrastate freight operating expense by reason of elimination of so-called foreign commerce. (NP Rec. 243.)

Peterson conceded that there was nothing in the record to substantiate the conclusions and facts set forth in this paragraph. (NP Rec. 250.) The court denied the State's motion to strike this paragraph because not supported by anything in the record. (NP Rec. 243.)

For the reasons urged under Assignment NP-28 we submit that this paragraph should have been stricken, and that the facts therein averred should be disregarded.

---

*(NP 29) The court erred in refusing to strike paragraph 3 of Peterson's affidavit (NP Rec. 243) to the effect that the N. P.'s operating ratio on shipments for export was lower than on its intrastate freight traffic. (NP Rec. 250.)

ASSIGNMENTS NP-30 AND GN-17*

COURT'S ERROR IN FINDING THAT IN PROPORTION TO REVENUE, COST OF THE N. P.'s AND G. N.'s INTRASTATE BUSINESS WAS GREATER THAN THE COST OF THEIR INTERSTATE BUSINESS.

This is truly a most remarkable finding in the light of the undisputed evidence. By operating ratio is meant the relation between operating expenses and operating revenues. The N. P.'s statistician found the N. P.'s operating ratio for *intrastate* freight traffic for 1933 to be 68.06% (NP Rec. 160), while Mr. Manschreck, the State's witness, found it to be 64.74% (NP Rec. 220, line "G"). Mr. Manschreck found the N. P.'s operating ratio for *interstate* freight traffic for 1933 (based on the N. P.'s own calculations) to be *91.20%* (NP Rec. 219, Line "E").

As to the N. P., no operating ratio as to either intrastate or interstate passenger traffic was computed by any witness, so that the court's finding is directly contrary to the undisputed facts.

In the G. N. case we again find the court reaching a conclusion directly contrary to the undisputed evidence, The G. N.'s statistician found the G. N.'s operating ratio for intrastate freight traffic for 1933 to be 51.33%. (GN Rec. 256, lines 1-b.) The operating ratio as to interstate freight traffic was not computed by any witness, but since it is the relation of operating expenses

---

*(NP 30) The court erred in finding that, in proportion to revenue, the cost of the N. P.'s intrastate business is greater than the cost of such company's interstate business. (Finding IX-a, NP Rec. 37.)

(GN 17) The court erred in finding that in proportion to revenue, the G. N.'s cost per unit of doing intrastate business is greater than its cost per unit of doing interstate business. (Finding V, GN Rec. 60.)

to operating revenues, it is exceedingly easy to calculate. Thus:

(A) Total freight service operating revenues for 1933, interstate and intrastate (G. N.'s Ex. "11," p. 11, GN Rec. 268a)	$6,574,087
(B) Less freight service operating revenues for 1933, intrastate, as claimed by G. N. (G. N.'s Ex. "11," p. "B," GN Rec. 255)	1,622,644
(C) Total freight service operating revenues for 1933, *interstate* (A—B)	$4,951,443
(D) Total freight service operating expenses for 1933, interstate and intrastate (Plff's Ex. "25," line 2, GN Rec. 233)	$4,620,998
(E) Less total intrastate freight service operating expenses for 1933 as claimed by G. N. (GN's Ex. "11," p. "C," GN Rec. 256, line 1-c)	832,903
(F) Total freight service operating expenses, *interstate* (D—E)	$3,788,095
(G) Interstate freight service operating ratio (F ÷ C)	76.5%
Interstate freight service operating ratio (shown above)	51.83%

It is noted that in the G. N.'s calculations as to intrastate freight operating expenses a three-year average was taken as to maintenance of way and structures and freight train car repairs. This was a larger expense figure in each case than the figure for 1933 alone. Consequently, had we used the three-year average expenses as to these items as to interstate, we would have had a larger figure for line "D," and for line "F," and consequently a higher operating ratio for interstate freight service in line "G."

The operating ratio as to intrastate passenger service was shown to be 161.09% (G. N.'s Ex. "11," p. "C," GN Rec. 256, line 2-c), and a different ratio was not claimed as to interstate passenger service. Thus, as in the N. P. case, the court's finding is directly contrary to the undisputed facts.

ASSIGNMENT NP-31*

ERROR OF THE COURT IN FINDING THAT THE N. P.'S NET REVENUES WOULD BE LESS IN 1934 THAN IN 1933.

The findings of fact were made on March 25, 1935, nearly three months after the close of the year 1934, and at a time when the results of the N. P.'s 1934 operations must have been known to counsel who prepared these findings. Yet we find counsel preparing for the court a deliberate misstatement of facts regarding the N. P.'s 1934 operations. In the annual reports of the N. P. and G. N. to the tax commission for the year 1934, at pages 24 and 25, we find the following operating statistics for the years 1932 to 1934:

SYSTEM (N. P.)

	1932	1933	1934
Railway operating revenues	$47,084,176	$47,578,676	$51,407,775
Railway operating expenses	41,433,179	38,993,492	41,550,814
Net revenues from railway operations	$5,650,997	$8,585,184	$9,856,961
Railway tax accruals	6,677,354	5,883,251	5,312,592
Uncollectible railway revenues	23,209	23,848	16,575
Railway operating income	$1,049,567 (deficit)	$2,678,086	$4,527,795
Net railway operating income*	$1,990,389	$5,975,973	$7,915,209

*After adding rentals from joint facilities and equipment.

---

*(NP 31) The court erred in finding that the tendency in 1934 was towards a substantial decrease in the N. P.'s net revenues, that increased cost of operation would be still greater in 1935, and that there was nothing apparent at the time said findings were made to suggest an increase in the N. P.'s gross revenues, but that the facts known suggested a decreased net income for 1935. (Finding V, NP Rec. 34-5; Conclusion 7, NP Rec. 53.)

STATE OF WASHINGTON (N. P.)

	1932	1933	1934
Railway operating revenues	$12,845,326	$12,064,954	$13,368,674
Railway operating expenses	12,336,819	11,145,042	11,675,083
Net revenues from railway operation	$508,507	$919,912	$1,693,591
Railway tax accruals	$2,730,016	$1,882,093	$1,833,863

SYSTEM (G. N.)

	1932	1933	1934
Railway operating revenues	$55,549,246	$61,923,891	$70,752,877
Railway operating expenses	45,655,673	41,545,224	48,610,181
Net revenues from railway operation	$9,893,574	$20,378,667	$22,142,696
Railway tax accruals	$6,697,424	$6,660,944	$6,181,111
Uncollectible railway revenues	14,210	7,213	10,527
Railway operating income	$3,181,940	$13,710,510	$15,951,058
Net railway operating income	$1,290,551	$11,810,227	$14,101,650

STATE OF WASHINGTON (G. N.)

	1932	1933	1934
Railway operating revenues	$8,389,154	$8,114,350	$9,062,655
Railway operating expenses	7,682,590	7,102,133	7,955,682
Net revenues from railway operation	$706,564	$1,012,217	$1,106,973
Railway tax accruals	$1,569,162	$1,363,567	$1,247,239

These reports being made pursuant to law, it would seem that statistical data contained therein should be matters of which the court should take judicial notice, particularly in actions wherein the constitutionality of a tax is attacked on the ground of insufficient earnings.

As a matter of fact, the increase in gross and net for 1932 over the 1933 figures was sufficiently forecast by Mr. Peterson, who testified for the N. P. on direct examination:

"The total operating revenues of the system for the eight months of 1934 were $33,044,301, an increase of $3,311,859 over the same period of 1933. During the same period the total operating expenses were $27,270,562 for the eight months of 1934, or an increase of $1,175,203 over the corresponding eight months in 1933. * * * Any estimate made for the balance of the year would be wholly conjectural. I don't know that it will be better in 1934 than in 1933. I think it will be pretty much the same as 1933. That is only an estimate that I make in the light of what knowledge I now have." (NP Rec. 112.)

Mr. Peterson's figures were of value as tending to indicate the upward trend of the business of these roads in 1934. But it is apparent that as a prophet, he had no better qualifications than the rest of us. If counsel wished to attempt to portray the future, he should have produced the then known facts and allowed the court to draw its own conclusions.

We are indeed at a loss to understand how, in the light of either the figures given by Peterson or the above reports, counsel for the N. P. would have the temerity to propose findings inducing the court to find that "the tendency in the year 1934 is toward * * * decreased net revenues." (NP Rec. 34-5.)

May we note here that these studies were made in one of the worst years in the history of these two roads. Whatever their intrastate earnings in 1933, who can say that such showing is representative of future years? The occupational tax act was in force but five months in 1933. Need we point out that a similar study made in 1934

would have shown quite different results. As was said in *Postal Tel.-Cable Co. v. Richmond,* 249 U. S. 252, 258:

"But a careful examination of the record fails to convince us that it contains that clear and convincing evidence that the tax thus falls upon interstate commerce which is necessary to justify a finding that the ordinance is unconstitutional and void."

APPENDIX "B"

Challenge to Trial Court's Findings of Fact and Rulings on Admissibility of Evidence in G. N. Ry. Co. v. State, No. 573.

ASSIGNMENT GN-4*

COURT'S ERROR IN FINDING THAT THE MAKING OF ACCURATE REPORTS AS TO THE G. N.'S INTRASTATE REVENUES WAS NEVER A MATTER OF IMPORTANCE PRIOR TO OCCUPATIONAL TAX ACT.

It is at once apparent that if it were contemplated that such reports were to be used as evidence in local rate investigations, such accuracy was always a matter of importance.

Nor are we so sure that these carriers are in a position to urge that it is not a matter of importance that a report required by statute to be made under oath be accurately made, and it is at least rather startling to find the lower court reaching such a conclusion.

Moreover, ever since 1929 both the G. N. and N. P. have been required to pay a fee of 1/10th of 1% on their gross operating revenue. (Laws 1929, Ch. 107, pp. 209-210; R. R. S. Sec. 10417.) In the case of the N. P. this fee is alleged to have been $6,481.32 for 1932 and $5,700.53 in 1933. (NP Rec. 15, 85.) The N. P.'s intrastate revenues were $6,613,959 and $5,802,530, respectively, in those two years. The G. N. alleges that this fee was $3,338.97 for 1932 and $3,137.05 for 1933 (and its local revenues $3,338,973 for 1932 and $3,137,047 for

*(GN 4) The court erred in finding that the making of accurate reports to the D. P. W. of the G. N.'s intrastate revenues was never a matter of importance prior to the imposition of the Occupational Tax Act of 1933. (Finding VI, GN Rec. 60-61.)

1933. (GN Rec. 14.) From these allegations it is evident that the fee was deemed both by the D. P. W. and the carriers to have been imposed only on intrastate revenues. Confirming this conclusion, Mr. Peterson testified on behalf of the N. P.:

"In paying this 1/10th of 1% tax that I have testified to, that is computed on the amount of local business in the way I have just described. * * * The N. P. has been paying the 1/10th of 1% tax for the years since 1929." (NP Rec. 87.)

Where these carriers have each, since 1929 been paying a tax or fee measured by their reported intrastate revenues, how is it possible, we ask, to sustain a finding that prior to the enactment of the occupational tax act in 1933 there was no incentive for these carriers accurately to report under oath their intrastate revenues to the D. P. W.?

ASSIGNMENT GN-5

(GN 5) The court erred in finding that the G. N. has never accurately reported its intrastate revenues to the D. P. W. (Finding VI, GN Rec. 60.)

Under the next assignment, we will show that no competent evidence was received at the trial showing that the G. N.'s intrastate revenues were other than as reported to the D. P. W.

But how, we ask, can such a finding be thought to aid these carriers who both base their calculations on the revenues as reported to the D. P. W.?

If it be true as found, that the G. N.'s reports as to State revenues have never been "accurately made" (GN Rec. 60), then surely the G. N.'s whole contention that it is doing business at a loss must fail. If there was no in-

centive to make accurate reports how can either the State or the G. N. rely upon such reports as evidence in a law suit involving the constitutionality of a tax?

ASSIGNMENT GN-6*

ERROR IN ALLOWING TESTIMONY THAT REVENUES ENTERED IN BOOKS AND REPORTED AS INTRASTATE WERE IN FACT INTERSTATE, WITHOUT REQUIRING PRODUCTION OF RECORDS FROM WHICH TAKEN.

The G. N. introduced in evidence Exhibit "11" upon which it relied to support its contention that in 1933 it lost money on its intrastate business. Pages 1 to 27 of this exihibit were based on the division of revenues between interstate and local business as reported by the G. N. to the D. P. W. for 1933. (GN Rec. 137, 142.) The results of this study are shown on page 1 of Exhibit "11" (GN Rec. 135-6, 258), and show that according to the G. N.'s own calculations, its railway operating income for 1933, after payment of taxes, was $491,544, and its net railway operating income (after deduction of joint facility rents and equipment rents paid) was $202,458. (GN Rec. 258.) In other words, *if the G. N. correctly entered upon its books of account, and correctly reported to the D. P. W. its intrastate operating revenues, said appellant, by its own admissions, wholly failed to prove that in 1933 it lost money on its intrastate operations.*

---

*(GN 6) The court erred in permitting various of the G. N.'s witnesses to testify over plaintiff's objection that the same was hearsay and not the best evidence, that certain railway operating revenues for 1933 entered in the G. N.'s books of account and reported under oath to the D. P. W. as revenues from intrastate business, were in fact revenues from interstate business, and in refusing to strike such testimony after the same was so received. (G. N. Rec. 175-9, 183-193.)

Mr. Burn, the G. N.'s statistician (GN Rec. 115) prepared these pages 1 to 27, of Exhibit "11" and brought the same out from St. Paul to Seattle about a week before the trial, and after showing his exhibit to the company's attorneys, prepared the remaining pages, "A" to "F," in which a large amount of revenue shown on the G. N.'s books of account and report to the Washington D. P. W. to be intrastate revenues, were switched over to the interstate side of the ledger. (GN Rec. 141-2.) This revised showing was made from Identification "20" (GN Rec. 202) which was given to Mr. Burn after reaching Seattle. (GN Rec. 142.)

The following is a comparison of the G. N.'s interstate and intrastate revenues for 1933 as shown on its books of account and report to the D. P. W., with those used by Mr. Burns in the preparation of that part of Exhibit "11" which it is claimed shows that as to Washington intrastate business the G. N. was operating in the red in 1933:

Acct. No.	Account	As shown by G. N.'s books of account and report to D. P. W. (G. N.'s Ex. "11", p. 11, GN Rec. 268A)	After attempted change in G. N.'s books without production of underlying data. (Fdg. 7(g), GN Rec. 67-8)
101	Freight	$2,599,331	$1,502,153
110	Switching	41,977	38,367
111	Special Service Train	14	14
112	Other freight train	434	434
135	Storage—Freight	2,010	2,010
137	Demurrage	1,016	1,016
138	Telegraph and Telephone	4,095	3,653
142	Rents of buildings and other property	52,205	46,570
143	Miscellaneous	52,621	28,427
152	Joint facility—net debit	0	0
	Total Freight	$2,753,703	$1,622,644

Total revenue which court found without the production of any basic data, should be transferred from intrastate as shown by G. N.'s books and reports, to interstate..... $1,131,059

As noted above, this transfer of revenues from intrastate to interstate was made by Mr. Burn in accordance with a written statement (GN's Ex. "20") handed to him after reaching Seattle (GN Rec. 142). This statement was offered and received in evidence as a convenient statement showing what had been eliminated and not to prove the fact that the items thereon were properly to be eliminated as intrastate traffic (GN Rec. 175), and is as follows (GN Rec. 202):

Revenues eliminated as applicable to interstate and foreign commerce as reported in amended answers to interrogatories:

Account		Total Applicable Aug. 1, 1933, to Dec. 31, 1933	Total Applicable To Year 1933
(101)	Freight:		
(a)	Consignments originating in Washington and specifically billed for export..... $92,580		
(b)	Consignments originating in Washington and billed to warehouses and elevators, practically all of which would be exported or transported by water and/or rail to other states..... 65,558		
(c)	All other imports billed to Washington stations from Washington ports 8,033		
(d)	The initial local state revenue collected for shipments into transit stations..... 308,896		
(e)	Absorbed switching 14,997		
(f)	Milling in transit adjustment on grain originating outside of Washington and the products reshipped to points in Washington..... 41,055		
		$531,119	$1,097,178

Account	Total Applicable: Aug. 1, 1933, to Dec. 31, 1933	Total Applicable: To Year 1933
(110) **Switching:**		
Switching revenue received on shipments pertaining to (c) and (d) under account 101	1,820	3,610
(143) **Miscellaneous:**		
Wharfage		25,000
Total	$532,939	$1,125,788

The court's basis for finding that all these items of revenues were properly transferred from intrastate to interstate is the testimony of certain witnesses who testified over objection that the same was hearsay and not the best evidence, that they had examined certain records under the G. N.'s control in the state of Washington.

Thus, as to item "a," account No. 101, the G. N.'s witness Brown, testified that he made up that item of $92,580, not from the original records, but as to apples and flour from punch cards in the general office showing shipments of flour and apples from Washington stations to the Seattle dock, and as to all other shipments, from answers to letters written to all stations and ports in Washington asking for statements of billing covering all carload shipments originating in Washington and destined to the Seattle dock. (GN Rec. 175-6.) The witness believed that copies of the way bills from which the data was originally taken were in the hands of the G. N.'s forwarding agents in Washington. (Ab. Rec. 181.) He testified further that the only way the State's attorney could possibly check his figures as to item "a," would be by an examination of those way bills. (GN Rec. 181.)

The G. N.'s witness, Berger, testified that the information regarding item "a" was obtained direct from

the defendant's records in its Seattle dock office, consisting of the expense bills, demurrage records and other accounts kept there. Only one month's records were checked. (GN Rec. 191-2.)

As to item "b" the information was obtained by letter from agents in Seattle, Tacoma, Everett and Bellingham. Witness Brown wrote to the agent and asked him, and the agent wrote back and purported to give him the information asked. (GN Rec. 177-8, 180-181.) This information was shown by the G. N.'s books in Seattle.

As to item "c," the information was taken from copies of way bills and bills of lading and was shown by the G. N.'s books in Seattle. (GN Rec. 192.)

As to item "d," Brown got his information from punch cards the same as in the case of item "a." (GN Rec. 182.) The original records consisting of the expense bills were available in Seattle, and were checked there by the G. N.'s witness, Berger. Only a month's business was so checked. (GN Rec. 192.)

Item "e" was a debit item, transferred from interstate to intrastate. (GN Rec. 182.) The underlying data upon which the same was based was not offered in evidence, and the State, without success, moved to strike the testimony regarding the same on the ground that the same was hearsay and not the best evidence. (GN Rec. 183, 193.)

The information as to item "f" was taken from reports furnished to the G. N.'s witness, Brown, by the Transcontinental Freight Bureau, an agency of all the carriers. The information was contained in way bills located in the State of Washington. (GN Rec. 183.) It

was also shown by the expense bills at Seattle from which Berger purported to make his check. (GN Rec. 193.)

The information as to Account 110, "Switching," was taken from a letter received by the G. N.'s witness, Tower, from the auditor of station accounts, which was his sole source of information. (GN Rec. 185-6.)

The information as to Account 143, "Wharfage," was shown in the station records at the G. N.'s Seattle dock. (GN Rec. 185.)

The record shows that not only was the testimony offered regarding all of these items objected to as hearsay and not the best evidence, but after the same was received appropriate motions to strike were made on the same grounds. (GN Rec. 175-193.)

We respectfully submit that all of this testimony should rightfully have been excluded under the "best evidence" rule. It must be remembered that this showing was made for the purpose of attempting to establish the falsity of the G. N.'s own records and 1933 sworn report. The company's own records would, of course, be the best evidence of what constituted its intrastate revenues. And surely, when it attempted to show that these records and its official report to the State regulatory body were untrue, it should, we submit, if the best evidence rule is ever to be applied, have been required to produce the original records showing these claimed errors. It goes without saying that the State's attorney and witnesses were wholly powerless either to cross-examine or to check the statements of these witnesses as to the justification for these attempted changes.

"It is a general demand of the law that the best possible evidence be produced, and secondary evidence is admissible only when it is clearly made to appear that primary evidence is, for some good and sufficient reason, unattainable, and then only after a showing of diligence."

Kennedy v. Canadian Pac. R. Co., 87 Wash. 134, 135;

Case Threshing Machine Co. v. Wiley, 89 Wash. 301, 303;

Seid Chee v. Sanitary Fish Co., 103 Wash. 345, 348.

"Where the controversy is over the contents of a written document, the document itself is, of course, the best evidence;"

Hoptowit v. Brown, 115 Wash. 661, 669-670.

We are, of course, not unmindful of the voluminous evidence rule which, under certain conditions, permits the introduction of the results of voluminous facts contained in writings. This rule is set forth in *Corpus Juris* as follows:

"Where the results of voluminous facts contained in writings, or of the examination of many books and papers or records are to be proved, and the necessary examination of this documentary evidence cannot be conveniently or satisfactorily made in court, it may be made by an expert accountant or other competent person and the results thereof may be proved by him, if the books, papers, or records themselves are properly in evidence, or their absence satisfactorily explained, the admission of such testimony being a matter resting largely in the discretion of the trial court. It seems, however, that the jury are not bound by the result thus ascertained, but may make their own calculations from the books and papers in evidence."

22 C. J. 1017.

We submit that the admission of this testimony without requiring the production of the books and rec-

ords from which the alleged facts were ascertained for use in cross-examination and making a counter-showing, was palpably unjust to the State in the present case. The G. N., as noted, had reported all of these items of revenue as intrastate in its 1933 report to the D. P. W. This report was made under oath. (Rem. Rev. Stat. Sec. 10416.) The details of this report were, of course, based upon the same way bills, bills of lading, and other writings as were those of the witnesses produced by the G. N. to impeach its own records. Surely, before allowing this company to impeach its own books of accounts and sworn report, it should have required that the company produce its records (all available in Washington) or properly authenticated copies thereof for examination by the court and opposing counsel.

ASSIGNMENT GN-7

(GN 7) The court erred in refusing to strike pages "A" to "F" of G. N.'s Exhibit "11," on the ground that the same was hearsay and based on records available but neither produced nor offered in evidence. (GN Rec. 228-9.)

As already pointed out, pages "A" to "F" were based upon testimony shown under the last assignment to have been clearly inadmissible. For the reasons there urged, we respectfully submit that the motion to strike should have been granted.

ASSIGNMENT GN-8*

COURT'S ERROR IN FINDING THAT THE G. N.'S 1933 INTRASTATE REVENUES WERE OTHER THAN REPORTED TO THE D. P. W.

As shown under Assignment GN-6, there was no competent evidence that the G. N's 1933 intrastate revenues were other than as reported to the D. P. W. Consequently there was no basis for the court's finding that such revenues were other than as so reported.

ASSIGNMENT GN-10

(GN 10) The court erred in finding that in the apportionment of operating revenues received from nterstate freight business to the G. N.'s Washington operating properties, such properties were not entitled to more than a mileage prorate of such interstate freight revenues. (Findings VII-e, GN Rec. 64-7.)

This question has already been fully considered in connection with Assignment NP-11, to which discussion the court is respectfully referred. (*Ante*, pp. 111-118.)

---

*(GN 8) The court erred in finding with respect to the G. N.'s 1933 intrastate operating revenues,—

(GN 8-a) That the total thereof was only $2,179,760, or any sum less than $3,305,548 as reported under oath to the D. P. W. (GN Rec. 268-a);

(GN 8-b) That the amount of such revenues assignable to "Freight," Account 101, were only $1,502,153, or any sum less than $2,599,331;

(GN 8-c) That the amount of such revenues assignable to "Switching," Account 110, were only $38,367, or any sum less than $41,977;

(GN 8-d) That the amount of such freight revenues assignable to "Rents of Buildings and Other Property," Account 142, were only $46,570, or any sum less than $52,205; and

(GN 8-e) That the amount of such freight revenues assignable to "Miscellaneous" were only $28,427, or any sum less than $52,621;

All as shown by the G. N.'s books of account and sworn report to the D. P. W. for 1933. (Findings VI and VII-g, GN Rec. 60-1, 67-8, compared with G. N. Ex. "11," p. 11, GN Rec. 268a.)

ASSIGNMENTS GN-9 AND GN-11 TO GN-16*

COURT'S ERROR IN FINDING THAT G. N. CONDUCTED ITS 1933 INTRASTATE OPERATIONS AT A LOSS.

To support its contention that it lost money on its 1933 Washington intrastate business, the G. N. offered in evidence G. N. Exhibit "11." This exhibit, as heretofore noted, makes two showings as to the results of the G. N.'s 1933 intrastate operations. Pages 1 to 27 are prepared on the assumption that the company correctly entered on its books of account, and correctly reported to the D. P. W. its 1933 interstate and intrastate revenues. We will, for convenience, call this its "book

---

*(GN 9) Having found that an amount of the G. N.'s traffic reported to the D. P. W. for 1933 as intrastate, was in fact interstate traffic to the extent that such 1933 intrastate operating revenues were in fact only $2,179,760 instead of $3,305,348, as reported under oath to said D. P. W., the court erred in finding with respect to G. N.'s intrastate operations for 1933,—

(GN 9-a) That its operating expenses were $1,730,361, or any sum in excess of $1,675,206 (Finding VI, GN Rec. 60-61);

(GN 9-b) That its net revenues from railway operations were only $449,399, or any sum less than $504,554 (Finding VI, GN Rec. 61);

(GN 9-c) That its railway tax accruals were $335,247, or any sum in excess of $211,532 (Findings VI and VII-e, GN Rec. 61, 64-7);

(GN 9-d) That its Joint Facility rent—net debit, was $193,455, or any sum greater than $140,800 (Finding VI, GN Rec. 61);

(GN 9-e) That its net railway operating income was a deficit of $99,269, or any sum less than $132,256. (Finding VI, GN Rec. 61.)

(GN 11) The court erred in finding that the 1933 ad valorem taxes paid on the G. N.'s Washington operating properties should be apportioned as between intrastate and interstate service on the basis of the relative revenues derived therefrom (with only a mileage prorate of interstate revenues apportioned to Washington), or on any basis other than the relative use made by the G. N. of its Washington operating properties as reflected by the only available factors shown by the record, to-wit: relative car and locomotive

showing." But pages "A" to "F" are prepared on the theory that the company's books and official reports were untrue, and that some $1,131,059 of the revenues shown therein as intrastate, were in fact interstate revenues. This we will refer to as the "revised showing." The results of these two sections of G. N. Exhibit "11" are summarized on pages "1" (GN Rec. 258) and "A" (GN Rec. 254) of the exhibit. Page "1" shows the results of the "book showing;" page "A," the results if the company's books and reports were incorrect, i. e., its "revised showing."

---

miles (as between freight and passenger), and relative freight car miles as between intrastate and interstate freight service. (Finding VII-e, GN Rec. 64-7.)

(GN 12) The court erred in finding that the G. N.'s net debit of $794,018 for joint facility rents in Washington for 1933 were assignable to its intrastate business on the basis of relative operating expenses intrastate and interstate, or on any basis other than the G. N.'s relative use of such jointly used properties in its intra and interstate operations as reflected by the only available factors shown by the record, to-wit: relative car miles (as between freight and passenger), and relative net ton miles as between intrastate and interstate freight service. (Finding VII-d, GN Rec. 63-4.)

(GN 13) The court erred in finding that pensions paid were properly chargeable as part of the G. N.'s operating expenses for the purpose of determining its railway operating income for 1933. (Finding VII-j, GN Rec. 69.)

(GN 14) The court erred in finding that the G. N.'s operating expenses incident to maintenance of way and structures and freight car repairs should be determined by taking the annual average for three years instead of for 1933 alone. (Finding VII-i, GN Rec. 68-9.)

(GN 15) The court erred in finding that G. N.'s Exhibit "11" showed the results of the G. N.'s intrastate operations in Washington during 1933 with substantial accuracy. (Finding VII-k, GN Rec. 69.)

(GN 16) The court erred in finding that the G. N.'s intrastate business as a steam railway company was conducted at a loss during 1933. (Finding VIII, GN Rec. 69-70.)

Joint facility rents paid not deductible as an operating expense:

Before analyzing the G. N. computations, let us first consider whether it is the deficit or earnings status of the *property,* or the deficit or earnings status of the *operating company,* which is determinative of whether the occupational tax is a burden on interstate commerce. If the intrastate operations of the operated properties themselves (independent of the question of ownership) show a railway operating income sufficient to pay the occupational tax payable on such operations, can it be said that because the operating company is losing money, the occupational tax must be paid from interstate revenues and is consequently a burden on interstate commerce?

In other words, is the criterion the *earnings of the properties operated* or the *earnings of the operating company?*

It is our position that it is the results of the operations of the particular *properties* operated by the tax-paying company which is the test, and it is not material whether the operating *company* is in fact losing or making money as a result of such operations. In other words, in determining whether the occupational tax is a drain on interstate revenues, it must be assumed that the operating company is the absolute owner of all of the property and interests in property employed in its railway operations. Thus, if a company has the legal title to its operating property, but such property is heavily mortgaged, the interest payable on such mortgages is not to be treated as an operating expense. And if, instead of constructing its own road, a company elects to

rent operating rights over another road, the rentals paid can no more be deemed an operating expense than can the bond interest payments on the portion of its operating property as to which it chances to hold the legal title. The same is true as to the equipment used. It can have no greater right to deduct as an operating expense the rentals paid for the use of the equipment it uses, than it would have to deduct as an operating expense the interest on the equipment trust notes which may be a lien upon its own equipment.

The fact is that the joint facility rental paid is the practical equivalent of interest payments on bonds issued for the construction of the company's own road. Had the G. N. constructed its own line from Seattle to Portland, it would have issued bonds to finance the new construction and would have paid, we may fairly assume, 4% to 5% interest thereon. Instead, it is, under the joint user agreement, required to pay one-third of 4½% on the cost of the property including additions and betterments. Surely this rental can no more be deemed an operating expense than could the interest payments on the company's outstanding bonds.

Moreover, it was the N. P.'s contention that in determining whether that company was making or losing money on its intrastate business, the test figure was "Railway Operating Income" computed by deducting "operating expenses" and taxes paid from "Gross operating revenues." (See NP Ex. "7," p. 1; NP Rec. 158.) In other words, counsel for the N. P. contended that join facility rentals *received* were not to be considered as operating income. (NP Rec. 97-8.) If this be true, we must likewise insist that the joint facility rental *paid*

by the G. N. cannot be deemed an operating expense in determining whether that road is making or losing money on its intrastate business.

The test is, we submit, is the *property* making a profit on intrastate business sufficient to pay the occupational tax imposed? If so, the tax cannot be deemed a direct burden on interstate commerce, even though the operating *company,* because of fixed interest and rental charges, is not making a corporate profit.

The case of *Atlantic Coast Line v. Daughton,* 262 U. S. 413, is, we submit, in point. There the Income Tax Law of North Carolina directed that the "net operating income" of railroads within the State be determined upon the basis of accounts to be kept according to the methods established by the Interstate Commerce Commission, and laid a tax upon the "net income," to be ascertained by deducting from "net operating income" only uncollectible revenue, certain taxes, and amounts paid for car hire, thus treating the railroad property within the State as the thing of which the income is taxed, and taking no account of other income of the corporation owning the railroad and making no deduction of its capital charges such as rent paid for lease of road or joint user rights. It was held that the statute, considering this distinction, did not, in effect, depart from the I. C. C.'s definition of net income, nor, as applied to interstate railroads, did it directly burden interstate commerce.

The same is true of the occupational tax here under consideration. It is the business of operating the particular property which is taxable, and not the individual

or corporation chancing to conduct such operations. Section 2 (2), subdiv. (e), Ch. 191, Laws 1933, provides:

"Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business, as follows:

* * * * * * * *

"III. Steam railways: one and one-half percent;"

Thus, the tax is measured by the gross income from the operation of the steam railway property, not by the income of the corporation. Just as in the *Daughton* case, the railroad property within the State is the thing of which the income is taxed, and no account is taken of the other income of the corporation chancing to own or operate such property. The following is quoted from the *Daughton* case (262 U. S. 413, 416, *et seq.*):

"Whether the statute is unconstitutional because it fails to include among the deductions from income allowed public service corporations the capital charges, including other rentals paid, is the main question for decision.

* * * * * * * *

"* * * The contentions are that the statute, in fact, taxes gross income; that the classification as made by it is unreasonable; and that for these, and other, reasons it violates both the federal and the state constitution. All the contentions are, in our opinion, unsound."

After pointing out that the net income is computed by deducting from operating revenues, the operating expenses, uncollectible revenue, taxes paid, and car hire, the court then shows it to be the contention of the contesting railroads that the State should have credited as revenues all of its other corporate income including income from lease of road and joint facility rent income, and charged against such revenues all of its corporate

expenses including rent paid for lease of road and rents paid for joint facilities. Answering this contention, the court continues (p. 419):

"Thus the State takes, as the entity to be taxed, the railroad property operated by the Seaboard within the State. Therefore, it takes, as the primary basis for the tax, only operating revenues; that is, the gross receipts from operating such property. The Seaboard, on the other hand, assumes, as the entity which should be taxed, the company in respect to its North Carolina interests. Therefore the Seaboard takes, as the primary basis for the tax, in addition to the operating revenues of the lines within the State, North Carolina's proportion of the non-operating income of the company derived from other property owned by it, wherever situated. For the Seaboard, like most other railroad systems, is, to some extent, a holding company, as well as an operating company; and, as holding company, receives dividends from other concerns, interest on bonds of other concerns, and rental from property owned but not operated. As the State treats the operated property as the entity, it does not concern itself with interest charges and the rentals paid, just as it does not concern itself with a mortgage upon the real estate when it lays the *ad valorem* tax. On the other hand, as the Seaboard treats the company—the person—as the entity to be taxed, it undertakes to ascertain the net income of the company. This includes as gross income, a proportion of the receipts from property not within the State and includes among the deductions from the gross income of the company, the capital charges.

"That a State may, consistently with the Federal Constitution, impose a tax upon the net income of property, as distinguished from the net income of him who owns or operates it, although the property is used in interstate commerce, was settled in *Shaffer v. Carter*, 252 U. S. 37, 44, 52. There an Oklahoma statute was sustained which laid the tax upon the net income of Oklahoma oil property owned by a citizen and resident of Illinois. * * * It is a common provision in state income tax laws to tax the net income of property within the State which is owned, or operated, by non-residents. The differences between the parties arise, in the main,

not from difference in the method of determining what is net income, but from difference as to what is the subject of the tax. In other words, they differ as to the thing of which the net income is to be ascertained. This will appear from an examination of the several grounds on which the validity of the statute is assailed.

"*First.* The contention that the statute is obnoxious to the commerce clause rests upon the argument that the State's definition of net income differs from that adopted by the Interstate Commerce Commission * * *. A conclusive answer to that argument is found in the fact that the State adopts (without modification) the commission's definition for the net income of that which it taxes. For treating as the entity to be taxed, the railroad property operated by the company within the State, it appears that every item which the railroad claims the statute wrongly disallowed as a deduction is of such a character, that it is either clearly a capital charge (as distinguished from an operating charge) or reasonably may be deemed such as a matter of accounting."

At this point, the Court continues in a note to which reference is made (p. 421):

"To prove that the statute, in fact, taxes some part of the gross earnings, attention is called specifically to some minor items which the statute does not allow as deductions. But these stand in no different position than the major items—interest on funded debt and leased line rentals—discussed above. Prominent among these lesser items is 'joint facility rents' which, in the case of the Seaboard, amounted net to $21,816.81. Joint facility rents paid were $34,480.98; those received (credited as non-operating income) were $12,664.17. This is rental paid for railroad facilities—like tracks, terminals and roundhouses. They are needed by the carrier as a part of the plant and, not being owned, are rented from others. The fact that they are used jointly with others, is, of course, immaterial. This rent, like the rent of a leased line, is paid to secure control of the property operated. Hire of freight cars might have been treated in the same way, but the State, for reasons satisfactory to it, permitted that financial charge to be deducted, and to that extent reduced the tax."

The occupational tax is imposed on the activity of operating the railroad operating property under the control of the G. N. and is measured solely by the intrastate revenues derived from such operation. Clearly, such tax cannot be a burden on the interstate business handled on this same property if the net income from these *properties'* intrastate activities is sufficient to pay the tax imposed.

We submit that the case cited is squarely in point.

IF JOINT FACILITIES RENTS NOT AN OPERATING CHARGE, THE G. N. IS ADMITTEDLY MAKING A SUBSTANTIAL PROFIT ON ITS INTRASTATE OPERATIONS.

In its "book showing" (G. N. Ex. "11," p. 1, line 5; GN Rec. 258) the "railway operating income" from the G. N.'s intrastate operations (after allowance for taxes) was shown to be $491,544. And even assuming the validity of its claim that a portion of the revenue reported and shown on its books as intrastate, was in fact, interstate revenue, its 1933 "railway operating income" from intrastate operations (after allowance for taxes) was $114,152 (G. N. Ex. "11," p. "A," line 5; GN Rec. 254).

Hence, even on its own showing, if joint facility rents are not a proper operating charge, the G. N. admittedly made a substantial profit on its intrastate operations even in so abnormal a year as 1933.

G. N. MADE A PROFIT ON ITS 1933 INTRASTATE BUSINESS THOUGH JOINT FACILITY RENT BE DEEMED AN OPERATING EXPENSE.

This is true, the State contends, because of fundamentally wrong theories followed in the G. N. calculations. Thus:

Duplication of operating expenses—The G. N. charged $79,239 as an operating expense under the head-

ing: "Operating expenses applicable to intrastate revenues (freight proportion) other than account 101 ($150,554 × 51.33%)." (G. N. Ex. "11," p. 7, line "C;" GN Rec. 265-6.) But it clearly appears from Manschreck's testimony (GN Rec. 203-4) that all of the G. N. operating expenses had already been charged in computing its "total freight operating expenses" amounting to $1,334,268 (G. N. Ex. "11," p. 7, line "B;" GN Rec. 265-6) except the item of $21,547 for "switching," (Plff's. Ex. "21," line "E;" GN Rec. 230) and that there was consequently an attempted duplication of expense in the G. N. figures amounting to $79,239 minus $21,547, or $57,692. This correction is on the "book showing" figures. On the "revised showing" (G. N. Ex. "11," pp. "A" to "F;" GN Rec. 254-7) the corresponding reduction would be: all items of intrastate freight revenue other than Acct. 101 "Freight," and Acct. 110 "Switching" (G. N. Ex. "11," p. "B"; GN Rec. 255), or $82,124 times 51.33% (the operating ratio applied by the G. N. See G. N. Ex. "11," p. "C," line "1-b"; GN Rec. 256) or $42,154.

Correction as to taxes—The state contends in the G. N. as in the N. P. case that taxes should be apportioned on the basis of the relative *extent* of use made of the G. N. properties in its intrastate and interstate operations. Thus, apportioning tax accruals on the same basis as we have more fully explained in the N. P. case (*ante*, pp. 123-4) we find that the taxes allocated to intrastate operations for 1933 (based on the G. N. "book showing") should have been $294,318 (Plff.'s Ex. "22," line "S;" GN Rec. 230-232) instead of $511,530 as contended for by the G. N. (G. N. Ex. "11," p. 9, line 5-f;

GN Rec. 267-8), or a reduction in expense of $511,530 minus $294,318 or $217,212. The corresponding reduction in the G. N.'s "revised showing," would be the difference between $211,532 (Plff.'s Ex. "27," line "I," GN Rec. 235-6) and $335,247 (G. N. Ex. "11," p. "C," line 4-c, GN Rec. 256), or a reduction of $123,715.

Correction as to joint facility rents—The G. N. attempts to apportion its net joint facility rentals paid, first as between freight and passenger (both intra and interstate) according to relative operating expenses, and then to apportion the total thus allocated as between intra and interstate according to relative gross revenues received in the two services. (G. N. Ex. "11," p. 9, GN Rec. 267.) The State contends, on the contrary, that these rentals paid should be apportioned (if at all), as between freight and passenger (both intra and interstate) according to relative *extent* of use (*i. e.*, freight car miles as compared with passenger car miles), and that the intrastate freight proportion should be then determined according to relative net ton miles hauled in intra and interstate service, and that the intrastate passenger proportion (there being no other available factor) should be determined on a relative gross revenue basis. (Plff.'s Ex. "23," GN Rec. 232-3.) Following this method, the State reaches a total charge (based on the G. N. "book showing") of $193,027 (Plff.'s Ex: "23," line "M," GN Rec. 233) as compared with $257,427 contended for by the G. N. (G. N. Ex. "11," p. 9, sum of lines 4-g and 4-h, GN Rec. 267), or a reduction in this item of expense of $257,427 less $193,027 or $64,400. The corresponding reduction in the G. N.'s revised showing, would be the difference between $140,800 (Plff.'s Ex.

"28," line "G," GN Rec. 237-8) and $193,455 (G. N. Ex. "11," p. "E," GN Rec. 257) or $52,655.

Elimination of "pensions" as operating expense item—The propriety of charging "pensions" as an item of operating expense in a case of this kind, has been heretofore discussed in connection with the N. P. case. (*Ante*, pp. 125-7.) The evidence shows that if this item be eliminated the G. N.'s net railway operating income (according to its "book showing," G. N. Ex. "11," p. 1, GN Rec. 258) would be increased by $22,066. (Plff.'s Ex. "25," GN Rec. 233-4.)

If, on the other hand, the court finds it to be established by competent evidence that a certain amount of the G. N.'s revenues reported as intrastate, should be transferred to interstate, then its intrastate freight revenue for 1933 would be $1,622,644 (G. N. Ex. "11," p. "B," GN Rec. 255), instead of $2,753,703, as shown by its books and report to the D. P. W. (G. N. Ex. "11," p. 11, GN Rec. 268.) and this item of $22,066, would have to be reduced to an amount represented by the proportion which $1,622,644 bears to $2,753,703, or 58.92%, making the amount 58.92% of $22,066, or $13,001.

Effect of above corrections—Summaries of the G. N.'s contentions are set forth on pages "1" and "A" of G. N. Exhibit "11." (GN Rec. 254, 258.) As already observed, the summary as to its "book showing" (G. N. Ex. "11," p. 1, line 9) shows that by its own calculations, taking the G. N. books and reports as to its division of intra and interstate earnings at their face value, its "Net Railway Operating Income" (after deducting joint facility rents and equipment rents in addition to taxes) on its Washington 1933 intrastate operations was

$202,458. Corrections as above indicated, however, give the following results:

Net Railway Operating Income as computed by defendant.	$202,458
Plus excess charge by reason of duplication of operating expenses as above indicated	57,692
Plus excess charge for taxes as above indicated	217,212
Plus amount improperly charged for "pensions" (*ante*, pp. —)	22,066
Plus excess charge for joint facility rents paid as above indicated	64,400
Total net railway operating income on G. N. Wash. 1933 intrastate operations as shown by plaintiff's correction of defendant's figures	$563,828

Except as to "pensions," this showing is summarized and the same result reached in a different manner by Mr. Manschreck. (Plff.'s Ex. "24," line 8; GN Rec. 233.)

The summary as to the G. N.'s "revised showing" (assuming certain of its revenues shown in its reports and on its books as intrastate, to be in fact interstate) shows the G. N. "Net Railway Operating Income" (after deducting joint facility rents and equipment rents in addition to taxes) on its Washington 1933 intrastate operations to be a deficit of $99,269. (G. N. Ex. "11" p. "A," line 9, GN Rec. 254.) Corrections as above indicated, however, yield the following results:

Net railway operating income as computed by G. N. on its "revised showing"	$99,269 (red)
Plus excess charge by reason of duplication of operating expenses as above indicated	42,154
Plus excess charge for taxes as above indicated	123,715
Plus excess charge for joint facility rents paid as above indicated	52,655

Plus amount improperly charged for pensions as above indicated	13,001
Total net railway operating income from G. N.'s Washington 1933 intrastate operations as shown by the state's correction of the G. N.'s figures	$132,256

Except as to "pensions," this showing is summarized and the same result reached in a different way by Mr. Mansehreck. (Plff.'s Ex. "29," line 8, GN Rec. 238.)

From the foregoing it follows: (1) that if the G. N.'s books and reports are correct, the G. N. confessedly made a substantial profit on its intrastate operations; (2) that if joint facility rents are not deductible as an operating expense, the G. N. confessedly made a substantial profit on such operations, even if allowed to transfer to interstate, some $1,131,059 in revenues reported as intrastate; and (3) that even allowing such wholesale transfer of revenues, and allowing joint facility rents as an operating expense, the company still made $132,256 from such 1933 intrastate operations, were its intrastate expenses properly computed.

We respectfully submit, therefore, that neither the N. P. nor the G. N. has sustained its defense that it lost money on its 1933 intrastate operations and will consequently be compelled to pay its occupational tax out of interstate earnings.

EVIDENCE UNDISPUTED THAT G. N.'S NET EARNINGS WERE AT LEAST $430,184 FROM ITS INTRASTATE FREIGHT TRAFFIC IN 1933.

As in the case of the N. P., the G. N.'s set-ups show its revenues and expenses incident to its intrastate passenger service separately from its revenues and expenses incident to its intrastate freight service. Con-

sequently, the results of its freight service operations alone may be readily calculated.

The revised claimed results of the G. N.'s intrastate operations for 1933, freight and passenger, are set forth in GN's Ex. "11," p. "A" (GN Rec. 254) wherein the following results are shown:

(1) Gross operating revenues	$2,179,760
(2) Operating expenses	1,730,361
(3) Net revenue from railway operations	449,399
(4) Railway tax accruals	335,247
(5) Railway operating income	114,152
(6) Equipment rents—Net debit	19,966
(7) Joint facility rent—Net debit	193,455
(8) Total rentals—Net debit	213,421
(9) Net railway operating deficit (Item 5 less item 8)	99,269 (R)

Now, using this same form of set-up, and showing the corresponding figures incident to freight service alone, we have:

(1) Gross operating revenues from freight service only (GN Ex. "11", p. "B", Col. 2; GN Rec. 255):	$1,622,644
(2) Operating expenses incident to freight service only (GN Ex. "11", p. "C", GN Rec. 256, ln. 1-c)	832,903
(3) Net revenue from railway operations from freight service only (ln. 1 less ln. 2):	$789,741
(4) Railway tax accruals incident to freight service only (GN Ex. "11", p. "C", GN Rec. 256, ln. 4-c—15.38% of $1,622,644):	249,563
(5) Railway operating income from freight service only (ln. 3 less ln. 4):	540,178
(6) Equipment rents incident to freight service only (GN Ex. "11", p. "D", ln. 5-e, GN Rec. 256)—Net debit	16,825
(7) Joint facility rent incident to freight service only (GN Ex. "11", p. "E", ln. 7-e, GN Rec. 257)—Net debit	93,119

(8) Total rentals incident to freight service only (ln. 6 plus ln. 7)—Net debit		109,944
(9) Net railway operating income incident to freight service only (ln. 5 less ln. 8)		$430,234

NET LOSS CLAIMED BY G. N. ON 1933 INTRASTATE PASSENGER BUSINESS.

Revenues from passenger service (GN Ex. "11", p. "B", 2nd vertical Col., GN Rec. 255)		$557,116
Operating expenses from passenger service other than taxes, car rentals and joint facility rentals (GN Ex. "11", p. "C", item 2-e, GN Rec. 256)	$897,458	
Passenger car rentals (GN Ex. "11", p. "D", item 5-j, GN Rec. 256)	3,141	
Joint facility rentals—Debit (GN Ex. "11", p. "E", item 4-j, GN Rec. 257)	100,336	
Taxes (15.38% of $557,116, See GN Ex. "11", p. "C", calculation line 4-c applied to passenger revenues; GN Rec. 256)	85,684	$1,086,619
Net loss claimed by G. N. on 1933 intrastate passenger service		$529,503
Ratio between total expense and total revenues		195%
Cost of each dollar of revenue received		$1.95

ASSIGNMENT GN-14

(GN 14) The court erred in finding that the G. N.'s operating expenses incident to maintenance of way and structure and freight car repairs should be determined by taking the annual average for three years instead of for 1933 alone. (Finding VII-I, GN Rec. 68-9.)

The propriety of using a three-year instead of a one-year average as the measure of operating expenses incident to maintenance of way and structures and freight train car repairs has already been considered in connection with Assignments NP-19 to NP-21, to which discussion the court is respectfully referred. (*Ante*, pp. 135-6.)

ASSIGNMENT GN-17

(GN 17) The court erred in finding that in proportion to revenue, the G. N.'s cost per unit of doing intrastate business is greater than its cost per unit of doing interstate business. (Finding V, GN Rec. 60.)

This assignment is covered by Assignment NP-30, to which reference is hereby made. (*Ante*, pp. 146-7.)

ASSIGNMENT GN-19

(GN 19) The court erred in finding that a substantial part of the G. N.'s investment in its railways in Washington was made by order of the Washington regulatory bodies. (Finding IX, GN Rec. 70.)

We are unable to find where this finding is substantiated by any evidence in the record. If such exists, the G. N.'s counsel will no doubt favor the court with the proper citations.

ASSIGNMENT GN-20

(GN 20) The court erred in permitting the G. N.'s witness, Burn, to testify over objection, as to the operating ratio in switching seven specified cars at different terminals. (GN Rec. 158-9, 230.)

Mr. Burn, the G. N.'s witness, was permitted to testify over the objection of the State's counsel as to the switching cost, revenue and operating ratio in connection with the intra-terminal switching of seven different cars at different terminals of the G. N. (GN Rec. 158-9.) The State's objection and motion to strike were made on the following grounds:

"The ground that unless they are all put in, they are not material. That they might make a considerable revenue on one and no revenue on another. That defendant should not be allowed to detail a few instances

and not give them all. That if that is to be investigated, we will have to open up the whole subject of G. N.'s operating ratio as to switching service." (GN Rec. 158.)

We respectfully submit that the testimony was objectionable for the reasons set forth in the objection and motion to strike, and consequently should be wholly disregarded by this court.

APPENDIX "C"

Evidence Bearing on Appellants' Contention that Their Intra and Interstate Instrumentalities Are Inseparably Commingled.

It is, of course, unquestionably true that both the appellant telephone company and the appellant railroads use the same instrumentalities in carrying on their intra and interstate operations.

But it is equally certain that if either of these appellants proposed to renounce its intrastate business, the purchaser or purchasers thereof would continue to use such appellant's interstate instrumentalities in continuing such intrastate business, with the practical result that there would be no duplication of equipment or operating expense in carrying on the two activities.

Let us first consider the position of the appellant telephone company: As a practical proposition, it cannot, we submit, be assumed that on renouncing its local business, the P. T., less than 10% of whose business is interstate (*ante*, p. 74), would be entitled to interstate rates yielding a fair return on all of its present operating properties. True, the company showed that it uses 92½% of its present property in its intrastate telephone and telegraph service. (PT Rec. 40.) But this does not mean that on surrendering its local business it would be compelled to retain the *exclusive use* of such properties for its long-distance service. It is, of course, inconceivable, that the various communities of Washington are to go without exchange and intrastate long-distance telephone service because of the imposition of this 3% gross earnings tax.

"The Company supplies something the public wants. If by a catastrophe, or series of catastrophies, all that it has was either wiped out of existence or made altogether useless for its present purpose, the people of the state would be deprived of all telephone facilities. The demand that they should be replaced would be general and insistent. To meet it, a new plant would be required." *Chesapeake & Potomac Telephone Co. v. Whitman,* 3 Fed. (2d) 938, 941.

The people would demand and would receive local telephone service. But the P. T.'s renunciation of its local business would certainly not mean a duplication of service in the different communities which it now serves. It must be presumed that such company and any new organizations proposing to furnish the local service so renounced, would proceed like ordinary business men confronted by the same problem. Where local exchange telephone service is supplied by one company, a company furnishing long-distance but not local exchange service to the same community, does not duplicate the local plant, but makes proper joint user arrangements with the local exchange company whereby long-distance messages are sent and received through the local exchange. This is exactly what would happen should the P. T. elect to surrender its local business. It would dispose of that portion of its plant chiefly valuable for handling local business, reserving joint user rights for handling interstate long-distance telephone messages thereover. Consequently, no duplication of equipment or operating property would be required.

It was agreed that the telephone system in Ellensburg is owned by a company independent of the P. T. (PT Rec. 66). With respect to this and other similar independent properties, R. W. Mastick, this company's

chief witness, testified on cross-examination to the following effect:

The Pacific Company makes connections of long distance service between Ellensburg and Seattle. The making of connection between Ellensburg and Seattle differs none at all from the method of making connections between Olympia, where the company owns the plant, and Seattle. The character of the property utilized in the Ellensburg plant differs not at all from the plant in Olympia in making the connection, as far as the exchange plant is concerned. The Pacific Company owns the toll lines between the Ellensburg Company and Seattle. The Ellensburg Company owns the equipment in the toll offices in Ellensburg. It is proper to speak of Ellensburg as a "foreign exchange area" or an "independent exchange." There are 100 or 102 independent exchanges in Washington comparable with Ellensburg. He presumed that all of these 102 companies connect with the Pacific system. And the inter-exchange service, which is the toll service, is handled in exactly the same way between each of these 102 companies and exchanges belonging to the Pacific Company as between stations belonging to the Pacific Company. The P. T. doesn't have any plant and equipment in the independent exchanges. It operates it itself. The P. T. has no duplication of plant and equipment with any exchanges in the state of Washington belonging to another company. (PT Rec. 66-8.)

Where long distance telephone messages are transmitted from foreign exchanges to exchanges of the Pacific Company, the latter company has certain contractual relations with the company operating the

foreign exchanges. Foreign exchanges get 30% of whatever the Pacific Company is entitled to on originating business. If the message were received by the foreign exchange and originated on the Pacific line, the foreign line would not get anything at all. (PT Rec. 68-71.)

Referring to foreign exchanges as exchanges that are independent not only of the Pacific Company but of the Bell system there would undoubtedly be several thousand of such foreign exchanges in the whole United States. Asked whether, so far as he knew, the operations of the Pacific Company with any of these foreign exchanges located outside of Washington are or are not competitive, he replied that he didn't know of any competitive system on the Pacific Coast. Asked if the P. T. has any competitive system in territory served by the Bell system as far as long distance is concerned, he replied, not to his own knowledge; that he did not specifically know of any case as to any of these foreign exchanges, either within or outside the state of Washington where there is a duplication of service as between the Pacific Company or the Bell system and the independent companies. In each of those cases the arrangement for handling long distance messages as between the foreign exchanges and the Pacific Company is handled as a result of a contract entered into between the Pacific Company and the independent company. What he had said of the relation between the exchange at Ellensburg and the Pacific Company and the transmission of toll messages between Ellensburg and the Pacific Company would apply equally to the transmission of toll messages between the Pacific Company and any one of these foreign exchanges, either within or without

the state of Washington. If the Ellensburg company should sell out all of its operating property to the Pacific Company and the latter should thereafter continue to furnish to Ellensburg the same service, both local and long distance that it now enjoys, he didn't see that the Pacific Company would have to acquire any additional property in order to furnish such service. Should the Pacific Company conclude that it didn't care to operate the Olympia exchange any more as part of the Pacific Company's property, it would be perfectly possible for some independent company to buy the Olympia exchange properties, and to have the same operating agreements with the Pacific Company which the Ellensburg Company has. In that case, the two companies would not have to acquire any additional property in order to carry on the operation in the same manner the property is now being operated by the Pacific Company. That would be true of all local exchanges such as Olympia that are now being operated by the Pacific Company in the state of Washington. In other words, if the two companies were split, one operating the local exchange and one continuing to operate the balance of the system, you wouldn't have to acquire any more property and you wouldn't sell any more in order to continue to function with the same degree of efficiency. (Pt. Rec. 73-6.)

As to all long distance messages transmitted to and from stations in said foreign exchange areas and points reached by the Pacific Company's long distance service, the Pacific Company, by contract with such owning companies, utilizes the telephone equipment of such local companies in the transmission of such long distance messages to and from telephone stations in such foreign exchange areas for which said Pacific Company pays such

other company an agreed service charge or division of the long distance tolls. (PT Rec. 89.)

If the Pacific Company did elect to cease to perform intrastate local or long distance service, and elected thereafter to render only interstate long distance service, as it now performs, and if the company could secure a purchaser for its property principally used for its local service or intrastate service, it could, of course, sell and convey that property to another company, but it wouldn't be doing a solely interstate business that way, because the local exchange does an interstate business over those facilities. If the Pacific Company, having elected to handle only interstate service, did elect to sell its property to some other company, he supposed that by a contractual arrangement it could reserve the right to use that property by a joint user arrangement for its interstate service. And if it did, by a satisfactory arrangement, enter into that sort of contract with the purchasing company, it wouldn't be necessary, then, to duplicate the actual equipment of the two companies, to increase the amount of the equipment of the two companies in handling the two classes of service. And if, on the same hypotheses, it sold out one piece of property, say Olympia property, to one company and its Seattle property to another company, it could make the same joint user contracts with each of those companies. (PT Rec. 90-92.)

There are now in the United States a large number of telephone companies doing a long distance telephone business between thousands of local exchange areas in which the local telephone service is supplied by local telephone companies other than the company or com-

panies doing the long distance business. So far as he knew, in none of those areas does the long distance company handling the long distance messages, maintain separate equipment for long distance use only. But in such cases the long distance companies utilize by joint user agreements, the facilities of such local telephone companies in handling the long distance service. (PT Rec. 92-3.)

APPELLANT RAILROADS:

Obviously the intrastate operations of these roads are even more essential to the people of Washington than those of the appellant telephone company. And it would seem that either of these railroads would likewise, if it chose to dispose of its intrastate business to another company, enter into joint user arrangements with such purchaser, as a result of which the same facilities and employes would be used in carrying on both the intrastate and interstate operations. It is a common practice for two or more companies to use the same rails. Express and sleeping car companies use the facilities of a railroad, as does also the United States mail service. Why could not a separate and distinct company handling only intrastate business, by contract, use the same rails, trains, cars and employes as the company handling only interstate business?

In such case, of course, there would be no duplication of either operating expenses or of equipment.

SUPREME COURT OF THE UNITED STATES.

Nos. 544, 573 and 529.—October Term, 1935.

544	Pacific Telephone & Telegraph Company, Appellant, *vs.* Tax Commission of the State of Washington.	On Appeals to the Supreme Court of the State of Washington.
573	Great Northern Railway Company, Appellant, *vs.* State of Washington.	
529	Northern Pacific Railway Company, Appellant, *vs.* State of Washington.	

[March 2, 1936.]

Mr. Justice Brandeis delivered the opinion of the Court.

The State of Washington laid upon practically all persons engaged in intrastate business an occupation tax effective August 1, 1933, to continue for twenty-four months. The tax is measured by a percentage of the gross income solely of that business; and, as construed, purports not to tax the privilege of doing interstate business. The rate for telephone companies is 3 per cent; for railroads, 1½ per cent. Laws of Washington, 1933, Ch. 191. No. 544 is a suit by Pacific Telephone & Telegraph Company against the Tax Commission to enjoin proceedings to enforce the tax. No. 573 is an action by the State against Great Northern Railway to collect the tax for the period ending December 31, 1933. No. 529 is a like action against Northern Pacific Railway. Each company is a foreign corporation. The cases are here on appeals from the Supreme Court of the State and were argued together. Each presents the question whether the statute, as applied, is obnoxious to the commerce clause of the Federal Constitution. The railroads claim also that the statute violates the due process clause by taxing income earned outside the State. In each case the trial court held the statute void. The Supreme Court sustained its validity in all the cases. 84 Wash. Dec. 52, 66.

None of the companies rests its challenge of the statute primarily upon proof that the tax, in fact, burdens interstate commerce. The Telephone Company relies wholly, and the railroads mainly, upon an alleged rule of law—the proposition that when a foreign corporation engages within a state in both local and interstate commerce, an occupation tax laid upon the local business is necessarily void, unless the corporation is free in law and in fact to withdraw therefrom without discontinuing its interstate business. They urge that the alleged rule applies to them, claiming that inability to abandon the local business without also discontinuing the interstate is imposed by state and federal law, and arises also from practical considerations. They insist that the rule applies although the tax is not such in character or amount as to induce withdrawal from the local business. The railroads contend further that the tax, in fact, burdens interstate commerce.

The trial court found, and the Supreme Court assumed, that practical considerations would prevent either of the railroads from abandoning its intrastate business without also withdrawing from the interstate. And this was assumed to be true of the Telephone Company. The operations of the two classes of business are inextricably intertwined. In the main, they are carried on at the same time, by the same employees, with the same plant, equipment, and facilities. The interstate business is found profitable when carried on in connection with the local, because the expenses of the joint operation are, under applicable accounting rules, apportioned between the two branches of the business. Withdrawal from local business would reduce by but a small percentage each company's cost of operation. The remaining unavoidable expense would be heavier than the interstate business could bear under the existing rates or under any conceivable increase. Moreover, the trial court ruled, and the Supreme Court assumed, that the governing law would not permit these corporations to withdraw from local business without discontinuing also the interstate.

The State denies the existence of the alleged rule of law that an occupation tax upon intrastate business is necessarily void, if the corporation is not free to withdraw from the local business without discontinuing also the interstate. There is no denial that a tax upon the privilege of engaging in the local business is void if, by reason of its character or amount, it, in fact, imposes a direct burden upon interstate commerce. The State insists that this tax does not do so.

First. Where interstate and intrastate commerce are served by the same instrumentalities of a common carrier, it is possible that

a regulation of the State applied directly to the intrastate business only may in fact burden the interstate. Where this occurs Congress may remove the burden, since state regulation must yield to its paramount power to assure adequate interstate service. That power is comprehensive; and has, under appropriate legislation, been extensively exercised. Through the Interstate Commerce Commission, Congress has commanded the raising of local rates where they were so low that the intrastate traffic did not bear its fair share of the cost of the service. It has prevented state authorities from compelling the erection of a union station so expensive as unduly to deplete the financial resources of the carrier. It has prevented the construction of an intrastate branch line which would have depleted the financial resources of the builder or of another interstate carrier. It has curtailed existing local service and authorized abandonment of a controlled line, despite the carrier's contract with the State to maintain the line. Such control over intrastate commerce exists because it is a necessary incident of freeing interstate commerce from burdens, obstructions or discrimination. It has been exerted wherever Congress deemed that the State's power to regulate and promote intrastate commerce is exercised in such a way as to prejudice the interstate. *Colorado* v. *United States,* 271 U. S. 153, 164-166.

Similarly, where interstate and intrastate commerce are served by the same instrumentalities of the carrier, it is possible that a tax applied directly to the privilege of doing the local business may in fact burden the related interstate business. While a State may tax the privilege of engaging in local business, as it may regulate local rates, it may not tax the privilege of engaging in interstate commerce. Taxation being one of the forms of regulation, *Lehigh Valley R. R.* v. *Pennsylvania,* 145 U. S. 192, 200, any tax laid directly upon the privilege is void even in the absence of legislation by Congress or a finding of prejudice. As local rates may be so low, and the circumstances such, that these rates must be raised in order to protect interstate commerce, so a tax on the privilege of engaging in local business may conceivably be so high, and the circumstances such, as to require lowering of the tax in order to protect interstate commerce. But the high tax on the local privilege, like the low rate for the local traffic, if it burdens interstate commerce at all, does so by reason of its consequences. This being so, a tax upon the local privilege only must be held valid in the absence of proof that it imposes an undue burden upon inter-

state commerce. "The question of constitutional validity is not to be determined by artificial standards." See *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 480. The alleged indirect tax must be judged by its practical operation.

In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an *ad valorem* property tax upon tangible property used exclusively in such business. Each increases the necessary cost of doing the local business. Either might conceivably be so large as to render the local business immediately unprofitable. A common carrier cannot be compelled to carry on business indefinitely at a loss. *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396; *Bullock* v. *Florida,* 254 U. S. 513, 520-521; *Railroad Commission* v. *Eastern Texas R. R.,* 264 U. S. 79, 85. If, because of such loss, a corporation, seeing no prospect of betterment, wished to discontinue its local business and were prevented by law from doing so unless it discontinued also its interstate business, the law might be held void as imposing an unconstitutional condition upon the privilege of engaging in interstate commerce. Compare *Pullman Co.* v. *Adams,* 189 U. S. 420. If it was the tax which caused the unprofitableness of the local business and, consequently, the desire to discontinue it, the tax would then appear as a direct burden on interstate commerce. Compare *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 258; *Postal Telegraph-Cable Co.* v. *Fremont,* 255 U. S. 124, 127. But no reason has been suggested why a tax upon the local business should be held void, if despite its burden, the local business is conducted at a profit; or if, although conducted at an apparent loss, the corporation desires to continue it because of benefits present or prospective. Compare *Ohio Tax Cases,* 232 U. S. 576, 590.

Second. Inherently the tax challenged is unobjectionable. It is not upon an instrumentality of interstate commerce; it is moderate in amount; and is not a disguised attempt to discriminate against interstate commerce. As the collection is being made by an action at law, the tax is not open to the objection raised in *Western Union Telegraph Co.* v. *Massachusetts,* 125 U. S. 530, 554, that payment may be made a condition of continuing to do business. Compare *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119. The tax is "imposed solely on account of the intrastate business"; and it appears "that the amount exacted is not increased because of the interstate business done." Compare *East Ohio Gas Co.* v. *Tax Commissioner,* 283 U. S. 465, 470. Although the two branches of the business of the companies are inseparable, the

tax is not laid inseparably upon both. Thus, it is not open to the objection held fatal in *Leloup* v. *Mobile*, 127 U. S. 640, and *Cooney* v. *Mountain States Telephone and Telegraph Co.*, 294 U. S. 384. "Certainly, one cannot avoid a tax upon a taxable business by also engaging in a non-taxable business." *Raley & Bros.* v. *Richardson*, 264 U. S. 157, 159.

The distinction drawn by those cases between an occupation tax valid because laid only on local business and one void because laid inseparably upon the whole business, is clearly shown in the discussion of the two classes of taxes involved in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 646-647. Taxes for the privilege of doing local business measured by the gross income of such business have frequently been laid upon concerns engaged in both intrastate and interstate business; and have, for half a century, been sustained without enquiry whether withdrawal from the local business would compel discontinuance of the interstate. That an occupation tax upon a foreign telegraph company measured by earnings from its local business is valid, was indicated as early as *Telegraph Co.* v. *Texas*, 105 U. S. 460, 464-465; and was definitely held in *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, which has been repeatedly cited with approval, in cases involving interstate railroads and telegraph companies.[1] Similarly, in *Southern Ry.* v. *Watts*, 260 U. S. 519, 529-530, a so-called franchise tax for the privilege of doing intrastate business, measured by a percentage of the value of property subject also to an *ad valorem* tax, was sustained as against both foreign and domestic railroads.

No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable. In cases relied upon by appellants there are expressions which may seem to support that contention. But in none of those cases was the challenged tax measured by the gross income of the intrastate business only. In some it was laid inseparably upon the privilege of doing both interstate and intrastate business.[2] In some the case was suggested of a

[1] Western Union Telegraph Co. *v.* Pennsylvania, 128 U. S. 39, 40; Western Union Telegraph Co. *v.* Alabama, 132 U. S. 472, 476-477; Lehigh Valley R. R. *v.* Pennsylvania, 145 U. S. 192, 201; Postal Telegraph Cable Co. *v.* Charleston, 153 U. S. 692, 697; Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 698. See also Pacific Express Co. *v.* Seibert, 142 U. S. 339, 349-350; Cornell Steamboat Co. *v.* Sohmer, 235 U. S. 549; Ohio Tax Cases, 232 U. S. 576, 591-593. Compare Osborne *v.* Florida, 164 U. S. 650; Kehrer *v.* Stewart, 197 U. S. 60.

[2] Allen *v.* Pullman Co., 191 U. S. 171, 179; Galveston, etc., Ry. *v.* Texas, 210 U. S. 217; Adams Express Co. *v.* New York, 232 U. S. 14.

compulsory local service which, coupled with a tax, might burden interstate commerce.[3] In *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and *Pullman Co.* v. *Kansas*, 216 U. S. 56, the question presented, and on which the Court divided, was whether payment of a confessedly unconstitutional tax could be made a condition of permitting a foreign corporation to exercise the privilege of continuing to do intrastate business within the State.[4] It is true that in *Sprout* v. *South Bend*, 277 U. S. 163, 171, the Court, when reciting the essentials of a valid license fee for doing local business, said that it must appear "that the person taxed could discontinue the intrastate business without withdrawing also from the interstate."[5] But that statement was made in discussing the validity of a flat bus license fee, prescribed by an ordinance which made no distinction between busses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce; and it must be read in that context. The license fee was held void, because Sprout, who was engaged in both classes of commerce, could not escape payment of the tax by confining himself to interstate business. The cases cited by the Court in that connection were of the same character.[6]

Third. The Telephone Company relies wholly upon the alleged rule of law. It makes no claim that the tax laid upon it in fact burdens interstate commerce. Nor could it do so. The company's business, both the intrastate and the interstate, was conducted at a profit during the tax period. The net operating income from the local business for the year 1933 was $781,338.44, after deducting taxes assignable thereto; the net operating income from the interstate business was $118,225.74.[7] The tax for the five months ending December 31, 1933, is apparently $112,251.31. Not only is the

[3] Pullman Co. *v.* Adams, 189 U. S. 420; Allen *v.* Pullman Co., 191 U. S. 171, 182-183; Postal Telegaph-Cable Co. *v.* Richmond, 249 U. S. 252, 258; Postal Telegraph-Cable Co. *v.* Fremont, 255 U. S. 124, 127.

[4] The statute was held, or assumed, to be inherently unconstitutional, because it was measured by a percentage of the authorized capital of the companies and was, therefore, a tax upon all their property without and within the State.

[5] See East Ohio Gas Co. *v.* Tax Commission, 283 U. S. 465, 470; Cooney *v.* Mountain States Telephone & Telegraph Co., 294 U. S. 384, 393, where the passage was repeated. Compare Interstate Busses Corp. *v.* Holyoke Street Ry., 273 U. S. 45, 51.

[6] Leloup *v.* Port of Mobile, 127 U. S. 640; Crutcher *v.* Kentucky, 141 U. S. 47, 58; Adams Express Co. *v.* New York, 232 U. S. 14, 30; Bowman *v.* Continental Oil Co., 256 U. S. 642, 647. Compare Williams *v.* Talladega, 226 U. S. 404, 417; Postal Telegraph-Cable Co. *v.* Richmond, 249 U. S. 252.

[7] The gross operating revenues from the intrastate business were $9,317,598.94; the net, $2,221,631.73. The net operating revenues from the interstate business were $282,728.59. Here, as elsewhere, no account is taken of a return on the cost or value of the property.

intrastate business (even with the addition of this tax) no burden; it is that branch of the business which makes it financially possible to carry on the interstate. The gross operating revenues from interstate business were in 1933 only $932,424.74, while the total operating expenses of the company within the State were $7,649,933.89. The greater part of these expenses involved plant, equipment facilities, and employees' services indispensable to the conduct of the interstate business: of the total expenses, $7,009,241.85 was charged to the intrastate business and only $640,692.04 to the interstate. As the statute is valid in the absence of a showing that the tax in fact directly burdened interstate commerce, the judgment against the Telephone Company is affirmed.

Fourth. The Great Northern, besides invoking the alleged rule of law, claims that in fact the tax upon it directly burdens interstate commerce. The amount for the five months ending December 31, 1933, is $12,988.35. To prove that this tax burdens interstate commerce, it presented accounts which, as the trial court found, show that in the year 1933 the intrastate business resulted in a net operating deficit of $99,269. But, even if the items in the account are correct, it does not follow necessarily that the local business (with the tax upon it) directly burdens interstate commerce. The contrary appears. The gross operating revenues from the intrastate business were $2,179,760. To it were charged $1,730,361 of the company's operating expenses, leaving net operating revenues amounting to $449,399. The deficit of $99,269 is arrived at by deducting from these net revenues both railway tax accruals to the amount of $335,247,[8] and equipment and joint facility rentals to the amount of $213,421. It is true that, according to this allocation of the joint expenses and charges, it appears that the intrastate business was carried on at a small loss. But it is conceded that withdrawal from intrastate business and carrying on the interstate alone would have subjected the company to a very heavy loss. As the trial court found: "The net result of abandonment by defendant of its intrastate passenger and freight business in order to escape the tax imposed by said Chapter 191, Law of 1933, would be the loss of $2,179,760 [the whole intrastate gross operating revenues], and the saving of not more than 14% of that amount."

It is said that the deficit from the intrastate branch of the business was paid from profits of the interstate branch; and

[8] *Ad valorem* taxes paid in Washington in 1933 totalled $1,238,385.

it is asserted that, as the tax would increase the amount of the deficit, it directly burdens interstate commerce. But this does not follow. Every tax, and every other charge or item of expense, reduces to that extent the profit which otherwise would be made from doing business. This tax lessens the benefit derived by interstate commerce from the joint operation with it of the intrastate business; but because of the advantage to the company (and to interstate commerce) in continuing to do the intrastate business, neither the tax of $12,988.35 here in question, nor the other taxes allocated to the local business, would induce the company to withdraw from the local business, even if it were permitted by law to do so. There is no more reason for saying that the $12,988.35, because an occupation tax, directly burdens interstate commerce, since it contributes to the operating deficit, than that the $335,247 taxes paid by local business under other statutes confessedly valid, do so. Since this tax is laid upon intrastate commerce only and is not shown to be a direct burden upon interstate commerce, or to be otherwise objectionable, the judgment against the Great Northern is affirmed. Compare *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 257, 261; *Postal Telegraph-Cable Co.* v. *Fremont,* 255 U. S. 124; *Williams* v. *Talladega,* 226 U. S. 404, 417.

Fifth. The Northern Pacific, besides invoking the alleged rule of law, claims also that the tax upon it directly burdens interstate commerce. The relevant facts are similar to those concerning the Great Northern; and the same rules of law govern both. The amount of the tax for the five months ending December 31, 1933, is $36,116.22. To prove that this tax in fact burdens interstate commerce, the company presented accounts which, as the trial court found, show that in the year 1933, the intrastate business resulted in a net operating deficit of $192,507. On the other hand to have abandoned the intrastate business while operating the interstate would have cost the company gross operating revenues of $5,271,893. Since the occupation tax challenged is not shown to be a direct burden upon the company's interstate business, the judgment against it is affirmed.

What has been said above disposes of the contention of the railroads that the statute violated the due process clause. It also renders unnecessary consideration of the additional reasons urged by the State in support of the judgments of its Supreme Court. On these we express no opinion.

Affirmed.